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**Testimony of Walter Smith, Executive Director
DC Appleseed Center for Law and Justice, Inc.**

Before the Committee on Government Reform
U.S. House of Representatives

June 23, 2004

Good morning, Congressman Davis. My name is Walter Smith. I am the Executive Director of The DC Appleseed Center for Law and Justice, Inc.

DC Appleseed is a nonpartisan, nonprofit public interest organization dedicated to improving living and working conditions in the National Capital area. Some of DC Appleseed's current projects include: (1) leading a coalition of various groups concerned with the conduct of the area's largest health insurance company, CareFirst; (2) addressing the problems of special education in the District; and (3) proposing solutions to the District's inability to raise the revenues it needs to deliver fundamental governmental services to citizens who work and live in the District of Columbia.

Today, though, I am happy you invited me to testify briefly about another project to which DC Appleseed is strongly committed, one that I have been personally involved with for seven years—DC's lack of voting representation in the Congress.

Just to note my history with this issue, I was the Deputy Corporation Counsel for the District of Columbia when Corporation Counsel John Ferren and I determined that a lawsuit needed to be brought on behalf of the District and its citizens contending that our lack of voting representation is unconstitutional. As you know, with the pro bono assistance of one of the District's leading law firms, Covington & Burling, we brought that suit before a three-judge federal court on July 4, 1998.

As you also know, by a narrow 2-1 vote, the court ruled that while our denial of the vote was inequitable, unjustified, and amounted to a serious grievance, our remedy nevertheless lay with Congress not the courts. I thereafter represented the District on a pro bono basis in appealing that ruling to the US Supreme Court.

Since the Supreme Court affirmed the 2-1 ruling, many of us who care deeply about our denial of voting rights, including DC Appleseed, have

June 23, 2004

Page 2

Walter Smith Testimony

been working with Congresswoman Norton, the Mayor, the City Council, and other District leaders to urge the Congress to rectify this inequity. We have brought our case to the Congress because that is precisely what the 2-1 ruling from the court directed us to do.

This last point is a key one and one that many people are not aware of: far from ruling that DC citizens are not entitled to voting rights, the court case actually ruled almost the opposite: that it is unjust that we do not have voting rights, but that this is an issue that Congress, not the courts, should address.

It is to your great credit that you and the Government Reform Committee are now addressing the issue and that you are holding this public hearing. It is also a very encouraging sign to us that there are several pending bills addressing the issue -- bills that come from both parties. This indicates to us that at long last the debate is no longer over whether to bring democracy to the Nation's Capital -- but only over the details as to how that is to be accomplished. Here are the five points DC Appleseed would like to make about this important issue.

First, there is no principled basis—none—for continuing to deny citizens of the Nation's Capital the most basic and most precious right of our democracy: the right to voting representation. And there is no better time than now, when we are fighting for democracy abroad, to be sure that we are protecting democracy here at home -- in our own Capital. We are the greatest democracy on earth; and yet we are the only democracy on earth that denies democracy to the people who live in its Capital. The Congress can and should address this inequity—now.

Second, DC Appleseed strongly supports the approach Congresswoman Norton and Senator Lieberman have proposed for Congress to address the inequity—giving the citizens of the District the same basic right as other U.S. citizens—the right to full voting representation in the Congress. That is and always should be our purpose on this issue and we should never settle for anything less than that.

Our third point is this: Congress has the authority by simple legislation to confer voting rights on District citizens. A constitutional amendment is not required. At the request of the District and Congresswoman Norton, DC Appleseed prepared a legal memorandum on that issue and submitted it to Senator Lieberman and his Committee for the Senate hearings. I also testified on that issue before Congresswoman Morella's Subcommittee on the District of Columbia. In addition, as you know, with the pro bono assistance of another leading firm in Washington, D.C., Latham & Watkins, we have submitted an additional memorandum on that issue to the staff of the Government Reform Committee. These two memoranda are attached to my written testimony.

The key point in these memoranda is this: Congress has power under its broad authority under the District Clause (Article I, Section 8, Clause 17) to treat the District as if it were a State

for voting purposes. This proposition is established by the governing judicial precedents and was confirmed in the court's 2-1 decision in our recent voting rights litigation (*Alexander v. Daley*).

DC Appleseed's fourth and fifth points relates to issues raised by the various bills now before the Committee. One issue is whether Congress could grant something less than full voting representation as an interim step—for example, either voting representation only in the House, or voting representation in the House plus a nonvoting delegate in the Senate. We believe Congress's exclusive authority over the District gives it the power to move in such incremental steps, although, as I say, we would support that approach only if those were in fact steps toward ultimate, full voting representation.

The other significant issue -- and our last point -- concerns proposals to grant DC voting rights by treating its citizens as if they were part of Maryland. As the third memorandum attached to my testimony explains, for two reasons we do not think this approach is either constitutional or even workable.

First, we do not think Congress has authority to deem citizens to be citizens of a state in which they do not and have never resided. In fact, if Congress had that power, it obviously could redraw voting jurisdictions at will and place citizens in whatever State it wished. That proposition was categorically rejected by the *Alexander v. Daley* court, which observed that a previous Supreme Court case (*Albaugh v Tawes*) "forecloses the conclusion that District residents may be allowed to vote in congressional elections through the State of Maryland." 90 F.Supp.2d at 57.

