Testimony of

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Ending Taxation Without Representation: The Constitutionality Of S. 1257
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I appreciate the opportunity to appear before this Committee to address S.1257. Others more eloquent than I have explained the political and policy imperatives for this legislation. No one has seriously disagreed with those sentiments. Instead, opponents of the bill have suggested that Congress lacks power to provide voting rights to the District's residents, and that the only legitimate ways to achieve that worthy goal are through constitutional amendment or retrocession. I have studied their argument and the text, precedents, and history on which they rely. And I believe the constitutionality of this bill presents a close question. But viewing the text in context and considering all of the relevant precedent and historical evidence, I conclude that Congress has ample authority to enact this bill.
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Opponents of the current legislation argue that because the District of Columbia is not a state, the Framers intended to exclude its residents from voting representation in the House of Representatives. The relevant constitutional text, however, is indeterminate, and the legislative history--the record of the debates during the constitutional convention and the state ratifying conventions--suggests no purpose to permanently disenfranchise the residents of the capital city.

Two clauses in Article I of the Constitution are directly relevant here. Article I, Section 8, Clause 17 of the Constitution, known as the "District Clause," provides Congress the authority to "exercise exclusive Legislation in all Cases, whatsoever, over" the District of Columbia. Both the ratification debates and Supreme Court precedent suggest that this power is plenary and that, absent a distinct prohibition elsewhere in the Constitution, it provides Congress the ability to provide District residents the same essential liberties (such as the right to a jury trial, the right to go to federal court, and, here the right to vote) that are enjoyed by other Americans who reside in states.

Two related Supreme Court cases confirm the breadth of Congress's authority to enact this legislation under the "District Clause." In the first, Hepburn v. Ellzey, Chief Justice Marshall construed Article III, Section 2 of the U.S. Constitution--which provides diversity jurisdiction in suits "between citizens of different States"--to exclude citizens of the District of Columbia. The Court found it "extraordinary," however, that residents of the District should be denied the same

access to federal courts that is provided to aliens and state residents, and it invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."

Nearly 145 years later, Congress accepted that invitation, and enacted legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Supreme Court in 1949 in a case called National Mutual Insurance Company v. Tidewater Transfer Company. A plurality of the Court led by Justice Jackson held that Congress could for this purpose treat District residents as though they were state residents pursuant to its authority under the District Clause. The two concurring justices would have gone even further; they argued that Hepburn should be overruled and that the District should be considered a state for purposes of Article III.

Tidewater strongly supports Congress's authority to provide the District a House Representative via simple legislation. As the plurality explained, because Congress unquestionably had the greater power to provide District residents diversity-based jurisdiction in special Article I courts, it surely could accomplish the more limited result of granting District residents diversity-based access to existing Article III courts. Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may, by simple legislation, take the more modest step of providing citizens of the District with a voice in the House of Representatives.

Opponents of this bill, however, read a distinct prohibition against extending District residents the right to vote into Article I, Section 2 of the Constitution--which requires that the House of Representative be chosen by the "people of the several states." In their view, this clause impliedly prohibits Congress from authorizing voting by District residents because they are not residents of a state. That argument is challenged at the threshold by the fact that Congress has already twice granted voting representation to citizens not actually living in a state. In Evans v. Cornman, the Supreme Court held that residents of federal enclaves within states-- such as the National Institutes of Health--have a constitutional right to congressional representation. And through the Overseas Voting Act, Congress has provided 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. There is no reason to suppose that Congress has less ability to provide voting representation to the residents of the Nation's capital.

Constitutional interpretation, moreover, requires text to be read in context, and there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting the language of Article I, Section 2. Instead, the Framers' word choice reflected two compromises. First, there was division over whether the House should be elected by the "people" or by state legislatures. As you know, the Framers resolved this debate in favor of direct election by individuals. Second, there was debate over whether voting qualifications should be set at the federal or state level--a debate that was resolved by letting states decide who would vote. At no point during either of those debates did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

Nor do the history and the debates leading to the creation of the District support the opponents' view. The Framers established a federal district to ensure that the nation's capital would not be vulnerable to the power of any one state. The need for a federal district was fairly

uncontroversial, and elicited relatively little debate. But nowhere in the historical record is there any evidence that the participants in the constitutional convention affirmatively intended to deprive the residents of the new district of their voting representation or other civil liberties by virtue of their residence in the new federal enclave.

