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ARTICLES

THE FUTURE OF DISTRICT OF COLUMBIA HOME RULE

Philip G. Schrag*

For proponents of greater home rule for the District of Columbia, the situation has gone from bad to worse. From 1961 to 1978, the District's more than 600,000 residents¹ gained both a greater role in national governance and greater opportunities for self-governance with respect to local matters.² But over the last twelve years, the goal of equal citizenship with other Americans has seemingly receded. Congress overturned two laws passed by the Council of the District of Columbia, the local legislature.³ Congress also made extensive use of policy riders to District of Columbia appropriations to legislate indirectly for the District.⁴ In addition, the states failed to ratify a constitutional amendment proposed in Congress that would have given the District voting representation in both Houses of Congress.⁵

This Article begins by briefly reviewing the recent historical development of home rule. Next, it explores the ways in which the people of the District

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1. As of the most recent count, the District had 622,000 residents. THE WORLD ALMANAC 540 (M. Hoffman ed. 1989). Its population exceeds the populations of Alaska, Vermont, and Wyoming. Id.
2. Obtaining a more significant voice in national affairs and more autonomy in local affairs can be perceived as either a single issue or as two related issues. As this Article demonstrates, either Congress or the people (through a constitutional amendment) could possibly address either of these problems without the other. However, home rule advocates tend to see the District's lack of voting representation in Congress and its limited home rule as two facets of a colonial status that can best be addressed through the single remedy of statehood. See, e.g., New Columbia: 51st State of the Union (D.C. Statehood Commission videotape, 1989).
3. See infra notes 15, 136-37 and accompanying text.
4. See generally infra Appendix.
might obtain a greater voice in the national legislature and more genuine home rule. Finally, it suggests that the District’s citizens may have to make a political choice, which they have until now avoided, between seeking gradual improvements in their political rights and pressing strongly for statehood.

I. THE RECENT HISTORY OF HOME RULE

Although the District of Columbia enjoyed a brief period of limited home rule for three years after the Civil War, the modern history of home rule began only in the 1950’s, when large numbers of Americans started to recognize the injustice of completely excluding the District’s population from participation in all political life. In 1961, the twenty-third amendment to the United States Constitution gave the District’s residents the power to participate in presidential elections. In 1967, President Lyndon Johnson reorganized the District’s Government and created the District of Columbia Council, comprised of appointed members, to legislate for the District. Consequently, Congress ceased to function as the District’s Council. In 1973, the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act or Act) provided for an elected legislature for the District while reserving to Congress several important legislative

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6. From 1871 to 1874, the District had a bicameral legislature. The President of the United States appointed members of the upper body, but the District’s residents popularly elected the lower body. L. Schmeckebier, THE DISTRICT OF COLUMBIA: ITS GOVERNMENT AND ADMINISTRATION 31 (1928). After a scandal in the early 1870’s, Congress revoked home rule and governed the District directly. S. Smith, CAPTIVE CAPITAL - COLONIAL LIFE IN MODERN WASHINGTON 146 (1974).


8. U.S. Const. amend. XXIII.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Id. § 1.


11. Id. § 401 (codified as amended at D.C. Code Ann. § 1-221 (1987)).
powers, including the power of final approval over the District's annual budget and the power to prevent local legislation from going into effect.\textsuperscript{12} Then, in 1978, Congress sent to the states for ratification a constitutional amendment which would have given the District voting representation in both houses of Congress.\textsuperscript{13}

The District, however, enjoyed only short-lived progress toward self-government. Indeed, 1978 proved to be the high water mark, to date, for the political rights of District residents. The state legislatures did not ratify the constitutional amendment within the congressionally specified seven-year period.\textsuperscript{14} Furthermore, Congress began to disagree with the political judgments of the elected Council and increasingly used its reserved powers to regulate the District. For example, in 1981, Congress overturned the Council's major reform of the criminal laws defining and punishing sexual offenses.\textsuperscript{15} Although this 1981 action involved the rare\textsuperscript{16} use of Congress' expressly reserved power to stop local legislation from becoming effective,\textsuperscript{17} Congress has frequently achieved an equal measure of control over District affairs by attaching conditions, colloquially known as "riders," to its annual approval of the District's budget.\textsuperscript{18}

\begin{footnotes}
\item[12] \textit{Id.} § 602(c) (codified as amended at D.C. CODE ANN. § 1-233(c) (1987)).
\item[14] \textit{See Time Runs Out, supra note 5.}
\item[16] Although in 1979 Congress overturned a District law that would have prevented foreign chanceries from being built in most residential neighborhoods, Congress has used its veto power only infrequently. \textit{See S. Con. Res. 63, 96th Cong., 1st Sess., 93 Stat. 1435 (1979); H.R. Con. Res. 228, 96th Cong., 1st Sess. (1979) (vacated by S. Con. Res. 63).} Yet the existence of that power may routinely exert influence on the legislative decisions of the District's Council. For example, in 1989, the District of Columbia Council abandoned a controversial gun control bill though the Council had passed it on its first of two readings, after the ranking Republican on the House District Committee threatened to offer a resolution to overturn the law if the Council passed it. Abramowitz & Pianin, \textit{D.C. Shelves Gun Law to Placate Hill,} Wash. Post, July 12, 1989, at A1, col. 5.
\item[17] Home Rule Act, \textit{supra} note 10, § 602(c) (codified as amended at D.C. CODE ANN. § 1-233(c) (1987)). Congress accomplished this particular exercise of power through a one-house veto, without presentation to the President, and therefore may have violated the separation of powers doctrine of Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983). In 1984, however, Congress amended the Home Rule Act to make the procedure for blocking District legislation consistent with \textit{Chadha} and at the same time, provided that "[a]ny previous Act of the Council of the District of Columbia which has been disapproved by the Congress pursuant to [the old provisions of the Home Rule Act] is hereby deemed null and void." \textit{Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(d)-(l), 98 Stat. 1974, 1974-75} (codified at D.C. CODE ANN. § 1-233(c) (1987)).
\item[18] \textit{See infra Appendix.}
\end{footnotes}
Since 1975, Congress has used riders to impose more than seventy-five types of restrictions on the District.\(^{19}\) Although riders are usually tied to annual appropriations,\(^{20}\) Congress has often imposed the restrictions in several consecutive years. For example, despite the principle of home rule, from Fiscal Year (FY) 1975 through 1986, Congress used a budget rider to prevent the District from initiating a program to install meters in taxicabs.\(^{21}\) In FY 1975, Congress used a rider to prohibit the use of the swimming pool at Woodrow Wilson High School after 9 p.m.\(^{22}\) In FY 1987, it barred the University of the District of Columbia from acquiring the assets of the now defunct Antioch School of Law without prior approval of the District's Council.\(^{23}\) From FY 1987 through 1989, Congress required the District to establish a free telephone hotline so that people living near Lorton Prison could promptly learn about any disturbances at the prison.\(^{24}\)

Further, Congress has shown particular interest in the regulation of morality. By legislating for the District, members of Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts. In particular, they can win the approval of their conservative

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\(^{19}\) A chart describing the principal restrictions and their statutory sources is included as an Appendix, infra.

\(^{20}\) The Continuing Resolution which appropriated funds for Fiscal Year (FY) 1985 provided a new procedural system for congressional review and possible preclusion of District legislation and provided that the new system was to be effective "without limitation as to fiscal year." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(n), 98 Stat. 1837, 1974-76.


\(^{22}\) 1975 Appropriation, 88 Stat. at 826.


constituents without incurring as much wrath from their liberal constituents as they would attract if those constituents were themselves being regulated. Beginning in FY 1980, Congress barred the District from using federally appropriated funds to perform abortions, with three limited exceptions. In 1981, Congress prevented the District from decriminalizing consensual, adult sodomy. In FY 1982, Congress barred the District from advertising its lottery anywhere on the public transportation network, including stops and stations.

Perhaps the greatest congressional backtracking on the 1973 promise of home rule came in a flurry of riders in the fall of 1988. In a single appropriations bill, Congress further restricted the availability of publicly-funded abortions in the District; barred the District from requiring District employees to live in the District; required the Council to repeal its law which prevented health and life insurance companies from requiring Acquired Immune Deficiency Syndrome (AIDS) testing as a condition of insurance; and required the Council to amend the District of Columbia Human Rights Law to permit church-related educational institutions to discriminate against people who promote or condone homosexual acts or beliefs.


27. 1982 Appropriation, 95 Stat. at 1175.

28. 1989 Appropriation, 102 Stat. at 2269-9; see also supra note 25.


30. Id.

31. Id. at 2269-14. Unlike the other riders, which applied only to the year for which Congress appropriated funds (and which therefore at least theoretically enabled their opponents to renew the political battle in Congress the following year), this rider stopped all District expenditures unless the Council amended its law as Congress required, an amendment that would have a permanent effect. The peculiar format in which Congress passed this rider — a funding cutoff unless the Council amended local law — resulted from the fact that an attempt to change the human rights law on the floor of Congress as part of an appropriations bill would have been subject to a point of order in either House. However, this very device, forcing the Council to pass a law rather than directly legislating for the District, raised constitutional questions, and indeed, the United States Court of Appeals for the District of Columbia Circuit declared it unconstitutional. Clarke v. United States, 886 F.2d 404, 417 (D.C. Cir.
As if to prove that Congress could render the District even less autonomous, early in 1989 Congressman Bruce Morrison observed "a minor movement . . . toward greater Congressional control" of District affairs.\textsuperscript{32} A subsequent wave of drug-related murders led Senator Warren Rudman to suggest federalizing the District's police force\textsuperscript{33} and led President George Bush to speculate that he might have to call on troops to keep order.\textsuperscript{34} The threat to cut back the District's already limited home rule was so effective that, in the summer of 1989, members of the District's Council withdrew their support from a gun control law opposed by the National Rifle Association as a result of "warnings that the bill could needlessly antagonize Congress at a time of fragile support for home rule."\textsuperscript{35} Later in 1989, President Bush showed that he could exceed Congress' regulation of morality for the District: When Congress passed the District's FY 1990 appropriation bill without repeating the FY 1989 ban on the use of the District's local revenues for abortion, he vetoed the bill on that basis.\textsuperscript{36}

These are disheartening developments for District residents who have voted\textsuperscript{37} for measures that would lead to statehood, a political status that would bring with it the same local autonomy that other states enjoy as well as equal participation with other states in national legislative policy.\textsuperscript{38}


\textsuperscript{34.} Weinraub, \textit{Bush Considers Calling in Guard to Fight Drug Violence in Capital}, N.Y. Times, Mar. 21, 1989, at A1, col. 4.

\textsuperscript{35.} Abramowitz & Pianin, \textit{supra} note 16.


\textsuperscript{38.} States must all be admitted to the Union on an "equal footing"; Congress could not give the District statehood without affording it or its citizens the same political rights as those
II. OPTIONS FOR CHANGE

What is to be done? In 1983, the District applied to Congress for admission to the Union as a state and has continually pressed its statehood petition. These efforts have not gone utterly unnoticed: the House District Committee favorably reported a statehood admission bill in 1987, and the National Democratic Party endorsed District of Columbia Statehood in its platform of 1988. However, the 1987 statehood admission bill was never voted on in the House and has never had a hearing in the Senate. Furthermore, while President Bush, to whom Congress would have to present the Act of Admission for signature, has expressed considerable interest in statehood for Puerto Rico, he has not shown parallel concern for self-determination in the Nation's Capital.

Therefore, to assess whether the District should properly focus all of its efforts for increased political liberties on the campaign to pass statehood legislation, one must examine not only the prospects for statehood, but also other ways in which the political rights of the District's residents could be enhanced. This Article considers retrocession of the District to Maryland, enjoyed by citizens of other states. Coyle v. Smith, 221 U.S. 559, 567 (1911). But see Seidman, supra note 31, at 403-09 (arguing that politically and constitutionally, Congress could continue to treat the residents of the new District differently, even if statehood were achieved).


40. The Committee voted six to five, one Democrat joining the Republican minority. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, NEW COLUMBIA ADMISSION ACT, H.R. REP. NO. 305, 100th Cong., 1st Sess. 30 (1987).