In any event, allowing District residents to vote through Maryland is for all practical purposes foreclosed by Article I, Section 2, Clause 2 of the Constitution. That clause provides that no person may be a representative unless he or she is "an Inhabitant of that State in which he shall be chosen." As the court in *Alexander v Daley* pointed out, if the District were treated as part of Maryland for purposes of that clause, no one from the District of Columbia could ever represent District citizens since none of them would be an "inhabitant "of Maryland. As the court said, this "would make the District the only area where all of the voters are constitutionally unqualified to serve as their own representatives." 90 F.Supp.2d at 61 n. 47. That unintended consequence should make this approach unacceptable. Any representation for the District should be for the District alone as a separate entity. This is the fair, sensible, and constitutional way for the Congress to proceed. And we urge it to do so expeditiously.

Again, many thanks for inviting me to testify today. I'd be happy to answer any questions you have.

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MEMORANDUM

July 31, 2003

ATTORNEY WORK PRODUCT
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To: Walter Smith, Executive Director, DC Appleseed Center for Law and Justice
From: Rick Bress & Matt Parker
File no: 501813-0000
Copies to: Gary Epstein, Jim Rogers
Subject: Preliminary Analysis Regarding D.C. Voting Proposal By Representative Thomas M. Davis III

At your request, we have done a preliminary analysis of the proposal recently announced by Representative Thomas M. Davis III (R-Virginia) to provide residents of the District of Columbia with a voting Representative in the House of Representatives. The details of the plan appear to still be in development, and the Congressman has not yet released a draft for review. Broadly speaking, however, the proposal is to add two new Representatives to the House, raising its number from 435 to 437. One new seat technically would go to Maryland, though it would be elected by a district composed predominantly of D.C. residents (the district would also include Maryland residents); the other new seat would go to Utah, which narrowly (by a margin of 857 residents) lost its fifth seat in the apportionment arising from the 2000 census. The House would then revert to 435 Members once the 2010 Census is completed.

Our understanding is that the purpose of Congressman Davis' proposal is to afford District residents voting representation in the House, and do so in a way that is likely to: (a) gather bipartisan support in the Congress; (b) gather support as well from D.C. citizens and groups seeking voting representation for D.C.; and (c) be achievable through simple legislation rather than constitutional amendment.

In our opinion, the Congressman's proposal is laudable and a significant advance for the cause of democracy in the Nation's Capital. We also think his determination to combine a new seat for Utah with a seat for D.C. is a shrewd and sensible proposal with a clear legal precedent – the conferring of new house seats on Alaska and Hawaii (by simple legislation) at a time when one was expected to vote Republican and the other Democrat. For these reasons, it appears to us that the goal of achieving bipartisan support for D.C. representation is well-served by the proposal.

However, we think that as the details of the proposal are further developed, serious thought should be given to the way in which residents of D.C. are given voting representation. Specifically, we believe that direct representation for D.C. as a separate entity, rather than as part of Maryland, is the better course. We say that for three reasons.

First, and not surprisingly, D.C. citizens and organizations supporting voting rights for D.C. are more likely to support the proposal if the new House seat is in fact a D.C. seat, not a Maryland-based seat. These groups consider DC to be a cohesive political and geographic entity and they favor it being given its own voting representation, rather than being required to “join” another State in order to gain such representation. And, as a related matter, it is not at all obvious that Maryland’s elected leaders would support a new Maryland seat tied to D.C. or that Maryland citizens would wish to be placed in a new district dominated by D.C.

Second, from our initial review we believe Representative Davis’s Maryland-based proposal is far less attractive as a matter of law and more likely to fail a legal challenge than would a proposal that simply gave the new seat to D.C. alone. In particular, as we detailed in our prior memorandum (attached hereto), there is substantial case law supporting Congress’s broad powers over D.C., including its power to treat the District as a State for several constitutional purposes, including voting. On the other hand, we have grave doubts that the courts would countenance legislation giving D.C. residents the right to select another State’s Representatives and treating D.C.’s residents as if they were residents of that other State. In fact, we know of no precedent that would support such an outcome.

Finally, and perhaps most important, we are concerned that the proposal’s indirect method of securing representation for D.C. residents will lead to troubling, unintended, adverse consequences. Principal among these – and the one that would surely be regarded by D.C. residents as fatal to the proposal – is that, voting as members of a Maryland district, D.C. residents will be constitutionally prohibited from choosing as their Representative a fellow District resident, and must instead be represented by an inhabitant of Maryland. In other words, the proposal to give D.C. residents voting representation through a new Maryland-based district would mean that D.C. residents could not be represented by someone from D.C. – including Eleanor Holmes Norton. Further, the proposal invites mid-Census redistricting by Maryland, which may affect D.C. residents’ ability to retain their own Representative, and it leaves a serious question whether the D.C. would retain the vote after the 2010 Census, when the House would revert to 435 seats.

In sum, for all these reasons, set forth in greater detail below, while we are heartened by Representative Davis’s proposal, we are skeptical of its relative legal and practical merit as initially proposed. At this point, therefore, we believe that the better tack is to reform the proposed legislation to provide direct voting representation to residents of the Nation’s Capital.