In retrospect, it not surprising that the Framers failed specifically to address the voting rights of District residents. After all, so long as the location, size, and population of the new federal district remained unknown, the issue was purely theoretical. All citizens of the Nation lived in a state at the time the Constitution was ratified, including those who lived in the parts of Maryland and Virginia that later became the District. Moreover, it would have struck the Framers as highly unlikely that, at the time of its creation, the District would be sufficiently populous to merit independent representation. At the time, no American city besides New York had a large enough population to justify a separate representative. Now, of course, the District has nearly 600,000 people--greater than the population of all of the thirteen original states.

Debates at the state ratifying conventions also suggest that the Framers may not have explicitly addressed this issue because they assumed that the states ceding the land to the federal government would provide for the civil rights and liberties of their residents as a condition of cession. Indeed, delegates at the Virginia and North Carolina ratifying conventions repeatedly observed that the states donating the land for the District could be expected to protect their residents' liberties as a condition of the cession. James Madison, for example, dismissed the anti-federalists' fear that Congress would exercise its power to strip the District's residents of basic liberties as unwarranted, because "nothing could be done without the consent of the states."

In the beginning, Madison's presumption bore out. As a condition of cession,
Virginia and Maryland both made general provision for the rights of their former residents, who continued to vote with Virginia and Maryland from Congress's acceptance of the cession in 1790 until Congress formally took control of the District in 1800. As it turned out, though, when the Congress assumed power over the District in 1800, the federal statute effectuating that changein-control disenfranchised the District's 8,000 residents. Congress's failure at the time to provide voting rights to the District's residents was, again, understandable. The District was more than 20,000 residents shy of the number then constitutionally required for a congressional district, and it was widely assumed that the residents' proximity to and frequent contact with members of Congress would make up in reality for any formal rights of representation they lacked.

In short, precedent supports Congress's authority under the District Clause to provide the District's residents the fundamental rights possessed by other Americans who reside in states absent a countervailing constitutional imperative. And nothing in the Constitution or in the records of the constitutional convention or state ratifying debates demonstrates that the Framers affirmatively intended to deprive District residents of voting representation in the House of Representatives. Instead, the historical record suggests the Framers likely did not specifically protect this right because they assumed the residents of the new federal district would be taken care of by the ceding states, and felt no need to provide distinct voting representation for residents of an as-yet undesignated district that would almost certainly have lacked the population necessary to warrant a separate seat.

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In sum, while I understand and appreciate the views of those who oppose this legislation, I do not agree with them. I believe Congress has authority to enact the D.C. Voting Rights bill and, indeed, that this legislation is what the Framers would have expected and embraced today as fulfilling their democratic vision for the Nation.

Addendum

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.

As discussed more fully below, Congress can fix that glaring problem legislatively without running afoul of the Constitution. Neither the Constitution's text nor controlling Supreme Court precedent preclude treating the District of Columbia as akin to a "state" for the purpose of providing the District's residents with voting representation. To the contrary, in National Mutual Insurance Company v. Tidewater Transfer Company, a plurality held that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide diversity jurisdiction to District residents pursuant to its authority under the District Clause.1 There is no reason to reach a different outcome here. Moreover, the historical record cannot fairly be read to reflect an affirmative desire by the Framers to bar District residents from voting representation. Instead, a far more plausible reading of the historical record is that the Framers did not explicitly address the issue of voting representation because they did not advert to the possibility that the residents of the as-yet undefined District would be without voting representation. To infer from the Framers' silence an intent to deprive District residents of this basic right would be to adopt an unfounded, aggressive reading of the history that simply does not hold up when considered in context. Finally, other reasons given for denying District residents a right to vote are unpersuasive and do not provide a sound basis for defeating the legislation proposed here.