42. See Address of President George Bush to Joint Session of Congress, 135 CONG. REC. H268 (daily ed. Feb. 9, 1989) (indicating support for Puerto Rican referendum, which would include a statehood option). President Bush recently declared himself “unsympathetic” to District of Columbia statehood, but his view seems to be based at least in part on a misunderstanding. He told reporters that the District “should remain a Federal city” because “its funds come almost exclusively from the Federal Government.” When the press later pointed out that only 14% of the District’s budget is a federal subsidy, a White House spokesperson corrected the President’s statement, saying that what he meant was that the District’s budget includes “some” federal money. Devroy & Melton, President Opposes Statehood; D.C. Dependence on U.S. Aid Miscast, Wash. Post, Mar. 24, 1990, at A1, col. 1.

43. Members of Congress who would not vote for statehood might, nevertheless, support other reforms. They may find the present political arrangement unsatisfactory, either because they recognize the injustice of not permitting District residents to vote in federal elections or
the formation of a new political entity, and the piecemeal accumulation of greater political liberty. Then this Article briefly considers statehood itself, because although Congress seems unready to support statehood at the present time, District residents should nevertheless probably continue to petition for it. Increased commitment from the District itself could eventually produce a change in congressional views on statehood.

A. Retrocession

Some suggest\(^{44}\) that retrocession of the District of Columbia to the State of Maryland, which, in 1788, ceded the land that is presently the District,\(^ {45}\) would properly dispose of the District. The advocates of retrocession assert that Congress could simply give Maryland back either the remainder of the District\(^ {46}\) or the entire residential portion, leaving as unique federal land the Capitol, White House, and Mall area. This proposal recently received unexpected political support when the Governor of Maryland said that he "would have no trouble with D.C. becoming part of Maryland."\(^ {47}\) Three

because it is embarrassing internationally for American legislators to trumpet the advantages of democracy while not permitting those who inhabit our nation's capital to vote. By more than a two-thirds vote in each House, Congress did propose a constitutional amendment a decade ago that would have given the District voting representation in both Houses of Congress. \(^1\) D.C. Code Ann. 357 (1981). Of course, members of Congress may have voted for the amendment cynically, expecting the state legislatures to refuse to ratify it.

In addition, some members might like to give the District more genuine legislative home rule because they would prefer not to have to vote on controversial local legislation for the District. If forced by congressional procedures to cast votes on such matters as local abortion practices and homosexual rights, the need to placate single-issue voters in their home districts may conflict with their better judgment as well as their sense of the propriety of municipal self-government. While undoubtedly some members of Congress benefit politically in being able to express their public morality without affecting their constituents, others might prefer not to take stands unnecessarily on highly emotional issues. Delegating more power to a local legislature would meet their needs, even though they or their constituents would not now support statehood.

44. See, e.g., J. Best, National Representation for the District of Columbia 77-83 (1984); May, supra note 32. Testifying on D.C. Statehood on behalf of the Department of Justice and claiming that the United States Constitution would require the consent of Maryland before the District became a state, Assistant Attorney General Stephen J. Markman noted that rather than accede to statehood for the District, "Maryland might wish to retain the District as it is entitled to do under the Constitution, returning to its original borders." D.C. Statehood Hearings Part I, supra note 39, at 341, 343. See also H.R. 4195, 101st Cong., 2d Sess, 136 Cong. Rec. H646 (1990).


46. In 1846, Congress retroceded the land that Virginia ceded to become part of the District of Columbia in the 18th century. See Phillips v. Payne, 92 U.S. 130, 131 (1876). The residents of Northern Virginia, who today live on land that once represented part of the District of Columbia, now enjoy the same liberties as citizens of all of the other states.

weeks later, Representative Ralph Regula introduced a retrocession bill in Congress. Nevertheless, the prospects for retrocession appear substantially smaller than the chance of passing a District of Columbia statehood bill in Congress. First, the citizens of the District who have voted to move toward statehood may not have much interest in retrocession to Maryland, particularly while any prospect of achieving statehood lingers. Second, the governor cannot act unilaterally to enlarge his state; both politically and legally he would have to obtain an act of the legislature. A recent survey of the Maryland House of Delegates and Senate, which asked the views of their members on retrocession, posed two questions. First, the survey asked whether, assuming Congress offered the District back to Maryland on the condition that Maryland assume responsibility for making up the approximately fourteen percent of the District's budget now provided by federal appropriations, they would accept the District on that basis. Second, the survey relaxed the assumption about the federal payment and asked the same question on the presumption that Congress would continue to provide a subsidy (in recognition of protective and other services that the District supplied to the federal government) half as large as it now appropriates.

Forty-seven percent of the members of the House of Delegates and fifty-one percent of the Senators responded. Of those responding, eighty-two percent of the Delegates and ninety-two percent of the Senators replied that they would reject retrocession even if Congress continued to provide a subsidy at half the level that it would appropriate for a federally administered

49. See supra note 37.
50. Reverend Jesse Jackson responded to the Governor's suggestion by terming it a "Ban­tustan concept," that is, an enclave in a white state. Schneider & Melton, Jackson Chides Schaefer for Offer to Annex District, Wash. Post, Feb. 28, 1990, at B5, col. 5.
51. MD. CONST. art. III, § 46 (legislature has power to accept land from the United States). The Regula bill would also not make retrocession effective until the Maryland legisla­tion had voted to accept it. H.R. 4195, § 7, 101st Cong., 2d Sess. (1990).
seat of government.\textsuperscript{53} Only one Senator and six Delegates out of the ninety-one legislators who responded were willing to take the District back.\textsuperscript{54}

The comments that the legislators wrote on the questionnaire reveal more than the raw statistics. The survey provided the respondents with a space in which they could write any remarks, but it did not require them to do so. One Delegate wrote, “With all the problems associated with the District, I would not support any effort to return this territory to Maryland.” Another said, “I would not want [Maryland] to accept the [District of Columbia] under any circumstances.” A Republican Delegate said that Maryland was “tough enough for Republicans now - this would make political progress that much more difficult.” Another Delegate explained that “[t]he State of Maryland has enough problems without accepting those of D.C.” A Senator responded that “Maryland has a city with similar problems to [Washington] . . . high crime rates, high property tax rates, poor schools, high rates of drug use, high teenage pregnancy, a dwindling population, and [a] decaying manufacturing base. To accept another city with most of these problems would greatly strap state resources.” Still other legislators responded more pointedly, such as the one who said, “[t]his sounds like a bad dream” or the Senator who sent his “THANKS, BUT NO THANKS! One would hope you had more important projects underway.” Clearly, the proposal for retrocession to Maryland has little vitality.\textsuperscript{55}

\textsuperscript{53} The actual count was as follows:

\textit{House of Delegates}

<table>
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<th>Number of members</th>
<th>142</th>
</tr>
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</tr>
<tr>
<td>Number who would vote:</td>
<td></td>
</tr>
<tr>
<td>a) Yes</td>
<td>6</td>
</tr>
<tr>
<td>b) No</td>
<td>56</td>
</tr>
<tr>
<td>c) Not sure or no answer</td>
<td>5</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Senate</th>
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<tbody>
<tr>
<td>Number of members</td>
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<tr>
<td>Number responding to survey</td>
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<tr>
<td>Number who would vote:</td>
</tr>
<tr>
<td>a) Yes</td>
</tr>
<tr>
<td>b) No</td>
</tr>
<tr>
<td>c) Not sure or no answer</td>
</tr>
</tbody>
</table>


\textsuperscript{54} Id.

\textsuperscript{55} In addition to possible objections from the District and from the legislature of Maryland, the possibility exists that the Governor of Maryland was not entirely serious or that he was more interested in blocking statehood than in annexing the District. First, Governor Schaefer must have known that the legislature did not favorably view retrocession, even if he had not performed a survey similar to the above one. Second, he made the statement not as a formal announcement of policy, but as a response to a reporter's question at a news conference.
B. Other Combinations

In principle, the District could join a state other than Maryland. Any state desiring to annex the District could make an offer to Congress; the Constitution does not require contiguity of territory. However, the political and economic barriers that make retrocession unlikely make annexation equally implausible.

Nonetheless, there are two plausible scenarios in which external incentives make union between the District and another state slightly more conceivable. The first involves Maryland. Imagine that Congress offered Maryland retrocession with the understanding that a negative response by Maryland to this right of first refusal would lead immediately to statehood for the District. Maryland might dislike statehood even more than it dislikes retrocession because the new state could impose a nonresident income tax on Maryland residents who work in Washington. The rate of this taxation, set by District legislators, even if no higher than the rate in effect for the District’s own residents, could be considerably higher than that which an enlarged Maryland would impose on itself. Such an offer might cause at least the state legislators from the counties nearest to the District to become ardent retrocession advocates. On the other hand, those legislators represent only a minority of the residents in the State of Maryland, and they probably could not persuade their colleagues to accept retrocession so that the burden of supporting the District would fall equally on all the residents of Maryland.

The other scenario posits a new state composed of the District and parts of two existing states: Montgomery and Prince George’s Counties in Maryland, and the northern counties of Virginia. A state consisting of the Greater Washington metropolitan area makes sense both sociologically and economically. Sociologically, Washington shares more common interests with its surrounding suburbs than those suburbs do with the rest of their called on another subject. Baker, supra note 47. Finally, a journalist noted that the Governor was “twinkling” as he spoke. Id.

56. The Upper Peninsula of Michigan and most of the Hawaiian Islands are parts of states separated from the main contiguous territories of those states by large bodies of water. More dramatically, the United States includes the State of Alaska, separated from the lower forty-eight contiguous states by the land mass of another country, Canada.

57. This is unlikely but not impossible, in view of the fact that if the new state did impose a nonresident income tax, voters from those counties would probably lobby powerfully for a credit against this tax on their Maryland income tax. This credit, if allowed by the Maryland State legislature, could generate a considerable revenue loss to Maryland. On the other hand, the majority could resist the political pressure and deny the credit, subjecting the commuters to taxation in two states.
Economically, the tax base of the new state would be more substantial than that of the present District of Columbia. To create such a state, both Maryland and Virginia would have to consent to divestment of those metropolitan counties. However, such action by the states is doubtful because those counties contribute significantly to their states' tax bases. Nevertheless, divestment is not utterly out of the question. Some legislators in both states believe that the counties nearest to Washington do not share the interests and values common to most other parts of the states.

C. The Piecemeal Approach

The third approach to greater political liberty envisions the District's leadership dividing the attributes of statehood into their component parts and seeking reform on a piecemeal basis. In principle, this approach offers two advantages. First, the members of Congress, who would have to grant each individual reform, may find it politically less threatening or less costly. Second, after a series of such reforms, the remaining gap between the political status quo and statehood would be reduced and would be easier to bridge than it presently appears. Yet this approach is problematic in that each reform might further reduce the political pressure on Congress to grant statehood, thus making that outcome progressively less likely.

At this juncture, there are six ways in which the District's residents have fewer political rights than their state resident counterparts: voting representation in Congress, legislative autonomy, budget authority, judicial self-determination, control over criminal prosecution, and the ability to preserve or change the basic political system. Congress can reform most of these.

1. Voting Representation in Congress

Since 1970, the District has had a Delegate in the United States House of Representatives. Congress permits this Delegate to vote in committees but...
not on the floor. The District has no representation at all in the United States Senate.

Having a Delegate in Congress is no small matter. The Delegate presents the views of District residents to members of the House. Further, the Delegate can vote in committee and even chair subcommittees, and thus may engage in logrolling, much as members of Congress do, obtaining advantages for the District in exchange for favorable consideration of bills that come through his or her committees.

Congress, however, restricts considerably the power of the District within its chambers by not allowing it a presence in the Senate and by not allowing its Delegate to vote on the House floor. Statehood would give the District a voting member of the House and two voting Senators. The constitutional amendment that failed in 1985 would have accomplished the same result. However, neither seems politically feasible in the near future.

Nevertheless, there are several available middle grounds. The District is now attempting to achieve some presence in the Senate by electing two "Senators" and a "Representative" who would appear on Capitol Hill and lobby

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64. "Logrolling" refers to a legislator's trading of his or her support on one issue for the favorable votes of his or her colleagues on one or more other issues.