ANALYSIS

A. The Proposal Would Be Strengthened From A Legal Perspective By Providing D.C. Residents Voting Representation Directly

Representative Davis's proposal is apparently designed to afford D.C. residents voting representation in a way that is most defensible as simple legislation rather than as a constitutional amendment. We believe (for reasons set out in our previous memo, attached) that the best way to do that is through legislation directly providing voting representation to the District of Columbia. On the other hand, we believe that the Maryland-based proposal presents serious constitutional impediments.

Although no provision of the Constitution says so directly, the text and ratification history make it quite clear (and leave no room for serious dispute) that only *residents* of a State have the constitutional right to vote for that State's congressional Representatives. This foundational proposition is implicitly confirmed in section 2 of the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers." Pursuant to this clause, a State is entitled (but entitled only) to that representation in the House according to its relative population as determined in a decennial census. *See* Art. I, § 2, cl.3. As a general matter, it would be unconstitutional for Congress to give a State greater representation than it is due by deeming its "respective numbers" to include non-residents. But that is what the Davis proposal would do if it treated D.C. residents as if they were residents of Maryland in order to create a new Maryland district.

It is equally clear, despite Maryland's historical cession of the lands that currently comprise the District, that as a matter of law District residents are not now Maryland residents for voting (or other) purposes. Contemporaneous with the birth of the federal District, Chief Justice Marshall declared in *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805), that upon the political "separation of the district of Columbia from the state of Maryland," a District resident "ceased to be a citizen of [Maryland]." On that same ground, the three-judge district court in *Albaugh v. Tawes*, 233 F. Supp. 576 (1964), *aff'd*, 379 U.S. 27 (1964), squarely rejected a claim that the District is part of Maryland for purposes of United States senatorial elections. That court observed that it is "clear that residents of the District of Columbia have no right to vote in Maryland elections generally, and specifically, in the selection of United States senators." *Id.* at 577. The reasoning of that holding applies just the same to Members of the House of Representatives.

Finally, it is hard to see how Congress could claim the constitutional authority to "deem" District residents to be Maryland residents for purposes of congressional representation. The political values underlying the system of proportionate representation would quickly lose their coherence if Congress were able to alter the apportionment by the addition to a State's tally of persons who have no plausible claim actually to be residents of that State. Congress, of course, does have authority at the margins to determine what qualifies as state residency for purposes of the census, apportionment, and voting. In this respect, the Uniform Overseas Citizen Absentee Voting Act, 42 U.S.C. § 1973ff-1973ff-6, provides that States must permit a member of the military or United States citizen living abroad to vote in its congressional elections when their last address in the United States was in that State. But there is a world of difference between permitting a former state resident to continue to use absentee ballots for that State while

abroad and allowing a District resident who has never resided in Maryland to have a voting say in Maryland's congressional elections.

B. A Maryland-Based Proposal Would Not Permit D.C. Residents To Elect As Their Representative A Fellow D.C. Resident

The fundamental concept of congressional representation in this Nation rests on the right of state residents to elect one of their own to represent them and their State's interests in Congress. This concept is manifested in the Constitution's prescription that "No person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Art. I, §2, cl.2. This means that every Representative of Maryland, including the one chosen by D.C. voters under Representative Davis's plan, must be a Maryland (not D.C.) resident. In other words, D.C. residents would be prohibited from choosing as their Representative a fellow D.C. resident. This is surely not intended by Congressman Davis and would obviously be unacceptable and unfair to D.C. residents. In fact, if District residents cannot elect a District resident, they will almost certainly consider themselves unrepresented.

C. A Maryland-Based Proposal Would Be Politically Unstable

Although Representative Davis's proposal is designed to avoid partisan and political disputes in the near term, if it is Maryland-based it will provide little political stability in the medium to long run. To begin with, once Congress creates an additional Maryland seat, Maryland will have to redistrict to create and accommodate the new district composed of D.C. and a small slice of Maryland. It is unclear that Congress could prevent Maryland state legislators at that time from redistricting the State in a way that would divide the District's vote and effectively eliminate the ability of District voters to have a true "District Representative." But even if that likelihood is remote, the proposal's provision for the elimination of the two additional House seats after the 2010 Census seems a very real and concrete concern. After that Census, Representatives will be apportioned under the Constitution as described above pursuant to each State's "respective numbers." For constitutional purposes, Maryland's respective numbers do not include District residents. Hence, Maryland's delegation would likely be reduced once again to four Members. At that time, either District voters would continue to vote for Maryland's representative (diluting the rightful votes of Maryland voters) or, more likely, lose the vote entirely. After all, if the new seat is to be a Maryland-based seat, reapportionment issues will be decided by the Annapolis legislature, not Congress, and D.C. residents will have no voting representation in that Annapolis legislature. And it seems likely that the Annapolis legislature will favor Maryland residents if a choice has to be made about which district to give up if Maryland loses a seat at the time of the reapportionment. For these reasons, even assuming the proposal were enacted and not successfully challenged, it strikes us as at best a very temporary fix and not one that would ensure permanent voting representation for D.C. residents.