I. THE TEXT OF THE DISTRICT CLAUSE GIVES CONGRESS FAR-REACHING POWER TO ENACT LEGISLATION THAT WOULD GIVE THE DISTRICT VOTING REPRESENTATION IN THE HOUSE

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."2 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.3 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,4 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.5 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,6 and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."7

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.8 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.9

A. Significance of Tidewater

A January 24, 2007 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 Congress's authority to enact voting-rights legislation.10 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 of the Court 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.11 Similarly, Congress's authority to grant the District full rights of statehood12 (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 vote in the House of Representatives.13

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."14 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."15 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,16 the same is of course true 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."17 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.18

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."19 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,"20 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."21

Thus, the driving force behind the dissenters' conclusion that the District Clause did not permit an expansion of federal jurisdiction thus 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, 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.22 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."23 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.24 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.25

II. A BROAD READING OF CONGRESS'S POWERS UNDER THE DISTRICT CLAUSE IS CONSISTENT WITH THE FRAMERS' ORIGINAL INTENT

The legislative history surrounding the Constitution's ratification provides further support for concluding that the District Clause authorizes Congress to enact legislation to provide voting representation for the District of Columbia. Although the constitutional debates reveal the Framers gave little specific attention to whether District residents would cast votes for

a member in the House, the limited evidence on this subject does suggest that they assumed the ceding states would ensure as a condition of cession that the District residents would retain their essential liberties. The Framers apparently did not debate whether District residents would have the same civil rights as other Americans because they never contemplated that District residents would not have those rights. Thus, to the extent opponents of the legislation argue that the Framers intended to deprive District residents of voting representation, those opponents are simply wrong: such a reading rests on cherry-picking selective quotes out of context from the state ratification debates, ignores the fact that amendments restricting Congress's power under the District Clause failed, and cannot be squared with Congress's assertion of its power to authorize representation for the new District's residents immediately following ratification.

A. The Framers Assumed That, After Ratification, District Residents Would Retain Voting Representation In The House Of Representatives

In his recent testimony before the Senate Committee on Homeland Security and Governmental Affairs, Professor Jonathan Turley argues that the District Clause should play no role in analyzing the Framers' intent on this issue and, moreover, that the Framers' failure to mention the word "district" in Article I, Section 2 necessitates a finding that the Framers did not intend to extend voting representation to District residents.26 Mr. Turley's argument largely rests on his implicit conclusion that silence in the legislative history requires a finding that the Framers affirmatively intended to strip District residents of the franchise. Mr. Turley's aggressive reading of the legislative history, however, is belied by the facts and circumstances attending ratification as well as statements made during the debates.

The legislative history accompanying ratification of both the District Clause and the Composition Clause is mostly silent on the question of whether the Framers expected residents of the new Federal District to have voting representation in the House. That limited history, however, is nonetheless instructive in understanding why the Framers did not explicitly grant District residents an affirmative right to vote. As shown below, the issue was mostly a distant one and to the extent it immediately affected the District's new residents, the Framers assumed those residents would have representation.

1. The District Clause

It is undisputed that the perceived need for a Federal District arose from a 1783 meeting of the Continental Congress in Philadelphia. During that meeting, Pennsylvania refused to provide assistance when the Continental Congress was confronted by a mob of mutinous soldiers from the Continental Army.27 Unable to obtain any guarantee of protection from the state, the Continental Congress was forced to adjourn its meeting and reconvene elsewhere. The events in Philadelphia that summer convinced the Framers that they could not leave the security of the new federal government in the hands of any one particular state. As James Madison remarked in The Federalist No. 43, without a Federal District, "the public authority might be insulted and its proceedings interrupted with impunity" and "the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."28 James Iredell, a delegate at the North Carolina state ratifying convention, likewise opined, "What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any

one particular state? Would not this be most unsafe and humiliating?"29 It was this widespread feeling--and certainly not a desire to create a second-class citizenry deprived of federal representation--that spurred the Framers to carve out a ten-mile square that would serve as the new seat of the federal government.30

Although the Framers were silent at the Constitutional Convention on the scope and source of rights the new District's residents would enjoy, the state ratification debates reveal the District Clause engendered no debate at the Constitutional Convention on this subject because it was widely (and uncontroversially) assumed that a state ceding territory for the District would, as a condition of cession, safeguard the fundamental liberties of its inhabitants.31 Statements at the state ratifying conventions confirm this view. At the North Carolina ratification convention, delegate Iredell noted that the District would have authority from "the state within which it lies" and that "such state [would] take care of the liberties of its own people."32 During the Virginia ratifying convention, James Madison (also a participant in the Constitutional Convention) similarly asserted that, for the creation of a Federal District to actually happen, the state(s) must agree to the terms of the cession.33 Virginia Delegate George Nichols likewise "insisted that as the state, within which the ten square miles might be, could prescribe the terms on which Congress should hold it, no danger could arise, as no state would consent to injure itself."34 Ratification of the District Clause was thus based on the assumption that states ceding territory for the District would protect the fundamental liberties of their citizens, of which the right to vote was paramount.