65. Professor Seidman argues that even if the District had voting representation in both Houses of Congress, it would have little ability to protect its interests through more effective logrolling. Seidman, supra note 31, at 411-12. He points out that the District's delegation would be small. Id. at 411. However, several other states have only one member in the House and the District would have at least as much power as those states' delegations. Furthermore, only occasionally do all of the members of large delegations, such as those of New York and California, vote as a bloc to maximize their logrolling power. Second, Seidman argues that logrolling engenders negative connotations in American political procedure, thereby making it difficult to make explicit, enforceable deals. Id. at 411. But this argument is no more applicable to the District's representatives than to any states' representatives. Finally, Seidman claims that the District's voting representatives would indeed have a more difficult time logrolling than similarly situated members of Congress from states because groups that lose battles within the District will ally themselves with national forces to obtain federal remedial legislation. Id. at 412. Seidman claims that this allowance will come even at the expense of undermining the District's representative's efforts to preserve local autonomy. Id. Divisions within the District may "undermine the freedom of the representatives to effect a logroll." Id. at 411-12. But while a divided constituency may shake the resolve of any representative, it is unclear that logrolling impairs the bargaining power of a representative who has taken the side of the prevailing faction within his or her district.

66. See supra note 13 and accompanying text.
for statehood. Tennessee did exactly that while its statehood petition gathered dust in Washington.\textsuperscript{67} Tennessee's "Senators-elect" became effective lobbyists for statehood in the halls of Congress.\textsuperscript{68} Similarly, Alaska followed this model during its quest for statehood.\textsuperscript{69} In 1980, the District's voters provided for the election of a Representative and two Senators in their statehood initiative.\textsuperscript{70} For nearly a decade, the District's Council amended the initiative, postponing those elections several times.\textsuperscript{71}

More recently, under pressure from Reverend Jesse Jackson, who revealed his interest in running for election as a "Senator" from the District, the Council voted to hold the elections in the fall of 1990.\textsuperscript{72} But in agreeing to let the elections go forward, the Council diluted the impact that the would-be legislators could have. The initiative that the voters passed authorized the expenditure of public funds for salaries and office expenses for the new legislators,\textsuperscript{73} but the Council decided that the "Senators" and "Representative" would have to "raise private donations to cover their own salaries and those of their staffs."\textsuperscript{74} Even worse, the would-be legislators elected under the initiative as it was passed by the voters would not have taken their seats in Congress until admission of the District as a state.\textsuperscript{75} As legislators-elect, they could legitimately have claimed authority to speak for the District on

\begin{flushright}
68. Tennessee's "senators" were elected after Congress refused to consider a bill to admit the state. These "senators" lobbied so effectively that Tennessee became a state 65 days after the election. V. Fischer, ALASKA'S CONSTITUTIONAL CONVENTION 152-55 (1975).
69. Id.; see also W. Hunt, ALASKA, A BICENTENNIAL HISTORY 129-30 (1976).
74. McCall (Statehood Lobbying), supra note 72. The elimination of public funding for the salaries and office expenses of the "Senators" and "Representative" was confirmed by an 8-5 vote in which the Council struck this item from the budget that had been recommended by the Mayor. Abramowitz, Tax Relief Probable in District, Wash. Post, Mar. 7, 1990, at D1, col. 6, D4, col. 6. In an age when campaign finance reform consists of attempting to remove the influence of private money on legislators, a law that requires a public official to raise his or her own salary from private sources seems odd.
\end{flushright}
any national issue, not only statehood, and they would have enjoyed a certain degree of prestige associated with their election as proto-legislators.

The Council amended the initiative to specify the duties of these officials; by listing only lobbying and reporting duties, the Council appears to have rendered them mere statehood lobbyists and may have undermined their claim to speak officially on national issues. Further, the sponsor of the amendments noted in a memorandum to other members of the Council, that the Statehood Admission Act pending in Congress provided for elections of federal legislators after statehood was congressionally approved, and that, therefore, "unless 'Tennessee Plan' officials are successful candidates for office in the elections called for by H.R. 51, they will not actually be seated in Congress." This approach is more timid than sending to Congress three officials who would claim the right to be seated immediately upon the admission of the District to the Union.

A more satisfactory partial measure to enhance the presence of the District in Congress would be a federal law giving the District one or two non-voting Senators, who could voice the District's concerns and participate in debate on all issues on the north side of the Capitol. Congress could accomplish this by simply enacting legislation, rather than a constitutional amendment.

A constitutional amendment providing for voting representation in both Houses of Congress, however, would represent a measure far more effective than either electing statehood lobbyists or providing non-voting representation in the Senate. Perhaps the amendment that Congress proposed in 1978 failed because state legislators believed that the District's population, smaller than that of all but three states, did not warrant three federal legislators. If so, a new and more palatable constitutional amendment could provide the District with one voting member of the House and one voting member of the

76. Bill 8-488, § 2(b), adding D.C. CODE ANN. § 1-113(g).
77. Memorandum to All Councilmembers from Hilda Howland M. Mason (Feb. 26, 1990).
Senate,79 in recognition of the District's unique status and relatively small population.80

An entirely different approach to enfranchising District residents in federal elections would be to permit them to vote for the federal legislators from Maryland. Congress could probably accomplish this by an ordinary act. Congress has already taken similar action in the Overseas Citizens Voting Rights Act of 1975,81 which provides that citizens residing outside the United States shall have the right to cast absentee ballots in any federal election in the state in which they were last domiciled and could have voted.82 District residents resemble American citizens overseas who have lost state domiciles. Because the last state in which they could have voted was Maryland, Congress could permit them to vote there.83 Indeed, as Professor Raven-Hansen discovered,84 District residents did vote in Maryland and Virginia congressional elections, and those elected represented them in Con-

79. My colleague William Eskridge has noted, in private conversation, that because of how the Senate operates, a single Senator has considerably more power than the fraction 1/100 seems to imply. He points out how effectively Senator Jesse Helms has affected the agenda of the Senate and the policies of some executive departments by the skillful use of his power to put holds on nominations, to block unanimous consent agreements, to organize filibusters, and to make points of order. See W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 183 (3d ed. 1989) (discussing Helms' use of holds on nominations to extract concessions from the State Department); see also id. at 190 (discussing Helms' threat to tie up consideration of Small Business Administration legislation unless the Senate voted on amending the Constitution to allow school prayer).

80. This would change the number of Senators from even to odd. However, such a change would be of little significance because all Senators rarely are present to vote and the Senate has occasional vacancies, so the total voting on any given occasion is as likely to be odd as it is to be even. It might even be desirable to give the Senate an odd number of members to reduce the number of important occasions on which it will be necessary to call upon the Vice-President to break a tie. The fact that the number of Senators plus the Vice-President would be even is not problematic because the Vice-President can vote only to break a tie, not to make one. U.S. CONST. art. I, § 2, cl. 4.

Because an amendment might be a stepping stone to statehood rather than a final resting point for the political aspirations of the District, the amendment should provide that both it and the twenty-third amendment (providing electoral votes to District residents) would become void if Congress and the states admitted the District, or its residential portion, to the Union as a state. This additional clause would quiet arguments that these amendments preclude Congress from granting statehood to the District. See D.C. Statehood Hearings Part 1, supra note 39, at 341-44 (statement of Stephen J. Markman, Assistant Attorney General).

82. Id. § 1973dd-1.
83. The Overseas Voting Rights Act is not a perfect precedent because only those who moved to the District from Maryland after reaching the age of 18 were eligible to vote in that state. But perhaps the historic nexus between Maryland and the District can be substituted constitutionally for the nexus between an American living overseas and the state in which he or she was last eligible to vote.
gress from 1791, when the cession took effect, until 1800, when Congress passed legislation that had the perhaps unintentional effect of eliminating their right to vote.85 What Congress has taken away, Congress can restore.86

Representative Stan Parris, an outspoken Republican opponent of statehood for the District, recently introduced in Congress a bill that would enact this approach. His legislation would give the District's Delegate the right to vote in Congress until the next congressional election. Thereafter, the legislation would enable District residents to vote in Maryland for federal legislators and Presidential electors.87

85. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801), reprinted in 1 D.C. CODE ANN. at 45 (1981); see also Raven-Hansen, supra note 84, at 174-76 (discussing at length the statute and its history).

86. Professor Raven-Hansen suggests that District residents may be entitled to vote for members of the House and Senate even without further action by Congress, much less a constitutional amendment. He suggests that the word "state" in article I, section 2 of the Constitution (providing that the House shall be composed of members chosen by the people of the several "States") and the seventeenth amendment (providing that there shall be two Senators from each "State") should properly be construed to include the District. Raven-Hansen, supra note 84, at 179-84. In addition, his analysis supports another argument for re-enfranchisement without further legislative action that he does not make. The gist of this second argument is that District residents may vote for federal legislators in Maryland elections, just as they did from 1791 through 1800, because the 1800 federal statute that has been thought for nearly two hundred years to have disenfranchised them did not actually have that purpose or effect. The statute continued Maryland and Virginia law as the law of the District until changed by act of Congress and thereby gave the District a background of law with respect to which citizens could order their affairs. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801), reprinted in 1 D.C. CODE ANN. 45 (1981). In an effort to defeat this bill, its opponents argued that an implicit effect of the new law prevents District residents from voting in Maryland elections. Raven-Hansen, supra note 84, at 174-76. But the text of the bill says nothing at all about the voting rights of District residents. Perhaps the majority that passed the bill never accepted the opponents' parade of horribles, and the history of the last two centuries is based on a mistake that could still be rectified by the courts.

Representative Stan Parris believes that "[n]either Maryland nor the Congress appear to have originally intended to deprive the citizens of the District of Columbia of the right of the Federal franchise" and that that right "may not have been specifically denied." He notes that the issue "might well have been tested in the courts . . . but apparently has not been so tested." He suggests that "lack of exercise would not constitute a bar to their exercise at the present time," and concludes that these rights "may need to be revived by an action of law." Memorandum in Support of Legislation to Restore the Rights of Residents of the District of Columbia to be Treated as Residents of the State of Maryland for the Purposes of Participation in Federal Elections, by Rep. Stan Parris (Mar. 6, 1990). Representative Parris' analysis is consistent with Professor Raven-Hansen's history and implies that a test case, initiated by a District of Columbia resident, who attempts without success to register to vote for federal officials in Maryland, might still succeed.

87. H.R. 4193, 101st Cong., 2d Sess. (1990). Initial reactions to the bill were hostile. A spokeswoman for the District's Mayor said that it "wouldn't make much sense," the Republican representative whose Maryland district abuts the District said that it was not serious, and Rev. Jackson called it "another expression of colonialism." Jenkins, Parris Bill Would Let
2. Legislative Autonomy

The legislative subordination of the District to the will of Congress has three different aspects. First, while the 1973 Home Rule Act gives the District its own legislature, it expressly denies the District's Council certain legislative powers enjoyed by the people's representatives in every state. For example, the Act bars the Council from imposing an income tax on nonresident commuters who work in the District, from reorganizing the structure or in any way changing the jurisdiction of the District's courts, or from permitting the erection of buildings or towers higher than the limit set by Congress.

Second, except for emergency legislation of short duration, no statute passed by the Council may become effective until at least thirty calendar days after it is transmitted to Congress. The period is extended to sixty days for matters affecting the District's criminal laws. During that period,

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88. See Home Rule Act, supra note 10, § 401, 87 Stat. at 785 (1973) (codified as amended at D.C. CODE ANN. § 1-221 (1987)). This provision was aimed in the direction of fulfilling the expectation of James Madison that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed" to District residents. THE FEDERALIST No. 43, at 218 (Wills ed. 1987).

89. Home Rule Act, supra note 10, § 602(a) (codified as amended at D.C. CODE ANN. § 1-233(a) (1987)) (express denial of certain legislative powers).

90. Id. § 602(a)(5) (codified as amended at D.C. CODE ANN. § 1-233(a)(5) (1987)) (bar to nonresident income tax).


93. The period of "30-calendar-day[s]" excludes Saturdays, Sundays, holidays, and days in which Congress is not in session because of an adjournment or recess of more than three days. Id. § 602(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)).