CONCLUSION

Congressman Davis is to be commended for his proposal to bring congressional voting representation to the Nation's Capital. His idea to combine a seat for D.C. with a new seat for Utah is a sensible and well-founded way to build support for his proposal. However, the proposal could be strengthened both legally and practically if D.C. voting representation were

established by treating D.C. as if it were a State solely for voting purposes, rather than attempting to deem D.C. residents to be residents of Maryland. The former course is constitutionally defensible, would assure that a D.C. resident would represent D.C. in Congress, would remain stable through later reapportionments, and is likely to be preferred by D.C. residents. But the latter course – the Maryland-based proposal – is constitutionally suspect, would deprive D.C. residents of the opportunity to represent D.C., would be politically unstable at the time of reapportionment, and is less likely to be supported by D.C. residents. We therefore recommend that the proposal be redesigned to afford D.C. representation directly through a new district that contains only D.C.

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MEMORANDUM

February 3, 2003

ATTORNEY WORK PRODUCT PRIVILEGED & CONFIDENTIAL

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

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

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

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

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

people in a way that unnecessarily abridges this right.²

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

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

(1) The residents of the District of Columbia are the only Americans who pay Federal income taxes but are denied voting representation in the House of Representatives and the Senate.

(2) The residents of the District of Columbia suffer the very injustice against which our Founding Fathers fought, because they do not have voting representation as other taxpaying Americans do and are nevertheless required to pay Federal income taxes unlike the Americans who live in the territories.

(3) The principle of one person, one vote requires that residents of the District of Columbia are afforded full voting representation in the House and the Senate.

(4) Despite the denial of voting representation, Americans in the Nation's Capital are second among residents of all States in per capita income taxes paid to the Federal Government.

(5) Unequal voting representation in our representative democracy is inconsistent with the founding principles of the Nation and the strongly held principles of the American people today.⁴

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

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

⁴ S. 3054, 107th Cong. §2 (2002).

In relevant part, the bill provided as follows:

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

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

ANALYSIS

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

⁵ S. 3054, 107th Cong. §3 (2002).

⁶ S. 3054, 107th Cong. §4, 5 (2002).

⁷ S. 3054, 107th Cong. §5(d) (2002).

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

⁹ U.S. Const. art. I, § 2.

¹⁰ U.S. Const. art. I, § 3.

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

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

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

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

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

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

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

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

¹³ Alexander, 90 F.Supp. 2d at 47.

¹⁴ Id. at 72.

¹⁵ Id. at 40 (*emphasis added*).

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

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

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

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

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

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

¹⁸ Id. at 1343.

¹⁹ Wesberry, 376 U.S. at 9-19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁵ 18 U.S. 317 (1820).

²⁶ U.S. Const. art. I, § 2, cl. 3.

²⁷ Loughborough, 18 U.S. at 322-4.

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

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

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

²⁹ 409 U.S. 418, 423-24 (1973).

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

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

³² 6 U.S. 445 (1805).

³³ Id. at 452.

³⁴ Id.

³⁵ Id. at 453.

³⁶ Id.

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

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

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

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

³⁸ 337 U.S. 582 (1949).

³⁹ Id.

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

⁴¹ Id. at 589.

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

⁴³ Tidewater, 337 U.S. at 589.

⁴⁴ Id. at 602.

⁴⁵ Id. at 600.

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

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

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

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

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

⁴⁶ Id. at 602.

⁴⁷ Id. at 585.

⁴⁸ Id. at 585-6.

⁴⁹ Id. at 589.

⁵⁰ 2 U.S.C. § 431(12) (1994).

⁵¹ 17 U.S.C. § 101 (1994).

⁵² 18 U.S.C. § 1961(2) (1994).

⁵³ 42 U.S.C. § 2000(e)(i).

⁵⁴ 42 U.S.C. § 10603(d)(1) (1998).

⁵⁵ Hepburn, 6 U.S. at 453.

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

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

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

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

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

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

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

⁵⁶ Alexander, 90 F.Supp. 2d at 72.

⁵⁷ Tidewater, 337 U.S. at 585.

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

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

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

⁵⁸ Term Limits, 514 U.S. at 803.

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

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

⁶¹ U.S. Const. art I, § 3.

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

⁶³ 398 U.S. 419, 422 (1970).

⁶⁴ 42 U.S.C. § 1973ff-1 (1988).

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

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

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

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

II. CONCLUSION

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

⁶⁵ 25 U.S.C.A. § 25a (1994).

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

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

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

⁶⁹ Wesberry, 376 U.S. at 17.

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

MEMORANDUM

TO:	Hon. Eleanor Holmes Norton, District of Columbia Delegate to Congress Hon. Anthony Williams, Mayor of the District of Columbia Hon. Linda Cropp, Chairman, District of Columbia City Council Hon. Robert Rigsby, District of Columbia Corporation Counsel
FROM:	Walter Smith, Executive Director, DC Appleseed Center L. Elise Dieterich, Esq., Swidler Berlin Shereff Friedman, LLP
DATE:	May 22, 2002
RE:	Congress' Authority to Pass Legislation Giving District of Columbia Citizens Voting Representation in Congress

We have been asked by the District of Columbia and by the District of Columbia's Delegate to Congress, the Honorable Eleanor Holmes Norton, to address the question of Congress' authority to provide, by legislation, that citizens of the District of Columbia shall have voting representation in the Congress.¹ The legal precedents relevant to this question are familiar to us, because we represented the District (on a *pro bono* basis) in litigation designed to determine whether the Constitution already requires that District citizens be given voting representation. That litigation, known as *Alexander v. Daley*,² was ultimately decided in the United States Supreme Court; it determined that the Constitution does not categorically require that D.C. citizens be given voting representation and, therefore, that the Court lacks authority to provide it.