Professor Turley counters that a series of amendments proposed in the state ratification conventions demonstrate that "the status of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress."35 Professor Turley's evidence does not beat that out. Principally, Professor Turley basis this assertion on a proposed amendment offered by Alexander Hamilton at the New York ratifying convention. That proposal, however, presumed that the District's residents could continue voting with the state from which the District was carved, and would have given them the automatic right to cast votes as District residents once the District's population reached the size necessary for a voting representative under the apportionment rules. 36 Professor Turley and other critics of the current proposed legislation claim this amendment's failure shows that the Framers opposed giving District residents any voting representative in Congress.37 But it shows no such thing. To the contrary, this failed amendment (at a state ratifying convention) highlights the Framers' assumption that the District's residents would retain the right to vote with their former state, and it demonstrates at most a disinclination to provide automatically for representation of the District qua District--a fact not surprising given the unknown facts relating to the District during the ratification debates. It does not remotely suggest that the Framers believed that Congress would lack power to effect that result legislatively. Nor does it suggest the Framers intended that District residents would not have the right to vote simply because they happened to live in the part of a state whose land became the Federal District.

Professor Turley fares no better in claiming that other events at the state ratification debates somehow show that the Framers intended to limit congressional power over the District. For instance, Professor Turley errs in arguing that failed amendments in state ratifying conventions

demonstrate a purpose to limit federal power.38 To stave off concerns of anti federalists, North Carolina, Pennsylvania and Virginia all proposed amendments to the Constitution as drafted that would have limited Congress to acting in the same capacity as a state. In all three cases, the states proposed amendments that would have limited Congress's "exclusive power of legislation . . . over the federal district . . . only to such regulations as respect the police and good government thereof."39 Tellingly, those amendments were not adopted--so to the extent they provide proof of any intent, they reveal the Framers desire not to limit federal power in the way Professor Turley claims.

Similarly, Professor Turley relies heavily on statements by Edmund Pendleton, President of the Virginia Ratifying Convention, and others to argue that the Framers intended to deprive District residents of voting representation because they feared that such power could be used to the detriment of the states.40 Professor Turley's reliance on Pendleton's statements, however, is misplaced because Pendleton merely addressed the concern that Congress would use its power over the district to augment its federal power to the detriment of the states. Here, of course, giving a voting representative to the District's more than 600,000 residents--leaving it with less representation in Congress than any state--would not aggrandize federal power at the expense of the states or enable the federal government to oppress the states. Professor Turley's other unsubstantiated statements--including his suggestion that providing district residents with voting representation would have "doomed" ratification--are hyperbole that find no support in the scant legislative record. Indeed, if precluding representation was so essential to ratification, the Framers would have at the very least debated the subject if not enacted clear language addressing the question.

When considered in context, the Framers' relative silence as to whether District residents would enjoy separate voting representation as an independent district is not surprising. At the time of ratification, the Framers decided only the limitations on its geographic bounds and left the rest to future Congresses. That made imminent sense at the time because the Framers did not yet know even the location or population of the new District. Indeed, it was not until the July 9, 1790 passage of the Residence Act, 1 Stat. 130 (1790), during the second session of the First Congress, that Congress (not the Framers) ultimately selected the District of Columbia as the seat of federal government in a compromise between the North and the South. Earlier, when the District Clause was enacted, it was possible that the nascent District would reside in the middle of an existing state (thereby easily allowing the residents of the District to continue voting in their original state, as residents of federal enclaves do today), or in a region that had fewer than 60,000 residents--the minimum then needed to qualify for statehood under the terms of the Northwest Ordinance.41

The First Congress, for example, split its time between New York City and Philadelphia. During this period various localities (large and small) were engaged in fierce lobbying efforts to become the seat of the nation's capital. As Rep. Samuel Livermore of New Hampshire noted, "[m]any parts of the country appear extremely anxious to have Congress with them. There is Trenton, Germantown, Carlisle, Lancaster, Yorktown, and Reading, [which] have sent us abundance of petitions, setting forth their various advantages . . . ."42 Tellingly, however, the population of none of those cities was more than 2,500.43 Indeed, New York City--the largest urban area in the entire country in 1790--had a population of only 33,131.44 It was highly

unlikely (if not impossible) that the new 10-mile square Federal District would have the number of residents necessary to qualify it for independent voting rights. And it seems equally implausible that states would have been fiercely competing to house the new Federal District if the price of winning the competition was expected to be the disfranchisement of their residents.