94. Id. § 602(c)(2) (codified as amended at D.C. CODE ANN. § 1-233(c)(2) (1987)).
Congress may repeal the statute by passing a joint resolution, which requires Presidential concurrence to become effective.\textsuperscript{95} No other city or state is required to present its local legislation to Congress for approval. Furthermore, for some subjects, important cultural and perhaps constitutional norms restrain congressional modification or negation of state legislation.\textsuperscript{96}

Congress has gone even further to maintain control over the District's local laws in three controversial areas — criminal law, criminal procedure, and the treatment of prisoners. Resolutions to repeal any law passed by the Council are referred to the District of Columbia Committee in each House of Congress. Like many oversight committees in Congress, these committees, from time to time, sympathize with the concerns of those they oversee.\textsuperscript{97} To prevent committees that are favorable toward home rule from bottling up repeal legislation in these three politically sensitive categories for longer than the statutory waiting period, Congress has provided that any one member of Congress may move to discharge the authorizing committee from

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\textsuperscript{95}Id. § 602(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)). The President may sign the resolution after the thirty-day period has expired. Id.

\textsuperscript{96}Of course, Congress routinely overturns state law related to local legislation. For example, using its power over interstate commerce, Congress has barred the states from imposing cigarette labeling laws more stringent than the limitations of federal law. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (amended by Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 88 (1970)). But there are other subjects, such as the regulation of marriage and the grounds for divorce, that jurists and scholars have thought should be reserved for state policymaking. “If the institutional interests of state governments in limiting federal intrusion into hitherto local spheres of concern are ordinarily taken into account in congressional actions, then the political process of federal legislation may be counted on to incorporate a consistent check against the full use of congressional power.” L. Tribe, AMERICAN CONSTITUTIONAL LAW 315 (2d ed. 1988). On such matters, the District's Council appears to remain at a disadvantage compared to state legislatures because the customary and political constraints against national legislation do not appear operative. Furthermore, even in areas that Congress regulates concurrently with the states, the fifth amendment bars it from doing so on a state-by-state basis unless Congress can articulate a rational basis for the state-by-state distinctions. Congress could not, for example, bar stringent cigarette labeling laws in Iowa while permitting them in Kansas. Although the issue has never been tested, it seems likely that this “geographic rationality” limitation would not apply to the District. Because of the plenary power over the District given to Congress by the Constitution, article I, section 2, clause 17, Congress might, for example, repeal a District law imposing strict cigarette labeling requirements while permitting the states to impose their own restrictions.

\textsuperscript{97}From 1973 to 1986, the House District of Columbia Committee received 22 proposed resolutions of disapproval and it voted against all but one of them. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, ACTIVITIES AND SUMMARY REPORT, H.R. DOC. NO. 99-1034, 99th Cong., 2d Sess. 38 (1986). It narrowly (8-6) passed the resolution disapproving the chanceries legislation. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, ACTIVITIES AND SUMMARY REPORT, H.R. DOC. NO. 96-1539, 96th Cong., 2d Sess. 71-73 (1980). The Committee has even taken the step of approving statehood. See supra note 40 and accompanying text.
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further consideration of the resolution.\textsuperscript{98} The motion is highly privileged, and debate on it is limited to one hour, precluding a Senate filibuster.\textsuperscript{99} If the motion passes, a maximum of ten hours of debate may follow, and a motion to limit further debate is not debatable.\textsuperscript{100} A motion to recommit the resolution to committee is also not in order.\textsuperscript{101} In essence, Congress has made it easy for a single member to force a vote on the floor to repeal any penal statute passed by the District's Council, something a single member could not do to advance almost any other category of legislation.\textsuperscript{102}

The third type of legislative power that Congress wields over the District is an appropriation rider.\textsuperscript{103} Congress must deal with District matters at least once a year to appropriate the revenues that the District has raised through local taxes and fees and to add any federal subsidy.\textsuperscript{104} The annual review of the District's budget, therefore, has become an occasion on which members of Congress can force changes in District practices that Congress did not upset through the thirty-day review process under the Home Rule Act.\textsuperscript{105} Thus, through the appropriation rider, Congress can reach District policies that local legislation never embodied, or policies embodied in acts of the Council that Congress did not overturn during the thirty-day period provided by the Home Rule Act. For example, Congress used an appropriation rider to force the District to restrict the scope of its human rights law, even though the law had been on the books for years and the period for review under the Home Rule Act had long since expired.\textsuperscript{106}

If Congress wanted to loosen the federal reins on the District without granting the District's statehood petition, it could relax these legislative restrictions. First, Congress could eliminate or cut back the list of subjects on

\textsuperscript{98} See Home Rule Act, supra note 10, § 604(e) (codified as amended at D.C. CODE ANN. § 1-207(e) (1987)).
\textsuperscript{99} Id.
\textsuperscript{100} Id. § 604(h) (codified as amended at D.C. CODE ANN. § 1-207(h) (1987)).
\textsuperscript{101} Id. The original statute pertained to concurrent resolutions, but when Congress changed the procedure in 1984 to provide for congressional repeal of District laws by joint resolution, it specified that the expedited procedures established by the original statute would apply to joint resolutions. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(g)-(h), 98 Stat. 1837, 1975 (codified as amended at D.C. CODE ANN. § 1-207(a)(2) (1987)).
\textsuperscript{102} Members of Congress have rarely invoked this power, most notably to stop the District's reform of its sex crimes legislation from going into effect. See H.R. Res. 208, 97th Cong., 1st Sess., 127 CONG. REC. 22,752-79 (1981).
\textsuperscript{103} See supra notes 18-20 and accompanying text.
\textsuperscript{104} Home Rule Act, supra note 10, § 446 (codified at D.C. CODE ANN. § 47-304 (1987)).
\textsuperscript{105} Id. § 602(c)(1)-(2) (codified at D.C. CODE ANN. § 1-233(c)(1)-(2) (1987)); see also supra notes 21-31 and accompanying text (illustrating Congress' use of appropriation riders).
which the Council may not legislate. This action would permit the District to impose a nonresident income tax, hardly a radical notion in view of the fact that such a tax is common in other parts of the country. 107 The District's imposition of such a tax could raise (in 1989 dollars) an estimated $300 million to $706 million, 108 figures which compare favorably with the current annual federal subsidy of approximately $430 million. 109 Indeed, in view of the federal payment that the District needs to balance its budget, some may view the prohibition on a nonresident income tax for the District of Columbia as little more than a subsidy for residents of suburban Washington by the taxpayers of the rest of the nation.

Congress could also use either of two methods to reduce its own power to repeal District legislation where the Council is allowed to act. First, Congress could repeal, in its entirety, the law that requires presentation of District legislation, that postpones the effective date of District legislation, and that provides a procedure for congressional review of District legislation. 110 Short of this, Congress could make congressional repeal of District legislation more difficult, so that repeal would follow only the most egregious instances of abuse by District legislators. For example, Congress could provide that, even for local laws affecting the criminal code or the handling of prisoners, it could discharge its District committees from further consideration of repealing resolutions only as a result of the action of a majority of the body, as is true for discharges of ordinary legislation. 111

107. From the District's point of view, substituting a nonresident income tax for the federal subsidy would replace an uncertain source of income with one on which the District could rely. Furthermore, although Congress could continue to impose legislative conditions on the expenditure of the District's locally raised funds, it may be politically more difficult to do so than to attach conditions to a federal subsidy. That is, members of Congress may think that they can justifiably legislate for the District because they provide the funds for part of its budget.


110. There is a risk that this reform could backfire. The 30-day period may impose some political or psychological barriers against congressional repeal of District legislation after that time has passed, and elimination of the period could lead some members of Congress to propose repeal of District legislation through federal statutes, even years after the local laws had gone into effect.

111. A majority of all members must sign a discharge petition in the House. W. BROWN, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 248, 100th Cong., 2d Sess., Rule XXVII, cl. 4 (1988) [hereinafter HOUSE RULES]. In the Senate, discharge requires a majority vote of the body and has occurred only 14 times in history. W. OLESZEK, supra note 79, at 234. There are at least two precedents for applying ordinary discharge rules to resolutions disapproving actions of other bodies: (1) the D.C. Home Rule Act, which only invests
Alternatively, Congress could amend the discharge procedure to require a petition signed by some intermediate fraction of members, such as one-third.\textsuperscript{112} Congress could also eliminate the time restrictions on debate, making it possible for a minority of Senators who cared enough to block a repeal resolution through a filibuster, as a minority can do with respect to most other legislation. It could abolish the privilege that attaches to disapproval resolutions, making it harder for their proponents to give them precedence over other congressional business. Furthermore, Congress could eliminate the rule that makes a motion to recommit out of order, enabling members to kill a repeal resolution through a relatively technical procedural vote, as they can do with other legislative matters.\textsuperscript{113}

Legally, neither repeal of the restrictions on District legislative power nor elimination of a specified period for congressional review of District laws would protect the District's Council from federal second-guessing. Unless the District becomes a state, the United States Constitution would continue to give Congress the right to exercise plenary legislative authority over the District. Accordingly, Congress could overturn any act of the Council at any time. Most significantly, Congress could even repeal the Home Rule Act. However, that constitutional reserve power has laid dormant in the background since Congress passed the Home Rule Act in 1973. In seventeen years, Congress apparently has used the reserve power only once.\textsuperscript{114}


\textsuperscript{113}. A bill recently introduced by Rep. Ronald V. Dellums would amend the Home Rule Act by continuing to require submission of District legislation to Congress, but permitting such legislation to take effect on the date of transmittal to the House and Senate, and by repealing the special procedures for discharging the District Committees of legislation to repeal District laws. H.R. 3293, 101st Cong., 1st Sess. (1989).

\textsuperscript{114}. Apparently, Congress recently used the reserve power to amend the D.C. Code to exempt certain universities from the long-standing prohibition against discrimination toward homosexuals. \textit{See} Abramowitz, supra note 31. On that occasion, Congress amended section 1-2520 of the D.C. Code, enacted in 1977 without congressional objection, to nullify the prohibition on educational institutions from discriminating based on sexual orientation. \textit{Nation's Capital Religious Liberty and Academic Freedom Act}, Pub. L. No. 101-168, § 141, 103 Stat. 1267, 1284 (1989) (Armstrong Amendment II). It was noted on the House floor that the amendment violated the spirit and principle of home rule, but no member reminded the House
Perhaps, having statutorily established *particular* limits on the legislative power of the Council and *particular* time limits on its power to review District legislation, Congress has persuaded itself that to invoke its constitutional reserve power to prevent the District from legislating on *other* subjects or to repeal District legislation years (as opposed to months) after enactment breaks all the rules of the game.\(^{115}\) Although the home rule compact may not create a legally binding obligation, Congress seems reluctant to alter the rules it has set down. In the future, the psychological or symbolic power of an amended home rule compact may be as great as the power that the 1973 legislation has exercised in constraining congressional interference in District affairs. Of course there is a political dimension of breaking the compact as well. As a *New York Times* reporter once said:

[in]ost Congressional Democrats are preparing to resist any attack on home rule. For a Democrat to support such an attack would entail heavy political risks, since home rule was an achievement of the civil rights movement and since limiting it would therefore arouse the ire of black politicians, and their heavily Democratic constituents, here [in Washington] and elsewhere.\(^{116}\)

While making it less likely that members will formally overturn District legislation, Congress could also act to make it more difficult for federal legis-

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\(^{115}\) Alternatively, Congress may have refrained, except on one occasion, from repealing District legislation more than a specified number of days after passage because it could achieve all of its objectives through appropriation riders. On this occasion, a federal court blocked enforcement of its rider. See *supra* note 114 and accompanying text.

\(^{116}\) Dionne, *supra* note 33.
lators to attach policy riders to District of Columbia appropriation bills. This would constitute an important reform because Congress has only expressly overturned two District laws since Home Rule began while it has attached riders to the District appropriations at least seventy-five times.\(^\text{117}\)

Congress presently may attach riders to the District’s annual appropriation because House and Senate rules, holding “legislation” in appropriation bills to be out of order for consideration by the legislature,\(^\text{118}\) can be evaded in five ways.

First, appropriation bills generally originate in the House.\(^\text{119}\) If the House Appropriations Committee includes in the bill a provision that requires a change in District law or policy\(^\text{120}\) or if a member of the House proposes such a provision as a floor amendment, any member can make a point of order to challenge the provision as impermissible “legislation.” Members of Congress may evade the prohibition on legislation, however, because the rules against legislating are not self-enforcing: no one, including the House leadership, has a duty to make a point of order against a rider, and if no one raises the point, Congress can adopt the rider.