However, as we will explain, the key court opinion in that litigation made clear that Congress does have authority to grant D.C. citizens voting representation and that there are compelling reasons for Congress to do so. As we will also explain, the *Alexander* decision is consistent with the other relevant legal precedents on the question of Congress' authority over this issue. *Alexander* is furthermore consistent with actions that Congress itself has taken in treating citizens of the District as if they were citizens of a State for other limited purposes under the Constitution. For all these reasons, discussed below, we conclude that Congress has the requisite authority under the Constitution to give D.C. citizens what the Supreme Court has called the most precious right of American citizens. In the Court's words:

¹ The District of Columbia has a non-voting delegate in the House of Representatives, but has never had full voting representation in the House or Senate.

² 90 F. Supp. 2d 35 (D.D.C. 2000).

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.³

The half million citizens of the District of Columbia, like citizens of the fifty states, bear all of the obligations of American citizenship: they are required to obey the laws passed by Congress; they pay federal taxes; they serve in the military; and, they fight and die in our wars. Yet, they lack the most basic right that should accompany American citizenship – the right to full voting representation in the Congress. The time is now ripe for Congress to exercise its authority to remedy this longstanding inequity.

I. CONGRESS' BROAD AUTHORITY TO LEGISLATE FOR THE DISTRICT OF COLUMBIA

The District of Columbia, the seat of the federal government, was established pursuant to Article I, Section 8, Clause 17 (the so-called "District Clause") of the United States Constitution. That Clause provides:

The Congress shall have 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[.]

The courts have repeatedly emphasized the magnitude of Congress' power under this Clause. It has been held, for example, that Congress may "provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end."⁴ Given the breadth of Congress' power under the District Clause, it would appear that Congress has the authority to provide for the "general welfare" of D.C. citizens by providing them the most important right they as citizens should possess – the right to vote. And in fact, the *Alexander v. Daley* decision confirms that is so.

II. THE ALEXANDER V. DALEY DECISION

In 1998, a group of District citizens and the District of Columbia brought suit seeking a declaratory judgment that the Constitution commands that District citizens be afforded voting representation in Congress. On March 20, 2000, a three-judge federal court in the District of Columbia decided that case, *Alexander v. Daley*. The court held, by a 2-1 vote, that the Constitution does not require that citizens of the District be given

³ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁴ *Neild v. District of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940).

voting representation in Congress. The court based its decision on the fact that Article I of the Constitution gives representation only to "people of the several States" and the District is not a State. On October 16, 2000, the U.S. Supreme Court affirmed this decision. *Alexander* is therefore the governing legal authority on the question whether District residents are constitutionally entitled to voting representation in the Congress; under *Alexander* they are not.

But *Alexander* also constitutes the best, most current legal authority on the question whether Congress has legislative power to grant D.C. citizens voting representation; under *Alexander*, Congress does have that power.

The *Alexander* court did not hold that the Constitution precludes District residents from having voting representation. Instead, the Court held only that "this court lacks authority to grant" voting representation.⁵ The court furthermore made clear that even though it lacked authority to grant relief, that did not mean plaintiffs were without recourse. The court stated that plaintiffs could seek relief "in other venues," including "through the political process."⁶ Indeed, the court specifically noted that counsel for the defendant House of Representatives asserted in the litigation that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."⁷

The *Alexander* court's interpretation and application of the relevant judicial precedents is consistent with House counsel's position. Two key precedents relied on by the court were Chief Justice John Marshall's 1805 decision in *Hepburn v. Ellzey*,⁸ and Justice Robert Jackson's 1949 plurality opinion in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Company*.⁹ It is important to describe those two precedents before explaining how the *Alexander* court applied them.

Hepburn was the first Supreme Court decision addressing whether the District of Columbia may be treated as a "State" within the meaning of the Constitution. The case concerned the fact that Article III of the Constitution authorizes the federal courts to hear cases "between citizens of different States." The question in *Hepburn* was whether District of Columbia residents are eligible under this Article III provision to bring suit in federal court. Chief Justice Marshall said they are not, relying primarily on the fact that the District is not a State within the meaning of the clauses of Article I of the Constitution granting congressional representation only to States. He believed that just as the District is not a State under Article I, it also is not a State under Article III.

⁵ 90 F. Supp. 2d 35, 72 (emphasis supplied).

⁶ *Id.*, at 72, 37.

⁷ *Id.*, at 40 (emphasis supplied).

⁸ 6 U.S. 445 (1805).

⁹ 337 U.S. 582 (1949).

Nevertheless, Chief Justice Marshall closed his *Hepburn* opinion by noting that: (1) citizens of the District are "citizens of the United States"; (2) they are "subject to the jurisdiction of congress"; (3) it is "extraordinary" that they should be denied rights to which "citizens of every state in the union" are entitled; and (4) this inequity is "a subject for legislative, not for judicial consideration."¹⁰

Nearly 150 years later Congress addressed the inequity by passing a law, under its District Clause power, treating D.C. citizens as if they were citizens of a State for purposes of federal court jurisdiction. In the *Tidewater* case, the Supreme Court was asked to decide whether this law was valid. The Court held that it was, although the Justices had different reasons for reaching that conclusion. The important opinion from *Tidewater* is the plurality decision issued by Justice Jackson, because it is the decision relied on by the *Alexander* court.