2. The Composition Clause

Professor Turley's very brief discussion of the debates surrounding the Composition Clause,45 fares no better in demonstrating that the Framers intended to deprive more than half a million people of representation in the federal government.46 In short, he claims that the Framers put much care in deciding that Representatives would be elected from "the people of the several states" and that, because the Framers placed great emphasis on "states," the Framers intended to exclude voting representation for the District. The ratification debates do not support his assumption because there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting that language. Instead, the Framers' word choice reflected two compromises. First, there was division over whether the House should be elected by the "people of the several states" or by state legislatures.47 The Framers, of course, resolved this debate in favor of direct election by individuals. Second, there was debate over whether voting qualifications should be set at the federal or state level--a debate that was resolved by letting states decide who would vote.48 At no point during either of those debates did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

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Certainly, when the Framers created the Federal District, they did not know that it would ultimately straddle two states, thereby raising a multiplicity of issues concerning the scope of the laws that would govern its residents' civil and political rights. Nor did they know the size of the new District, though they presumably did not think it would be large enough initially for its own residents to qualify as such for Congressional representation. Notwithstanding those facts, the ratification history suggests that the Framers believed that the ceding states would preserve their former residents' essential liberties. There is no evidence in the ratification debates that that the Founders of our democracy affirmatively meant to deny democracy to those living in our capital.

B. Congress's Actions In The Period Following Ratification Confirm That The Framers Expected District Residents To Maintain Their Voting Rights And Meant For Congress To Have The Authority To Establish Those Rights

Any doubt on whether the Framers expected the District residents to maintain voting representation in the House of Representatives is largely dispelled by their actions in the period immediately following ratification.

In 1788 and 1789, Maryland and then Virginia ceded land to the United States for the new Federal District.49 In ceding the land, both Maryland and Virginia explicitly provided that their respective laws would continue in force in the territories they ceded until Congress accepted the cessions and provided for government of the District. In 1790, acting pursuant to the District Clause, Congress enacted legislation that accepted the ceded land and provided for the metes and bounds of new District and authorized the President to determine the metes and bounds of the new territory. 50 That legislation likewise provided that the laws of Maryland and Virginia would

continue to operate after the land was ceded until the date Congress formally moved to the new Federal District.51

On March 20, 1791, the President issued a proclamation defining the boundaries of the new federal district.52 At that moment, consistent with the District Clause, the territory comprising the federal district was officially established. Yet notwithstanding that fact, the residents of the new District did not lose their representation in Congress but instead, pursuant to the 1790 legislation, continued voting in Maryland and Virginia. "Thus, during that interim period, the citizens enjoyed both local and national suffrage notwithstanding the fact that the District was a federal jurisdiction and theoretically under the exclusive control of Congress."53

Pursuant to the 1790 legislation, on December 1, 1800, the Congress assumed full control over the federal district. And in 1801, the Congress enacted legislation that provided the laws of Maryland and Virginia "shall be and continue in force" in the areas of the District ceded by the respective states.54 Yet because the Congress had assumed jurisdiction over the District's residents in 1800 but failed to enact legislation that protected their franchise, in 1800 the District's residents ceased voting for a federal representative. At that point, it was a decade too late for the ceding states to protect the franchise of their former residents.55 It bears noting that it was Congress's decision to terminate the authority of Maryland and Virginia over its former residents--not a judicial interpretation of the Constitution and the Framers' intent--that took away District residents' right to vote.

To be sure, in the years that followed, Congress did not act affirmatively to restore this right, as it is now doing. Yet for two reasons, that absence of such legislative action should not be interpreted to suggest a view by the early Congresses that they lacked the power to provide District residents with the right to vote. First, although in 1800 the minimum population required for a state to elect a voting representative to Congress was 60,000 residents, a mere 8000 residents resided in the District of Columbia at that time.56 It is therefore neither surprising nor telling that in the years immediately following the District's establishment no serious effort was made to secure the District's residents a voting representative. Second, as a practical matter, with the District housing just 8000 residents in 1800, the need for federal representation was far weaker than it later became. When the Congress convened in the District for its first full session in 1801, the 137 members of the Seventh Congress alone (not including their families and staff) constituted nearly two percent of the entire District's population. Thus, there was some sense to the notion that the views of District residents would naturally be taken into account from their frequent, direct interaction with members of Congress themselves. In contrast, with an estimated population of 581,530 residents in 2006, even assuming all of the 535 members of Congress reside in the District, they constitute just .092 percent of the District's population.57 And now, of course, many members of Congress live outside of the District, and modern transportation permits representatives to travel more frequently to their home districts. In today's world, there is simply no opportunity for the average District resident to interact on a day-to-day basis with members of Congress, and no reason to believe that residents' views and concerns will naturally be considered by the federal legislature in the absence of their having a voting representative.