A second, more common, evasion scenario involves the House Rules Committee. That body may include in its rule for floor action a waiver of points of order.\(^\text{121}\) If a rule includes a waiver, no member may properly challenge a rider despite its inconsistency with the House rule prohibiting legislation in an appropriation bill.

Third, even if a point of order is permitted, the presiding officer may deny the challenge. Because of the vagueness of what constitutes “legislation” within the meaning of the House rule, the House leadership can allow a rider without admitting that Congress is ignoring its rules for the purpose of imposing a politically popular policy change on the District. Despite the ban on “legislation,” a rider which limits the use of appropriated funds (barring them from being spent unless various conditions are met by the agency, here the District government) is in order unless the limitation rider “(1) impose[s]...\(^\text{117}\)
\(^{\text{\textsuperscript{117}}}\) See infra Appendix.
\(^{\text{\textsuperscript{119}}}\) W. Oleszek, supra note 79, at 52.
\(^{\text{\textsuperscript{120}}}\) Any provision that directly or indirectly changes “existing law” must be specified in the appropriations committee’s report on the bill. Senate Rules, supra note 118, Rule XVI, cl. 2; House Rules, supra note 111, Rule XXI, cl. 3. However, the various appropriations subcommittees are not all equally conscientious in reporting legislative riders, and the full appropriations committees do not police their subcommittees in this respect. Telephone interview of Fred Mormon, House Appropriations Committee Staff, (July 26, 1989). Furthermore, the rules requiring reporting include no sanctions for non-compliance.
\(^{\text{\textsuperscript{121}}}\) See generally Bach, Special Rules Proposing to Limit Floor Amendments, 1981-87 (Cong. Research Serv., Apr. 15, 1988).
additional duties or burdens on executive branch officials; (2) interfere[s] with these officials' discretionary authority; or (3) require[s] officials to make judgments or determinations not required by existing law." Members almost always carefully draft riders so that they constitute "limitations" on expenditures of the appropriated funds without running afoul of the three exceptions. Clever drafting may enable the presiding officer to accept them despite a point of order from an objector.

The Senate, like the House, technically prohibits legislation in appropriation bills. Nevertheless, if the House has already attached a legislative rider to an appropriation bill, the rider is not subject to a point of order in the Senate. Furthermore, the Senate may then change the rider in any way it desires.

Even if the House has not appended any riders to an appropriation bill, the Senate may initiate the process, thus producing the fourth and fifth possibilities for imposing such provisions. The first of these two procedures for insulating Senate-initiated riders from a rules-based challenge is rather arcane. After a challenger raises the point of order that a rider constitutes impermissible "legislation," any other Senator may interpose the defense that the rider is germane to legislative language in the bill that was transmitted from the House. If the presiding officer rules that the rider meets a minimal "threshold" test of germaneness, then he or she calls an immediate vote of the whole Senate to determine whether the rider is germane. If the Senate rules that the rider is "germane," then the ruling automatically defeats the point of order that the rider constitutes "legislation" because germane amendments to House legislation are acceptable on an appropriation measure.

This device assists the proponents of riders in two ways. First, because the Senate rather than its presiding officer applies the "germaneness" test, the Senate is spared the awkwardness of overruling the presiding officer's judgment that the rider constitutes impermissible legislation. Second, be-

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122. W. OLESZEK, supra note 79, at 54.
123. Id. at 53.
124. SENATE RULES, supra note 118, Rule XVI, cl. 2.
126. A Senate amendment, however, must be germane to the House-passed bill as it stands when the amendment is offered. Id. The theory behind this exception to the Senate rule against legislation in an appropriation bill is that the Senate must maintain its ability to perfect House-passed language. Id. at 133.
127. Senate Rule XVI, clause 4, makes legislation in an appropriation bill subject to a point of order. SENATE RULES, supra note 118, Rule XVI, cl. 4.
128. W. OLESZEK, supra note 79, at 54-55.
129. See infra note 132.
130. See supra note 126.
cause the concept of germaneness is even more ambiguous than the definition of "legislation," the Senate also spares itself of any discomfort that it might experience in determining that a policy rider, such as an abortion prohibition, is not "legislation." Thus, Senators frequently cast their votes on "germaneness" based on their views of the merits rather than the procedural propriety of the rider.

The fifth device for adopting riders rests upon a possible exception to the Senate rule that provides that even non-legislative riders, those that are merely "limitations" on the use of appropriated funds, are improper if they "take effect or cease to be effective upon the happening of a contingency." Under this possible exception, a rider is nevertheless in order if use of the appropriated funds is contingent upon an act or event that would necessarily occur by a date certain within the period covered by the appropriation. This

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131. Although the Senate's definition of "legislation" is unwritten, the Senate "use[s] tests for [the definition of legislation] similar to the House's." C. TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 991 (1989).

132. A recent precedent has increased slightly the power of the Senate leadership to fend off legislative riders. After a Senator who favors a rider interposes the defense of germaneness to avoid a prior point of order, an opponent of the rider may make a second point of order that there is no language in the bill as it stands to which the amendment could possibly be germane. F. RIDDICK, supra note 125, at 130; see also 125 CONG. REC. 31,892-94 (1979). The presiding officer must rule on this point of order, and if he or she sustains it, the Senate can vote on germaneness only by overruling the presiding officer. However, a vote to overrule requires only a simple majority, enabling politically popular riders to survive this hurdle.

133. W. OLESZEK, supra note 79, at 55. Senator Brock Adams observed that his colleagues "view the rules [against legislation] primarily as a technical obstacle and translate a procedural vote into the underlying substantive issue." Id. Where the House has attached no legislative restrictions to an appropriation bill, the Senate would find it awkward to overrule the presiding officer's "threshold" ruling that a proposed rider was not germane to any House-passed language. On the other hand, where the House has attached legislative restrictions to the bill, Senators can maintain that even Senate language quite different from House language is nevertheless "germane" to the House-passed bill.

134. SENATE RULES, supra note 118, Rule XVI, cl. 4; see F. RIDDICK, supra note 125, at 152. The exception depends upon whether Congress subjects the non-legislative rider to one or more events that may or may not take place, such as the enactment of future legislation or the occurrence of an irregular natural event.

135. Technically, this exception is not a "precedent" because it centers on only informal advice from the Senate Parliamentarian to sponsors of riders and has never been determined by a vote of the Senate itself on a motion to overturn a ruling of its presiding officer. In the case of the original Armstrong Amendment, the presiding officer of the Senate ruled that the rider was acceptable, and the Senate confirmed the officer's judgment. However, at the request of the Majority Leader, the Senate passed a unanimous consent agreement that withdrew the point of order, vitiated the presiding officer's ruling, and retracted the Senate's vote. 134 CONG. REC. S9124-28 (daily ed. July 8, 1988). As a result, the status of this doctrine is now unclear. Precedents in the House of Representatives also forbid riders subject to contingencies (such riders are deemed "legislation"), and the House does not appear to have carved out an exception for contingencies certain to be resolved by a particular date. See HOUSE RULES, supra note 111, at 599.
exception provided the basis on which the Senate rationalized the propriety of the 1988 Armstrong Amendment, which Congress used to cut off all of the District's funds unless, by the "date certain" of December 31, 1988, the D.C. Council narrowed a provision in the D.C. Human Rights Law to enable religious institutions to discriminate against homosexuals. Based on advice from the Senate Parliamentarian, the presiding officer overruled a point of order against the Armstrong Amendment, basing the ruling on the ground that the contingency would definitely be determined within the relevant fiscal year.

Congress could restrict the exceptions to the rules against riders in several ways. First, it could simply recognize the District of Columbia as a semisoevereign jurisdiction rather than an executive agency of the Federal Government; therefore, the procedures Congress uses for controlling executive departments through conditions and limitations on appropriated funds should not apply to the District's budget. In other words, Congress could allow the District's Council to spend, without federal review, the eighty-six percent of the District's budget that the District raises from non-federal revenue sources. Alternatively, Congress could adopt rules flatly prohibiting

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137. 134 CONG. REC. S9124 (daily ed. July 8, 1988). In 1989, Senator Armstrong again offered an amendment to prevent the District from applying its Human Rights Act to discrimination against homosexuals by Georgetown University and The Catholic University of America. Senator Armstrong recast his proposal as an amendment to the D.C. Code rather than as a non-legislative limitation on the District's appropriation because the United States Court of Appeals for the District of Columbia Circuit had declared the 1988 Armstrong Amendment to the District's appropriation unconstitutional. Clarke v. United States, 886 F.2d 404, 417 (D.C. Cir. 1989). In this form, the amendment, which had not been considered by the Committee on the District of Columbia, was subject to the possible objection that it was legislation in an appropriations bill. While noting this possible objection, Senator Brock Adams, the floor manager, did not object because "that would leave to [sic] an appeal of the ruling of the Chair." 135 CONG. REC. S11,107 (daily ed. Sept. 14, 1989). In fact, the Office of the Senate Parliamentarian told Senator Adams' office that the presiding officer would be advised to rule against the point of order because the Armstrong Amendment was germane to the portion of the House-passed bill which provided funding for higher education. Telephone interview with Steve Elmendorf, Office of Senator Brock Adams (Sept. 26, 1989). The House bill had no provisions dealing with Georgetown University or The Catholic University of America, with homosexuals, or with the D.C. human rights law, but the standards of germaneness applied in the Senate are considerably less strict than those used in the House. The new Armstrong Amendment passed both houses of Congress and became law. Pub. L. No. 101-168, § 141, 103 Stat. 1284 (1990).
138. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. No need exists, however, for the 86% of the District's funds raised locally to pass through the Federal Treasury.
any provisions other than appropriations in District appropriation bills.\textsuperscript{139} At the very least, Congress could cease conditioning the uses to which locally raised revenues are devoted.

In another approach, Congress could eliminate or tighten the five procedural exceptions to its rules against legislating in appropriation bills, either for District appropriations or for all appropriations.\textsuperscript{140} Appropriation committee chairs could rule rider proposals out of order in committee markups. Although the present appropriation committees’ rules do not expressly forbid legislation in such bills or invite points of order against such legislation, appropriation committee chairs could invoke “the rules of the chamber”\textsuperscript{141} or, if necessary, move for adoption of new committee rules barring such legislation.\textsuperscript{142} Congress could also amend committee and floor rules in order to make riders, adopted by an appropriations committee, subject to a point of order if the committee does not expressly describe and explain the substance of the riders in terms of the policy changes in the Committee’s report.\textsuperscript{143}

\textsuperscript{139} Under this second option, for example, Congress could elect to appropriate funds or not to appropriate funds for health clinics, but it could not provide that no funds could be used for abortion.

\textsuperscript{140} D.C. home rule advocates may have allies. Since the 1977 Hyde Amendment debate restricting nationally federal funding for abortions others have urged tighter procedural control on legislation in the guise of appropriations, defeating review by the substantive committees which have oversight responsibilities over the agencies to which the appropriations are directed. See S. Res. 2, §§ 13, 16, 99th Cong., 1st Sess., 131 CONG. REC. 6-7 (1985); S. Res. 24, 99th Cong., 1st Sess., 131 CONG. REC. 329 (1985); S. Res. 32, § 8, 99th Cong., 1st Sess., 131 CONG. REC. 334 (1985); H.R. Res. 5, 98th Cong., 1st Sess., 129 CONG. REC. 34 (1983); DEMOCRATIC STUDY GROUP, SPECIAL REPORT: THE APPROPRIATION RIDER CONTROVERSY (Feb. 14, 1978).

\textsuperscript{141} Telephone interview with Charles Tiefer, Deputy Counsel to the Clerk of the House (July 13, 1989).

\textsuperscript{142} Senator Robert Byrd, who became chair of the Senate Appropriations Committee in 1989, seems less likely than his predecessors to tolerate riders. He has demonstrated his hostility to them over a period of years. See, e.g., 134 CONG. REC. S9125 (daily ed. July 8, 1988) (Senator Byrd expressing disagreement with the ruling of the presiding officer that the Armstrong Amendment was not impermissible legislation); 125 CONG. REC. 31,892-94 (1979). In the long run, however, new rules or precedents are necessary for the appropriations committees and for the floors of both Houses of Congress. The House has a precedent for barring its Appropriations Committee from including in appropriation bills any matter that would encroach on the policy prerogatives of a particular substantive committee. Since 1983, a House rule has barred the Appropriations Committee, and all other committees except the Committee on Ways and Means, from reporting tax or tariff proposals. Tax or tariff riders in reported appropriation bills are subject to points of order. W. OLESZEK, supra note 79, at 55.