Justice Jackson said that the clear implication of Chief Justice Marshall's opinion in *Hepburn* was that Congress had the power under the District Clause to treat the District as if it were a State for purposes of federal diversity jurisdiction. As noted, Chief Justice Marshall said in his opinion that it was "extraordinary" that citizens of the District, which is "subject to the jurisdiction of Congress," do not have the same rights as "citizens of every state in the union," but that this is "a subject for legislative, not for judicial consideration." Justice Jackson interpreted this to mean that "Congress had the requisite power under Art. I [the District Clause]" to address the inequity facing District citizens.¹¹

It is true, said Justice Jackson, that Chief Justice Marshall's reference to this being a subject for "legislative" consideration is "somewhat ambiguous, because constitutional amendment as well as statutory revision is for legislative, not judicial, consideration."¹² Even so, Justice Jackson concluded, the better reading of Chief Justice Marshall's opinion is that Congress has power under the District Clause to treat the District as if it were a State. And, in any case, Justice Jackson said, "it would be in the teeth of his language to say that it is a denial of such power."¹³ Finally, Justice Jackson said, "congress had acted on the belief that it possesses that power" and Congress' determination is entitled to great deference.¹⁴ This is particularly true given that "congressional power over the District, flowing from Art. I, is plenary in every respect."¹⁵ Thus, the Court in *Tidewater* approved Congress' legislative expansion of federal diversity jurisdiction to embrace the District, notwithstanding the use of the word "State" in Article III.

Based in part on *Tidewater* and *Hepburn*, plaintiffs in the *Alexander* case argued that the court should treat the District as if it were a State under the provisions of Article I

¹⁰ 6 U.S. 445, 453.

¹¹ 337 U.S. 582, 589.

¹² *Id.*, at 587.

¹³ *Id.*, at 589.

¹⁴ *Id.*, at 603.

¹⁵ *Id.*, at 592.

giving voting representation to States. The dissenting judge in *Alexander* agreed with this argument.¹⁶ The two-judge majority disagreed, but it disagreed in a way that clearly validated Congress' power to treat the District as if it were a State under Article I.

First, the majority said that *Tidewater* "reconfirmed Marshall's conclusion that the District was not a state within the meaning Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District."¹⁷ Then, and more importantly, the *Alexander* majority declared in the closing section of its opinion that "many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation."¹⁸ Yet "it is the Constitution and judicial precedent that create the contradiction" and "that precedent is of particularly strong pedigree."¹⁹ That "pedigree," the *Alexander* majority said, was primarily *Hepburn* and *Tidewater*; to support that view, the *Alexander* majority quoted this passage from *Tidewater*:

Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claim which his decision denied to residents of the District . . .²⁰

The *Alexander* majority then closed by stating:

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.²¹

Taken together, these statements by the *Alexander* court constitute persuasive legal support affirming the legislative authority of Congress to address the voting inequity described by the court, for the reasons that follow.

In *Hepburn*, Chief Justice Marshall concluded that the District is not a State under Article III, but he strongly implied that this inequity (denial of federal court jurisdiction to District citizens) could be remedied by Congress under the District Clause. *Tidewater* later made express what Chief Justice Marshall had implied – that Congress does have

¹⁶ 90 F. Supp. 2d 35, 94-96.

¹⁷ *Id.*, at 54-55 (emphasis supplied).

¹⁸ *Id.*, at 72.

¹⁹ *Id.*

²⁰ *Id.*, at 72 (emphasis supplied) (citing *Tidewater*, 337 U.S. at 586-87).

²¹ *Id.*

the power under the District clause to give D.C. citizens the same rights that citizens of States have under Article III. Indeed, the Judiciary Committee of the House of Representatives recommended the Act of April 20, 1940, which defined the word "States" as used in the diversity jurisdiction statute to include the District of Columbia, as a "reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia."²²

Alexander now makes clear that Congress may use this same District Clause power to remedy the other inequity identified by Chief Justice Marshall – denial of voting representation to District residents. The *Alexander* court gave its guidance on this issue in essentially the same way as had Chief Justice Marshall; *i.e.*, once the court found that the District was not a State for purposes of Article I, it offered a closing statement regarding the best manner to address that inequity – just as Chief Justice Marshall had done.

Thus, in *Hepburn*, Chief Justice Marshall expressed his view that it is "extraordinary" that District citizens should be denied rights available to citizens of every state in the union; the *Alexander* court similarly stated that it was inequitable and contrary to our "democratic ideals" that District citizens are denied the voting representation enjoyed by other U.S. citizens. Likewise, Chief Justice Marshall specifically referenced the fact that citizens of the District are subject to the jurisdiction of Congress, referring to Congress' power under the District Clause; the *Alexander* court, in turn, quoted the passage from *Tidewater* noting that Chief Justice Marshall was reluctant to "deny federal power" regarding District residents, given the "equitable claim" they presented. The "federal power" available to address the "equitable claim," as *Tidewater* explained, is plainly Congress' District Clause authority.