III. OTHER CONCERNS IDENTIFIED BY OPPONENTS DO NOT PROVIDE A SOUND BASIS FOR REJECTING THE PROPOSED LEGISLATION

Apart from the issues addressed herein, the January 24, 2007 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 that merit a response. 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.58 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."59 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 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."60 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.61 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."62 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.63 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.

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.64 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.65 And the question whether Congress might ever attempt to provide District residents representation in the Senate is entirely speculative.

* * * * *

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. . . ."66 The Framers had no way of knowing at the time the Constitution was ratified what the Federal District they conceived would look like more than two centuries later. Indeed, the Framers did not even know where the Federal District would be located.

Today, we have little direct evidence of the Framers' views regarding the Federal District's residents' right to congressional representation. The ratification debates suggest that the Framers never seriously contemplated the possibility that residents of the national capital would be deprived of the fundamental right to vote. Indeed, as a practical matter, they likely did not perceive a need to create an explicit provision for District residents to elect a voting member of Congress because they presumed the ceding states would make adequate provision for their former residents. But apart from that most accurate reading of the history, we do know that the Framers considered the franchise the most cherished of liberties and that they believed the state or states which ceded land for the District would generally safeguard their former residents' fundamental rights. After all, the Framers had quite carefully devised a government based on "the consent of the governed."

For these reasons, it would be improper (as the Court found in Tidewater) to view the term "state" as a limitation on Congress's power. The Framers simply were not thinking of the states to the exclusion of the District's residents when they so limited representation in the House. And it would be contrary to the basic liberties they sought to preserve and protect to leave those nearly 600,000 residents as the last residents in any capital city in the world that are denied voting representation in the national legislature. The Congress can and should enact legislation restoring the franchise to the District's residents without running afoul of the Constitution.

1 See 337 U.S. 582, 601-02 (1949).
2 U.S. Const. art. I, § 8, cl. 17.
3 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.
4 6 U.S. 445 (1805).
5 Id. at 453.
6 Id.
7 Id.
8 See 337 U.S. at 601-02.
9 See id. at 604-06.
10 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://opencrs.cdt.org/rpts/RL33824_20070124.pdf.
11 337 U.S. at 597-99.
12 See U.S. Const. art. IV, § 3, cl. 1.
13 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.
14 Tidewater, 337 U.S. at 625.
15 Id. at 623.
16 See CRS Report at 13-14. 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 its argument that the Tidewater plurality might have thought such legislation to be beyond Congress's authority under the District Clause. In my view, 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.

17 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).

18 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.

19 Tidewater, 337 U.S. at 647 (Frankfurter, J., dissenting).

20 Id. at 635 (Vinson, J., dissenting).

21 Id.

22 90 F. Supp. 2d 35 (D.D.C. 2000). The Supreme Court summarily affirmed without opinion. Alexander v. Mineta, 531 U.S. 941 (2000).

23 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 (quoting Adams, 90 F. Supp. at 50); see also CRS Report at 4-5, 11.

24 Adams, 90 F. Supp at 47.

25 Id. at 72.

26 Equal Representation in Congress: Providing Voting rights To The District of Columbia, before the Committee on Homeland Security and Governmental Affairs, United states Senate, 110th Cong., May 15, 2007 (testimony of Jonathan Turley).

27 Roy F. Franchino, The Constitutionality of Home Rule and National Representation for the District of Columbia, 46 GEO. L. REV. 207, 209 (1957).

28 The Federalist No. 43 in THE FEDERALIST PAPERS 279-80 (Cosmio, Inc. 2006).

29 Remarks at the Debate in North Carolina Ratifying Convention, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTING OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 2d ed. 1907), available at http://memory.loc.gov/ammem/amlaw/lwed.html (hereafter "THE DEBATES IN THE SEVERAL STATE CONVENTIONS").