\textsuperscript{143} See supra note 142. In addition, the House of Representatives could build upon a reform it initiated in 1983. Under current House rules, as amended, before any appropriation riders, other than those recommended by the Appropriations Committee or those relating solely to dollar amounts, can be considered on the House floor, the floor manager may move that the Committee of the Whole (the full House sitting as the body which initially considers legislation) rise and report to the House. If carried, this motion preempts further amendments.
Second, the Chair of the House District of Columbia Committee could assume responsibility for making a point of order against every legislative rider, whether originating in the Appropriations Committee or on the floor, to a District of Columbia appropriation, unless barred by a rule waiving points of order. Moreover, the House Rules Committee could adopt an internal rule or a practice of never waiving points of order against riders to District of Columbia appropriations.

Third, points of order will not necessarily block impermissible riders and could be overruled by the presiding officer or the chamber itself. Therefore, Congress could adopt written, less ambiguous rules governing which appropriation riders are impermissible and which are valid “limitations” on the appropriations being made. For example, the Senate could adopt a more restrictive test of when an appropriation rider was germane to House-passed language. The Senate could also tighten its rule against amendments conditioning funds on contingencies by not excepting those contingencies which will occur by a date certain. If Congress will not bar riders to District of Columbia appropriation bills as a class, it should at least distinguish between amendments which merely reduce the amount of funds available, such as across the board percentage cuts, and those which attempt to impose legislative policy on the District, such as prohibiting the use of funds for abortions. At a bare minimum, the Senate could instruct its Parliamentarian to adopt a stance regarding germaneness more akin to that applied in the House, so that, for example, a provision in a House bill providing funds

See 129 Cong. Rec. H35-51 (1983). This procedure has significantly reduced the number of riders approved by the House. Telephone interview with Stanley Bach, Congressional Research Service (June 22, 1989). Congress could strengthen this procedure, however, by imposing the duty, rather than the option, on floor managers to move to rise or alternatively by providing that the chair of the relevant authorizing committee, such as the District of Columbia Committee, can make the motion.

144. This may indeed be the purpose of the existing distinction between impermissible “legislation” and permissible “limitations,” but the distinction is rooted in case-by-case congressional precedents that are difficult to apply to new situations. The distinction has not worked in practice to prevent federal second-guessing of local policy decisions.

145. See, e.g., 135 Cong. Rec. H6939 (daily ed. Oct. 11, 1989) (a successful point of order raised on grounds of germaneness by the District's House Delegate against a rider that would have limited the degree to which the District could have given preference to its own residents on civil service employment). The Senate's less restrictive attitude toward germaneness affects House procedure as well because riders that could not originate in the House may be tacked on to appropriations in the Senate and then returned to the House as a result of Senate-House conferences. At that point, the House can disagree with the conference recommendation, but a conference recommendation can not be ruled out of order in the House on grounds of germaneness. House Rules, supra note 111, Rule XXVIII. One member of the House noted:

If we are going to go through this practice of trying to ram through Senate amendments which would never be permissible here as amendments to an appropriation bill
generally for higher education would not be a sufficient predicate for a Senate amendment repealing human rights protections for college students.146

Fourth, the Senate could modify its practice of mooting points of order against riders through supervening challenges to their "germaneness." The Senate could provide that any claim that a rider, though legislative, is germane must be resolved by a ruling of the presiding officer, with a possible appeal to the body, rather than by a dispositive vote on whether the proposal is germane. This procedure could help to focus the Senate on the technical issue rather than the merits of the rider, thereby buttressing the procedural integrity of the Senate's action.147

Finally, appropriation riders adopted by the Senate but not by the House must eventually be brought back to the House floor. There, any member can insist that the House vote on the appropriations separately rather than as submerged in an overall vote on a conference report.148 The Chair of the House District of Columbia Committee should insist on such a vote for every District of Columbia appropriation rider added by the Senate and accepted by the House conferees. Although the House might accept some of the Senate amendments, others would probably be defeated, and the House conferees would soon show greater resistance to the legislative riders proposed by their Senate colleagues.

3. Budget Authority

With respect to ordinary legislation, the District must wait for congressional review and, perhaps, the repeal that might follow. Congressional review, however, does not actually affect the overwhelming majority of District laws. On the other hand, the District's annual appropriation must endure a searching review by the appropriations committees on Capitol Hill, and it cannot become law without being affirmatively enacted by Congress.149 As a result, even the eighty-six percent of the District's budget that the District raises through the imposition of local taxes and fees may not be spent without a federal review of the allocation of the funds. For purposes of budget approval, Congress treats the District as though it were a federal agency rather than a local government.

because of our rule against legislating on an appropriation bill, we are simply giving the other body a tremendous whip hand over us in the legislative process.

146. See supra notes 124-33 and accompanying text.
147. See supra notes 127-33 and accompanying text.
148. HOUSE RULES, supra note 111, Rule XX.
149. Home Rule Act, supra note 10, § 446 (codified at D.C. CODE ANN. § 47-304 (1987)).
The most obvious step that Congress could take in the direction of greater local autonomy would be to allow the District’s Council to appropriate the funds the District itself raises as the Council deems fit. Alternatively, Congress could treat the budget like other District bills, requiring the District to submit budget legislation to Congress for its information, review, and possible revision by affirmative legislation, but providing that budgets approved by the District’s Council would become law if not overturned by an Act of Congress.

Unfortunately, the District’s dependence on Congress to appropriate fourteen percent of the District’s budget from the United States Treasury could render such a reform meaningless. The District’s annual plea and need for a federal subsidy could prompt language in the subsidy legislation conditioning the federal payment in various ways, reallocating the part of the budget derived from local revenues, and even barring the District from spending its own funds for purposes disapproved by Congress. 150

A bill recently introduced by Representative Dellums might reduce the risk of congressional alteration of the District’s budget. 151 Under this bill, the federal subsidy payment would be authorized on a permanent basis pursuant to a statutory formula, and the District’s Council, rather than Congress, would approve the budget. 152 Congress’ subsidy appropriation would represent its only annual involvement in the budget process. With the line-item appropriations of the budget no longer before them, perhaps the appropriations committees would focus only on the District’s needs and on whether the amount determined by the authorization formula had been correctly computed. Moreover, Congress would be less inclined to change the allocations of funds within the budget or to attach policy riders. If Congress continues to undertake policymaking for the District as part of its review of the federal payment, then perhaps the District should consider foregoing the federal payment and becoming economically independent of Congress, a task that would become much easier if Congress would eliminate the bar to imposition of a nonresident income tax. 153

150. See, e.g., 1989 Appropriation, supra note 24, 102 Stat. at 2269-9 (providing that no funds, even those raised locally, could be used to perform abortions, except where the mother’s life was endangered).

151. H.R. 3293, 101st Cong., 1st Sess. § 2(b) (1990). Under this bill, Congress would perpetually authorize a federal payment amounting to 21% of the total tax revenue of the general fund of the District.

152. Id.

153. See supra notes 107-09 and accompanying text; see also H.R. 11303, 95th Cong., 1st Sess. § 1 (a bill to eliminate this bar failed on an 8-12 vote in the House District of Columbia Committee in 1978). See generally Commuter Tax: Hearings and Markups on H.R. 11303 and
The Dellums bill would only make the authorization of appropriations permanent; Congress would still have to appropriate the federal payment annually. A former minority staff director has criticized the bill on that ground. Even if the Dellums bill passed, the House and Senate appropriations committees would have an annual occasion to legislate for the District, and they might be tempted to make use of it. Alternatively, Congress, in a single law, could authorize and appropriate for every future year a sum of money for the use of the District of Columbia, based on a percentage of locally raised revenues. A future Congress could repeal that law, reverting to annual appropriations, but if it did not do so, the appropriations committees would have no annual occasion on which to consider the District's morals legislation or any other District policy. While a nonconstitutional provision bars a bill to establish a permanent indefinite appropriation for the District, it could incur opposition from members of the appropriations committees because it would reduce their discretion.

4. Judicial Self-Determination

An important characteristic distinguishing self-determining communities from those held in colonial rule is that the colonial ruler rather than the people in those territories usually selects the judges in colonially-governed territories. In this respect, the District more closely resembles a colony than a state. The people do not elect the judges, and the Mayor does not appoint them. Rather, the President of the United States nominates the judges and the United States Senate confirms them. The President must select nominees from among three names proposed by a seven-member commission, of which only three members are selected by District government officials. Federal law, rather than local law, determines the judicial term of office. Here too, some changes short of statehood could give the District greater autonomy. The one change most respectful of the principles of home rule would be to allow the District to select its judges through a method deter-

H.R. 10116 Before the Subcomm. on Fiscal and Gov't Affairs of the House Comm. on the Dist-

157. The President appoints one member of the commission, the Board of Governors of the D.C. Bar appoint two members, the Mayor of the District appoints two members, the Council appoints one member, and the chief judge of the federal district court appoints one member (a federal judge). Id. § 434, reprinted in 1 D.C. CODE ANN. 11.
158. Id. §§ 431, 432, reprinted in 1 D.C. CODE ANN. 8-10.
Ministerial authority is determined by the District’s Council and to determine the judges’ terms of office. Alternatively, Congress might choose a method through which the people of the District could select their judges. For example, Congress could substitute the Mayor for the President or the Council for the Senate in an appointment process. At the very least, if Congress wants the judiciary selected through very indirect methods, it could reconstitute the selection commission to include only persons chosen, directly or indirectly, by the voters of the District.

5. Control Over Criminal Prosecution

Except in the nation’s capital, every state and city selects the officials who will prosecute local crimes. In the District, however, the United States Attorney, rather than an official chosen by the District’s officials or voters, prosecutes all crimes other than violations of minor regulations. This arrangement not only symbolically insults the District, but it diffuses responsibility, allowing members of Congress to blame the District’s local government for insufficient crime control while refusing to allow officials

159. Given the opportunity, the people of the District would probably retain an appointment process for judicial selection rather than change to direct election of judges. In the District’s Statehood Constitutional Convention in 1982, little sentiment existed for electing judges, although a vigorous battle took place over whether appointed judges should be subject to popular votes in retention elections. See P. Schrag, supra note 37, at 204-07.

160. For example, some members might be chosen by the Mayor, some by the Chair of the Council, some by the full Council, and some by sitting District of Columbia judges. There seems to be little justification for giving a voice in selection of local judges to the chief judge of the federal system while excluding the chief judge of the system in which the local judge will serve.

161. “Local crimes” means offenses defined by the Council. There is nothing unusual, of course, in having United States Attorneys selected by the President prosecute crimes defined by Congress.

162. D.C. Code Ann. § 23-101 (1989). Congress has forbidden the District’s Council from enacting any “act . . . relating to . . . the duties or powers of the United States attorney.” Home Rule Act, supra note 10, § 602(a)(8) (codified as amended at D.C. Code Ann. § 1-233(a)(8) (1987)). It is not clear whether that provision of law literally prevents the Council from amending section 23-101 to give its attorney, the Corporation Counsel for the District of Columbia, concurrent authority to prosecute crimes. Perhaps such a grant of power to an official of the District would not even “relate to” (much less diminish) the powers of the United States Attorney who would, in principle, gain a cooperative colleague and not lose any authority. However, such a move by the District would give the appearance on Capitol Hill of a grab for power with potential for creating rivalries between the two prosecuting authorities. In this respect, it should be noted that any amendments by the Council to title 23 of the D.C. Code are given special scrutiny by Congress; Congress prevents the amendments from going into force pending a 60-day congressional review (compared with 30 days for other types of legislation). If reforms are made in this area, they almost certainly will have to come from Congress, not from the Council.
chosen by the District to decide which crimes to prosecute, what plea bargains to accept, and what sentences or sentencing alternatives to seek.

Ideally, Congress should transfer to the District the power to prosecute all local crimes, retaining for the Federal Government, of course, the power to prosecute violations of federal criminal statutes. Alternatively, Congress could authorize District officials to prosecute certain types of serious crimes, while reserving to the United States Attorney the authority to prosecute the most serious crimes.