Perhaps most important of all, just as Chief Justice Marshall had noted that the inequity presented in *Hepburn* presented a "subject for legislative" consideration, so too the *Alexander* court noted that District citizens could take their claim to "other venues," including the "political process."²³ Indeed, the *Alexander* opinion is even stronger on this point than was Chief Justice Marshall's opinion because the *Alexander* court specifically referenced Congress' own position that the inequity at issue could be addressed through "congressional legislation or constitutional amendment."²⁴

For all these reasons, the recent *Alexander* decision, affirmed by the United States Supreme Court in October 2000, has made clear the authority of Congress under the District Clause to pass legislation treating citizens of the District of Columbia as though they are citizens of a State for purposes of voting representation. Furthermore, although *Alexander* only recently made that authority clear, past actions by Congress and other relevant legal precedents confirm that authority.

²² H.R. Rep. No. 1756, 76th Cong., 3d Sess., p. 3.

²³ 90 F. Supp. 2d 35, 37.

²⁴ *Id.*, at 40 (emphasis supplied).

III. OTHER AUTHORITY CONFIRMING CONGRESS' DISTRICT CLAUSE POWER

Beyond *Tidewater* and *Alexander*, there are other examples in which the courts have approved the extension by Congress to District residents of a constitutional protection otherwise applicable only to residents of the states. The most important example is found in the cases construing 42 U.S.C. § 1983, the federal statute implementing the protections of the 14th Amendment. In *District of Columbia v. Carter*,²⁵ the Supreme Court held that, because the 14th Amendment does not apply to the District of Columbia, Section 1983 did not apply to District residents. “[T]he commands of the 14th Amendment are addressed only to the State or to those acting under color of its authority. . . . [S]ince the District of Columbia is not a ‘State’ within the meaning of the 14th Amendment . . . neither the District nor its officers are subject to its restrictions.”²⁶ For this reason, the Court held, “[I]nclusion of the District of Columbia in § 1983 cannot be subsumed under Congress’ power to enforce the 14th Amendment but, rather, would necessitate a wholly separate exercise of Congress’ power to legislate for the District under [the District Clause].”²⁷ In response, Congress subsequently enacted legislation, pursuant to its power under the District Clause, making Section 1983 expressly applicable to the District. The validity of that legislation has never been challenged, and the courts have since assumed its applicability in many cases brought under its auspices.²⁸

The Supreme Court also has upheld instances where Congress has used its power under the District Clause to extend to District citizens certain burdens of citizenship that, under the Constitution, apply to citizens of “states.” The most important example is *Loughborough v. Blake*.²⁹ In that case, the Supreme Court held that Congress, under the District Clause and in conjunction with its Article I, Section 8 power “to lay and collect taxes,” could impose a direct tax on the people of the District, notwithstanding that Article I, Section 2 states that “direct taxes shall be apportioned among the several States.” Taken together, these cases confirm that Congress has authority under the District Clause to extend the benefits and burdens of U.S. citizenship to District residents, even where the Constitution applies those benefits and burdens only to citizens of the States.

A final confirmation that Congress has power under the District Clause to give D.C. citizens the vote is the fact that Article IV, Section 3 of the Constitution gives Congress the power to grant all the privileges of statehood – including the vote – by simple legislation. Accordingly, there should be no doubt that Congress also has the lesser power to grant a single attribute of statehood – the right to voting representation in Congress – if it deems that appropriate. As Justice Jackson said in *Tidewater*, when

²⁵ 409 U.S. 418 (1973).

²⁶ *Id.*, at 423-24.

²⁷ *Id.*, at 424 n.9.

²⁸ See, e.g. *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998).

²⁹ 18 U.S. 317 (1820).

Congress treated the District as a State for purposes of Article III of the Constitution, it was "reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution."³⁰ And Congress did so in circumstances where "no good reason is advanced" for denying Congress that power.³¹ All of this applies equally to Congress' power to treat citizens of the District as if they were citizens of a state under Article I solely for voting purposes.

IV. THE 1978 PROPOSED CONSTITUTIONAL AMENDMENT

The only remaining question is whether Congress' power under the District Clause is somehow undermined by the proposed constitutional amendment adopted by Congress in 1978. We do not think it is.

As you know, in 1978, a bi-partisan, two-thirds majority in Congress approved a proposed constitutional amendment, which provided: "For purposes of representation in the Congress . . . the District constituting the seat of government of the United States shall be treated as though it were a State." At that time, there appears to have been consensus that an amendment to the Constitution would be the simplest and most durable remedy to the District's disenfranchisement. Several experts consulted by Congress in connection with the 1978 Amendment argued that Congress could, by simple legislation, enfranchise citizens of the District of Columbia, but took the position that a constitutional amendment would be preferable.³² Others, including the spokeswoman for the administration of then-President Carter and a task force convened to examine the problem, apparently assumed that, to effectuate a legislative solution to the problem, Congress would exercise its authority pursuant to Article IV, Section 3 of the Constitution to confer full statehood on the District, a step perceived by many as problematic.³³

The House Judiciary Committee in its report ultimately said: "The committee is of the opinion that the District should not be transformed into a State . . ."³⁴ Indeed, it seems clear from the record that Congress in 1978 was seeking a solution that would permanently enfranchise District citizens without the possibility of a later legislative reversal, while still maintaining the unique status of the District as the national capital, under federal control. Thus, the Committee concluded, that: "If the citizens of the

³⁰ 337 U.S. 582, 603.

³¹ *Id.*

³² See, e.g., *Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 95th Cong.* 86-100 (1977) (testimony of Peter Raven-Hansen, Attorney at Law, and Herbert O. Reid, Professor of Law, Howard University School of Law).