30 See Franchino, 46 Geo. L. Rev. at 211 ("It is quite clear that the objective of the Founding Fathers was to create a Federal District free from any control by an individual state."), id. at 213 ("It cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount."); Remarks by James Madison in the Virginia Ratifying Convention, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 433 ("How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such state?"); Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 HARV. J. ON LEGIS. 167, 170 (1975) (having the national and a state capital in the same place would give "'a provincial tincture to your national

deliberations." (quoting George Mason in THE DEBATES IN THE SEVERAL STATE CONVENTIONS 332)).
31 Raven-Hansen, 12 HARV. J. ON LEGIS. at 172 (noting "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").
32 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 219-220.
33 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 433 ("T]he states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether.").
34 Id. at 434.
35 Turley at 22 (emphasis in original).
36 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett and Jacob E. Cooke eds., 1962).
37 See, e.g., Turley at 23.
38 Id.
39 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 245 (North Carolina Ratification Convention); see also 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 545 (Pennsylvania Ratification Convention) (proposing that "the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof"); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (Virginia Ratification Convention) (proposing similar amendment).
40 Turley at 25.
41 The Northwest Ordinance was passed by the Continental Congress in 1787 under the Articles of Confederation. In 1789, the Congress adopted the ordinance as federal law. Ordinance of 1787: The Northwest Territorial Government, 1 Stat. 50 (1789).
42 1 ANNALS OF CONG. 819 (Joseph Gales, ed., 1834), available at http://memory.loc.gov/ammem/amlaw/lwac.html.
43 U.S. Department of Commerce, Bureau of the Census, "Population of the 24 [largest] Urban Places: 1790," available at http://www.census.gov/population/documentation/twps0027/tab02.txt.
44 Id.
45 Art. I, sec. 2, cl. 3.
46 Turley at 18-19.
47 See, e.g., THE RECORDS OF THE FEDERAL CONVENTION OF 1787 55-61 (Max Farrand ed., 1911), available at http://memory.loc.gov/ammem/amlaw/lwfr.html (debates concerning whether individuals or state legislatures should elect a state's representative to the House of Representatives).
48 See, e.g., THE RECORDS OF THE FEDERAL CONVENTION OF 1787 201-04 (debates concerning qualifications for voters in elections for the House of Representatives).
49 See An Act to Cede to Congress a District of Ten Miles square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, reprinted in 1 D.C. Code Ann. 34 (2001) (cession of land by Maryland), An Act for the Cession of Ten Miles Square, or any Lesser Quantity of Territory Within This State, to the United States for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, reprinted in 1 D.C. Code Ann. 33 (cession of land by Virginia).
50 An Act for Establishing the Temporary and Permanent Seat of the of the Government of the United States, 1 Stat. 130 (1790), reprinted in 1 D.C. Code Ann. 42, amended 1 Stat. 214,

reprinted in 1 D.C. Code Ann. 45.
51 Id.
52 Proclamation Fixing Boundaries of the District of Columbia, March 30, 1791, reprinted in 1 D.C. Code Ann. 45-46.
53 Franchino, 46 GEO. L. REV. at 214.
54 Organic Act of 1801, An Act Concerning the District of Columbia, 2 Stat. 103, Feb. 27, 1801, reprinted in 1 D.C. Code Ann. 46-49.
55 As one commentator has noted: The ceding states could have prevented the situation that now exists by reserving that the rights of their citizens should not be impaired. Such a reservation would have insured the continuation of franchise rights. However, it is reasonable to assume that the ceding states felt such a reservation was not necessary, that such political rights went with the transfer of jurisdiction. It would seem that any view which considers that the Founding Fathers intended to preclude such a basic right would be contrary to the rights and privileges existing in the ceding states and totally inconsistent with the underlying principles which gave rise to the Federal Congress. Id.
56 U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 26 (1975).
57 U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Quickfacts for the District of Columbia, available at http://quickfacts.census.gov/qfd/states/11000.html (last visited May 11, 2007).
58 CRS Report at 17.
59 Id.
60 U.S. Const. art. IV, § 3, cl. 2.
61 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.).
62 Carter, 409 U.S. at 432.
63 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).
64 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 11, 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.
65 See U.S. Const. art. V.
66 Tidewater, 337 U.S. at 587. See also Raven-Hansen, 12 HARV. J. ON LEGIS. 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. . . .").