6. The Evanescent Nature of Home Rule

A final respect in which the District's residents have fewer political rights than residents of states lies in the fact that, while Congress cannot revoke a state's admission to the Union or prevent a state from having the same political rights as all other states,\(^\text{163}\) it can rescind even the limited autonomy that it has granted to the District.\(^\text{164}\) Furthermore, the Home Rule Act rests upon such a frail political charter that Congress can undercut its limited grant of autonomy without paying the political price associated with its repeal or amendment. It can simply violate the Home Rule Act on an *ad hoc* basis.

For example, the Home Rule Act provides that Congress may repeal a statute passed by the Council within the thirty-day waiting period before the law becomes effective.\(^\text{165}\) If Congress waited until the thirty-first day before repealing a law of the District, the repeal would still be effective. Some political fallout may result from this maneuver because the Home Rule Act has created expectations that Congress will not meddle with local laws after the thirty-day period has expired. However, no legal obstacle would bar this repeal because Congress has constitutional power to legislate for the District, and because no Congress has the power to bind its successors.\(^\text{166}\) The existing political expectations that would be challenged are held primarily by District residents, and they have no voting representatives in Congress. In-

\(^{163}\) *See* Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacked the power to impose restrictions in Oklahoma's enabling statute that would deprive Oklahoma of its power to locate its own seat of government and thus render it unequal to other states).

\(^{164}\) The United States Constitution provides that Congress shall "exercise exclusive Legislation in all Cases whatsoever" over the District. U.S. CONST. art. I, § 8, cl. 17. In the exercise of this power, Congress has delegated some of its lawmaking authority to the District government. But nothing in the Constitution, except Article IV, which permits Congress to establish states, authorizes Congress to divest itself of its constitutional power.


\(^{166}\) For a delightful and exhaustive analysis of the legal and philosophical justifications for the prohibition on self-entrenching legislation, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379.
deed, the frequency with which Congress does pass legislation for the District in the guise of appropriation riders reveals the insignificance of the political cost of breaking the home rule compact.

D. Statehood

Compared with retrocession, combinations with other jurisdictions, and the piecemeal approach, statehood obviously presents an attractive option. Not only would it provide the residents of the District with political rights fully equal to those of the residents of existing states, but the conferral of those rights would be permanent rather than subject to reversal when the political coalition that had produced reform began to dissolve.

Achieving statehood, however, seems much more difficult than obtaining incremental reform over a long period of time. A statehood vote would require legislators to offer District residents considerably more power immediately. Statehood, therefore, attracts simultaneous opposition from: all those who object to the likelihood of two more Democrats in the Senate; those who do not want their own states' influence in the National Legislature diluted even by two percent; those in Maryland and Virginia who want to avoid the possibility of a commuter tax on their incomes; those who think that the security of federal buildings would somehow be compromised if Congress gave up its right to re-nationalize the District's police force; those who believe that some basic principle makes the concept of a city-state unthinkable; those who think the District too "liberal;" those District residents who believe that their taxes would go up more quickly if Congress no longer had to approve the District's budget; and those, if any, who would prefer not to live in a country that includes a state with a black governor, a majority-black state legislature, and in all possibility, two black United States Senators. 168

167. "What have we gotten by enacting home rule? . . . Let's either revoke or drastically restructure home rule — let's finally help the unfortunate residents of this festering liberal hellhole." 135 CONG. REC. H4918 (daily ed. Aug. 2, 1989) (statement of Rep. DeLay). See also Ayres, Washington Council Backs Vote on Congress Delegation, N.Y. Times, Feb. 28, 1990, at A20, col. 3 ("In the past, some of the most adamant opposition to statehood has come from conservatives in Congress. Those lawmakers have argued that the predominately Democratic city would send only liberals to Congress."). Ed Rollins, a strategist for the Republican Party, has noted that "[g]enerally, Republicans do not favor statehood [because] you're going to get two liberal Democrats [in the Senate] and keep getting them for the next 100 years." Devroy & Melton, supra note 42.

168. Senator Edward M. Kennedy has been quoted by his colleague Senator Orrin G. Hatch as saying that opposition to the failed constitutional amendment to give the District voting representation in Congress was based on antipathy to a constituency that was "too liberal, too urban, too black, and too Democratic," and that the arguments against the amend-
The fact that opponents of greater home rule can make three constitutional arguments against statehood that they could not make against incrementally-achieved greater home rule further diminishes the likelihood of achieving statehood. These arguments, however dubious, have drawn attention away from the merits of equal political rights for District residents and thereby obscured the issues.

The first of these arguments centers upon the language of article I, section 8, clause 17, of the Constitution. Some argue that when the framers of the Constitution permitted Congress to "exercise exclusive Legislation . . . over such District (not exceeding ten Miles square) as may, by Cession of particular States . . . become the Seat of the Government," they intended to make any such ceded land a permanent capital and to prevent Congress from granting statehood to any part of it. Testifying against statehood on behalf of the United States Department of Justice, Assistant Attorney General Stephen J. Markman claimed that "[o]nce the District became the seat of government in the manner prescribed in this provision, Congress cannot by simple legislation permanently abrogate its constitutional power to exercise exclusive legislation [over it]."

Markman's argument, however, is vulnerable in two respects. First, the power to exercise "exclusive" legislation over a territory obviously includes the power to delegate legislative authority, as in the Home Rule Act, and, almost though perhaps not quite as obviously, the power to make such a delegation permanent.

Second, Congress has already divested the Federal
Government of part of the territory of the District. In 1846, finding that "no more territory ought to be held under the exclusive legislation given to Congress over the District . . . than may be necessary and proper for the purposes of such a seat," Congress retroceded about a third of what had been the District of Columbia to Virginia. This land became Arlington and part of Alexandria, Virginia. Under the Justice Department's theory, Congress must have unconstitutionally retroceded those portions of Virginia, which are therefore still part of the District. Confronted with this objection, Markman could say only that "[t]hat is a very good question, Congressman, and it is one of the more difficult questions that needs to be dealt with." The second constitutional argument against statehood rests upon the claim that even if Congress can divest itself of part of the District, it cannot do so without the consent of Maryland. The Constitution states that "no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent" of the legislature of that state. Objectors to statehood argue that because the part of the District that would be made into a new state was once ceded by Maryland, the consent of Maryland would be necessary before the District could become a state. However, a literal interpretation of the Constitution provides little support for this theory because even if Maryland had clearly expressed some continuing interest in the District when it ceded its land to Congress in 1788, the District is surely not now "within the Jurisdiction" of Maryland, a state that has lacked authority over the territory for nearly two hundred years.

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174. D.C. Statehood Hearings Part 1, supra note 39, at 369 (statement of Stephen J. Markman, Assistant Attorney General). A taxpayer constitutionally challenged the retrocession in Phillips v. Payne, 92 U.S. 130 (1875), but the United States Supreme Court rejected the challenge on the ground that, whether or not the retrocession had been lawful, Virginia was the de facto sovereign and that the plaintiff was estopped from challenging such a sovereignty.

Professor Raven-Hansen has noted in private conversation that the First Congress, which included many of the Framers of the Constitution, also changed the boundaries of the District, enlarging them to include the mouth of a river. Act of Mar. 3, 1791, ch. 17, 1 Stat. 214. Although this Act appears not to have ceded any land, it does suggest that the Framers thought the District's boundaries less than immutable.

175. U.S. Const. art. IV, § 3, cl. 1.
177. Professor Seidman has noted in private correspondence that the force of this argument depends on when, precisely, the new state had to be "within the jurisdiction" of the old state for the constitutional clause to be operative. Although the District is not presently within the
In addition, Professor Raven-Hansen has shown that the Maryland legislature used absolute and unconditional language to cede the land, although clauses retaining reversionary interests in land, in the event the grantee no longer needed it for a particular purpose, were in common use at the time and were in fact used for grants of land to the Federal Government. Raven-Hansen indicates that to whatever extent a state can be said to have an intention, Maryland's intention was to divest itself of any interest in the land. One could argue, of course, that no one in Maryland could have contemplated an eventual District bid for statehood and that therefore Maryland cannot be said to have had an intention to divest so completely its interest, or that because Maryland ceded its land for the limited purpose of creating a federal district, it imposed an "implied condition" on its land grant, the unconditional language of its cession statute notwithstanding.

The final constitutional objection to statehood is that the twenty-third amendment, which grants three Presidential electors to the "District constituting the seat of Government of the United States," precludes elimination of the District of Columbia because the amendment would then be meaningless and equally precludes shrinkage of the District to the White House, Capitol, and Mall area because then a handful of people living in that small territory, such as the President and his or her spouse, could control three electoral votes.

This argument, however, overlooks the fact that the twenty-third amendment was not self-executing. It authorized Congress to "direct" the method of selection of electors from the District and to "enforce this article by appropriate legislation." The amendment became part of the Constitution on April 3, 1961, when its ratification by the legislatures of three-fourths of the states was certified. Congress did not pass legislation providing for jurisdiction of Maryland, the land that now comprises the District was within Maryland in the eighteenth century. Should statehood admission be viewed as a separate act, because it occurs 200 years after cession, or as merely the second stage of a 200-year process?


180. J. Best, supra note 44, at 69.


183. U.S. CONST. amend. XXIII, § 2.

the popular election of presidential electors until six months later.\textsuperscript{185} If the United States had held a Presidential election before enabling legislation had been passed, the District would not have been able to participate.\textsuperscript{186} Similarly, if, as part of the act admitting the District to the Union, Congress merely repealed the law that provides a method for choosing electors, the electoral status of what remained the District of Columbia would revert to what it was during the summer of 1961. If there happened to be any persons residing in it who did not vote in the states,\textsuperscript{187} they would not be entitled to vote for presidential electors. Congress could then at its leisure propose repealing the twenty-third amendment, which would have no further utility.

The constitutional arguments against statehood are unpersuasive, but they are politically weighty. These arguments have enjoyed the support of the Department of Justice not only in the Reagan administration, but in several


\textsuperscript{186} This is not an imaginative interpretation of the twenty-third amendment; Congress intended the amendment not to be self-executing. This colloquy took place in the House during debate on the resolution to propose the amendment:

\begin{quote}
Mr. ROGERS of Colorado. But if the Congress fails to take any action whatsoever, the people would not be permitted to vote in the District of Columbia?

Mr. MEADER. I think it would take affirmative action by the Congress before anyone could vote for electors in the District of Columbia. Does not the gentleman agree with me?

Mr. ROGERS of Colorado. I agree it would take affirmative action, and that under the affirmative action the Congress could set the qualifications for electors or the voters.
\end{quote}

106 CONG. REC. 12,560 (1960). Representative Meader made the further point that the language of the amendment authorized the District to “appoint,” not elect, electors, just as article II, section 1 of the Constitution authorizes states to “appoint” electors in a manner directed by their legislatures. Indeed, a congressional committee had expressly rejected the language of the amendment resolution as originally introduced, which would have provided for the “people” of the District to “elect” presidential electors in a manner to be provided by Congress.\textit{Ibid.} Congress subsequently chose to authorize the popular election of presidential electors, but the colloquy suggests that no particular District resident, including members of the presidential family, could legitimately expect, absent enabling legislation, to have a right to participate in the selection of presidential electors.

\textsuperscript{187} Presidents and their families have traditionally voted in the states in which they resided before they occupied the White House rather than in the District of Columbia. If there were other residents of the portion of the District that did not become a new state, they could vote in the new state by virtue of its Constitution. NEW COLUMBIA CONST. § 1110, 1 D.C. CODE ANN. 117, 162 (Supp. 1989). If New Columbia repealed that portion of its Constitution, Congress could nevertheless authorize such persons to vote for federal officers in New Columbia, just as it has permitted United States citizens living abroad to vote for federal officers in the states in which they formerly resided, notwithstanding state election laws to the contrary. 42 U.S.C. § 1973dd-1 (1982).
of its predecessors. Members of Congress opposed to statehood echo them, and they would provide good camouflage for a President who wanted to veto a statehood admission act without appearing to be a foe of home rule or voting representation in Congress.

III. THE REQUIREMENT OF STRATEGY

This analysis suggests that while statehood would provide both real power in the two Houses of Congress and genuine self-determination for District residents, those seeking to achieve statehood face exceedingly difficult odds. Moreover, statehood is not the only means to enhance the political liberty of those living in the District. Congress could reduce the extent to which it treats the District's residents like colonial subjects in many ways.