³³ See, e.g., *Proposed Constitutional Amendments (H.J. Res. 139, 142, 392, 554, and 565) to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 95th Cong.* 125-126 (1977) (testimony of Patricia Wald, Assistant Attorney General, Office of Legislative Affairs).

³⁴ H.R. Rep. No. 95-886, at 4 (1978).

District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.”³⁵

Despite this definitive-sounding statement, the Committee was not unanimous in believing that a constitutional amendment was necessary. Representatives Thornton, Hungate, Butler, Hyde, and Kindness filed separate views with the House Judiciary Committee Report on an early version of the proposed constitutional amendment, stating: “[I]t would be desirable for the residents of the District of Columbia to have voting representation in Congress . . . [but] we are not convinced that a constitutional amendment is either wise or necessary. More careful consideration should be given to the possibility that statutory provisions could be used to achieve this goal.”³⁶ Representative Holtzman of the Committee also filed supplemental views, stating that: “the Committee [should] explore the possibility, suggested by Rep. Ray Thornton, of providing the District of Columbia with representation through the normal legislative process.”³⁷

Taking the record as a whole, we conclude that Congress, confronted with conflicting views on whether legislation would suffice, having heard the recommendation of several experts favoring the permanency of a constitutional amendment, and wishing to avoid debate on whether Congress should confer statehood on the District, determined that the proposed constitutional amendment afforded the most straightforward means to the desired end. It also appears from the record that Congress was confident that the proposed amendment would soon be ratified. The Committee on the Judiciary, in the 1975 report on an early version of the constitutional amendment, stated that:

On June 16, 1960, Congress proposed the 23rd amendment to the Constitution. On April 3, 1961 – less than 1 year later – that amendment was ratified. It represented a national consensus that the District of Columbia was entitled on a permanent basis to participate in the election of the President and Vice President of the United States. Based upon the testimony received by the committee we conclude that there is an equally broad consensus that the denial of representation in the Congress for District citizens is wrong and that correction of this injustice is long overdue.³⁸

In 1978, the Committee on the Judiciary, considering the final resolution proposing the constitutional amendment, said: “The committee is of the opinion that the District should not be transformed into a State, and it is confident that this proposed

³⁵ *Id.*; H.R. Rep. No. 94-714, at 4 (1975).

³⁶ H.R. Rep. No. 94-714, at 15 (1975).

³⁷ *Id.*, at 9.

³⁸ *Id.*, at 3.

constitutional amendment when submitted to the States will be quickly ratified.”³⁹ As it turned out, however, the proposed constitutional amendment failed to gain the approval of three-fourths of the states within the allotted seven year time period, as required, and was not ratified, leaving District citizens disenfranchised, as they still are today.

We believe there are two points from the 1978 Amendment's legislative history that are relevant to Congress' power now. The first is that there were strong differences of opinion in 1978 whether a constitutional amendment was required, and it is clear that many who supported a constitutional amendment did so because they thought one would be quickly passed and would render a permanent solution to the problem. It is also clear that many believed even in 1978 that Congress had the power to address the problem by simple legislation. The *Alexander* decision has now provided persuasive judicial support for that power. Subsequent experience has also shown that those who believed quick ratification would be forthcoming were mistaken; the fact is that even where a proposed constitutional amendment is supported by an overwhelming majority of the people (which polls show is the case with regard to giving D.C. citizens the vote),⁴⁰ obtaining ratification by three fourths of the states is very difficult.

The other important lesson to be drawn from the 1978 Amendment is that the majority view in Congress was then, and presumably still remains, that some means should be found to address the inequity facing D.C. citizens. As Senator Strom Thurmond stated in defense of the passage of the proposed amendment:

I think it is a fair thing to do. We are advocating one man, one vote. We are advocating democratic processes in this country. We have more than 700,000 people in the District of Columbia who do not have voting representation. I think it is nothing but right that we allow these people that representation. We are advocating democratic processes all over the world. We are holding ourselves up as the exemplary Nation that others may emulate in ideas of democracy. How can we do that when three-quarters of a million people are not allowed to have voting representation in the capital city of this Nation?⁴¹

As Senator Dole similarly stated:

The absence of voting representation for the District in Congress is an anomaly which the Senate can no longer sanction. It is an unjustifiable gap in our scheme of representative government – a gap we can fill this afternoon by passing this resolution.

³⁹ H.R. Rep. No. 95-886, at 4 (1978).

⁴⁰ *Metro in Brief*, WASH. POST, April 13, 2000, at B3.

⁴¹ 124 Cong. Rec. 27,253 (1978).

It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government.⁴²

The *Alexander* decision has confirmed the correctness of these statements by Senators Thurmond and Dole. As noted, that decision declared that there is "a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation."⁴³ And, most importantly, the *Alexander* decision demonstrates that Congress has authority to correct this contradiction and include District residents in our democracy.

CONCLUSION

The *Alexander* decision, affirmed by the United States Supreme Court, has made clear that Congress has legislative authority to give voting representation to the citizens of the Nation's capital. That court has also confirmed Congress' own stated view that denial of that voting representation is a serious inequity that should be corrected. Now that Congress' authority has been established, it seems appropriate that Congress should act expeditiously to correct the inequity.

⁴² 124 Cong. Rec. 27,254-55 (1978).

⁴³ 90 F. Supp. 2d 35, 72.