Ironically, efforts to reform home rule may be politically damaging to the drive toward statehood. By improving its political autonomy through statutory reforms, the District may simultaneously undermine its most compelling arguments for equal treatment. For example, obtaining the right to have one voting member in each House of Congress would largely undermine the politically appealing claim of being subject to "taxation without representation." Achieving many of the assurances of self-determination described throughout this Article could considerably narrow the disparity between

188. See D.C. Statehood Hearings Part 1, supra note 39, at 354, 374 (statement of Stephen J. Markman, Assistant Attorney General, paraphrasing memoranda from Justice Department officials in the Kennedy and Carter administrations).


190. Statehood would bring the District greater influence over national affairs in other ways as well. For example, President George Bush held an "education summit" with the nation's governors, including those of Puerto Rico and the Virgin Islands, in September 1989. Although District schools have been experiencing one of the country's most severe crises, the District was excluded from the conference because it has no "governor." D.C. Officials Dis­mayed at Lack of an Invitation, Wash. Post, Sept. 28, 1989, at A4, col. 4.

191. Some members of Congress might prefer statehood for the District rather than a slow process of reform. Supporters of statehood might include those who believe in full self-determination for all Americans, those who think that Congress wastes too much time by debating local issues every year, and those who would prefer not to have to choose between voting their consciences to support a liberal District Council and avoiding frequent political exposure on issues that are often highly emotional. Cf. 135 CONG. REC. H6549 (daily ed. Oct. 3, 1989) (statement of Rep. Hoyer). Supporting the D.C. Council's ban on discrimination against homosexuals "is subject to a 30-second ad . . . and they can say, 'Steny Hoyer is for homosexuals,' and somehow put in fear those who will go to the polls and select [Hoyer]." D.C. Officials Dismayed at Lack of an Invitation, Wash. Post, Sept. 28, 1989, at A4, col. 4.

192. Comparisons between the political status of the District and that of a colony have often been made. See, e.g., S. SMITH, supra note 6. For a thumbnail description of Washington, D.C. as a colony, see P. SCHRA, supra note 37, at 9-10.
between the independence people have in the District and the independence people enjoy in the states, but at the cost of undercutting the drive toward full political freedom. Gradual reform through incremental improvements may be much easier to achieve than statehood, but it may make the achievement of statehood impossible.\textsuperscript{193}

The sixty to forty vote for the initiative that led to the District's statehood petition\textsuperscript{194} indicates that the people of the District support full membership in the Union. But construing that vote as a \textit{strategic choice} in favor of statehood or as a genuine, deep, and continued commitment to a new political order would be fallacious. First, the political atmosphere has changed since the vote a decade ago.\textsuperscript{195} Second, no one has put before the electorate an alternative strategy of seeking a gradual improvement in political rights. Third, the lack of congressional interest in statehood for the District has been mirrored by an apparent lack of interest in the District itself.

Aside from the lobbying efforts of Delegate Walter Fauntroy, the speeches of Reverend Jesse Jackson, and the educational endeavors of a stalwart band of activists who comprise the Statehood Commission,\textsuperscript{196} the statehood issue has been barely visible since 1982. Until Reverend Jackson suggested his interest in running to become one of the District's "Senators," District newspapers and radio stations rarely discussed the issue. Few voluntary organizations have pressed for, or even endorsed, statehood. There have been no mass demonstrations supporting the concept.\textsuperscript{197} The Council repeatedly

\textsuperscript{193}. It is possible, of course, to make exactly the opposite argument, that statehood would become more likely after a period in which Americans became accustomed to a fully self-governing District of Columbia, particularly one that voted in Congress. But it seems more likely that the political imperative of granting the District statehood rests on the perceived injustice of its unequal status and, particularly, on the fact that District residents have no voting representation in Congress. If its moral claims to statehood based on its quasi-colonial status were removed, the District would probably have trouble making a claim on the national agenda.

\textsuperscript{194}. D.C. Board of Elections and Ethics, Official Results of Nov. 4, 1980, General Election, at 003.000 (Table). The initiative is codified at D.C. \textsc{Code Ann.} \textsection 1-111 (1981).

\textsuperscript{195}. Two subsequent votes provide even less clear indications that the District's residents favor statehood. The 1981 election of delegates to a statehood constitutional convention was not a vote on statehood because the ballot did not include the option of not holding such a convention; the only choice was among candidates for delegate. Similarly, the 53-47 vote ratifying the constitution drafted by the convention was not a vote on statehood, but only a vote supporting the proposed constitution in the event that the District became a state. See D.C. Board of Elections \& Ethics, Election Results for Nov. 2, 1982.

\textsuperscript{196}. The Statehood Commission is a public body established by the 1980 Statehood Initiative, charged with advancing the cause of District Statehood. D.C. \textsc{Code Ann.} \textsection 1-115 (1981).

\textsuperscript{197}. Even a statehood rally that Reverend Jackson called for on Martin Luther King Jr.'s Birthday, 1990, "failed to materialize and instead became a news conference." \textit{Loose Lips}, Wash. City Paper, Feb. 16, 1990, at 4, col. 1. The Mayor and Council of the District have
postponed the elections, called for in the 1980 initiative, for a Representative and Senators, who would become highly visible advocates for statehood on Capitol Hill.\textsuperscript{198} Most importantly, neither the business nor the political leadership of the District has attempted to rally support for statehood among the people who have the political power to bring it about: the citizens of the fifty states. The constitutional amendment that would have given the District voting representation in Congress passed the Senate in 1978 primarily because the Senate viewed the amendment as a civil rights issue. Republican Senator Strom Thurmond and other Southern senators with substantial numbers of black constituents in their home states supported the amendment after Delegate Fauntroy took the issue on the road.\textsuperscript{199} No one since has undertaken a comparable national political campaign on behalf of District statehood.

If incremental reform of home rule and statehood are mutually inconsistent objectives, the first step to move the District beyond the present drift would be to put the strategic choice into focus for the leadership and electorate of the District. After a period of public debate about alternative strategies, the people should be asked to decide whether they really want statehood, taking into account the likelihood that they will have to work harder to achieve it in the coming decade than they have to this point and that pressing for statehood may require foregoing other reforms that could undermine the District's moral claim to admission to the Union. This choice should be expressed through a new referendum, and the Council, or the people directly through an initiative campaign, should now set into motion the process of a new District-wide vote on statehood.\textsuperscript{200}

\textsuperscript{198} Occasionally acted to support the District's statehood bid (for example, by enacting a less controversial state constitution than the one ratified by the voters). D.C. Act No. 7-19 (1987) (codified at D.C. CODE ANN. § 1-113 (Supp. 1989)); see also NEW COLUMBIA CONST., 1 D.C. CODE ANN. 117 (Supp. 1989) (enacted 1987). They have tended, however, to follow rather than lead the electorate on this issue. A voter initiative, rather than the Mayor or the Council, started the process of seeking statehood, and only three of the thirteen Council members sought office as delegates to the Constitutional Convention. The Mayor also chose not to run. P. SCHRAG, supra note 37, at 20-28.

\textsuperscript{199} See P. SCHRAG, supra note 37, at 23.

\textsuperscript{200} A new referendum is warranted in any event because no one submitted the Council's action in 1987, which replaced the proposed constitution that the voters ratified in 1982, with one drafted by the Council for voter approval. While voter approval is not legally necessary because Congress will dictate what constitution goes into effect or what procedures are necessary for putting a constitution into effect, a constitution ratified by the voters should not be changed without further voter approval. Indeed, the proposed constitution which the voters ratified specified that the constitution could be amended by the Council, but that the amend-
The new referendum should produce a reaffirmation of the desirability of statehood and a renewed commitment of energy to the task of obtaining it. Congress' actions over the last three or four years give the District no reason to expect that incremental reform will be forthcoming. Furthermore, the ultimate argument against incremental reform and in favor of statehood is the revocability of any reforms not entrenched or perpetuated either by a constitutional amendment or by admission of the District to the Union.

201. Indeed, Congress appears remarkably hostile to such reforms. In 1989, when the Senate Energy and Natural Resources Committee defined the options to be considered by the voters in a plebiscite on the future of Puerto Rico, some Senators proposed that continued Commonwealth status, if that were chosen by Puerto Rican voters, should include a non-voting "Senate representative" with a staff of accredited Senate employees. The representative would not have been able to speak on the floor or to vote in committee. This proposal was defeated in the Committee because it might have set a precedent for granting similar privileges to the District of Columbia. Havemann, Senate Voice for Puerto Rico Opposed, Wash. Post, Aug. 2, 1989, at A8, col. 1. The Senate Energy and Natural Resources Committee did accept the concept of permitting the Commonwealth of Puerto Rico to have a "liaison office" whose staff would have the privileges enjoyed by employees of the Congressional Research Service rather than the privileges given to the staff members of Senate offices. Havemann, Panel Passes Referendum on Puerto Rico's Status, Wash. Post, Aug. 3, 1989, at A12, col. 1.

202. See supra notes 152-66 and accompanying text. My colleague Louis Michael Seidman argues that even statehood could not protect the present District against congressional legislation directed only at the new state's residents because the power of Congress under the commerce clause is essentially unbounded, "no Supreme Court case has held that discrimination among states is unconstitutional," and "the Court has permitted such discrimination even in the teeth of the express constitutional requirement of uniformity in the areas of bankruptcy and taxation." Seidman, supra note 31, at 407.

Seidman's arguments are ingenious but not entirely persuasive. First, while Seidman is correct in saying that the Court has never invalidated a federal statute effective only in one state, the Court appears never to have upheld such a law either. Indeed, the rarity, or perhaps total absence, of such legislation tends to suggest that Congress believes that legislating for particular states, as it routinely does for the District and the territories, would violate principles of equal protection. Second, while Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), rejected the view that certain state powers were immune under the tenth amendment from invasion by Congress, the issue of whether Congress could target only certain states for the application of federal law was not raised or addressed in that case. Finally, Seidman cites two cases for his proposition that the Court has on occasion permitted "such" discrimination, but in neither case was the application of federal law congruent with state boundaries. In the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), the federal law at issue applied not to one state, but to all of the states in a certain region, and to portions of three other contiguous states. In United States v. Ptasynski, 462 U.S. 74 (1983), the special tax exemption provided by Congress was described in a statute as one applicable to "Alaskan oil," id. at 77, but the Court made a point of noting, as it upheld the legislation, that this description was "not entirely accurate," id., that "less than 20% of current Alaskan production is exempt" id., from tax, that oil produced in "certain offshore territorial waters — beyond the limits of any State — is [also exempt]," and that "[t]he exemption thus is not drawn on state political lines" id. at 78 (emphasis added). The Court upheld rational distinctions based on bona fide geographical differences "based on neutral factors." Id. at 85. However,
While the liberty of the District's 600,000 residents could be enhanced in many ways short of statehood, statehood represents the best way of permanently securing for our fellow Americans residing in the Nation's Capital the political privileges that we who live in the fifty states have always taken for granted.

the Court's explicit notation that Congress did not use state boundaries to define those geographical differences suggests that, in its view, federal legislation applicable only to one or two states would be of dubious validity.

Seidman also argues that Congress could circumvent a constitutional ban on state-by-state legislation by defining certain states descriptively rather than by naming them. Seidman, supra note 31, at 408. Courts would be quite capable, however, of determining whether the differences in applicable law were rationally related to the differences defined by the congressional descriptions. To use Seidman's example, there could be no reasonable justification for congressional approval of religiously-based discrimination against homosexuals only in states with large numbers of federal employees. Id. at 404-05.
APPENDIX*  
Significant District of Columbia Appropriation Riders  
Approved by Congress, FY 1975-1989


General Operating Expenses:
D.C. cannot spend more than $7,500 on “test borings and soil investigations.”203

Human Resources:
Total reimbursement to St. Elizabeths Hospital shall not exceed the amount paid in FY 1970.204

Highways & Traffic:
No funds are available “for the purchase of driver-training vehicles.”205

* N.B. To aid the user of this Appendix, the act in which the restriction first appeared is in bold face print and the restriction heading is in italics.


Environmental Services:

No funds are available for the collecting of ashes or miscellaneous refuse from hotels, businesses, or rooming/boarding houses.206

Capital Outlay:

The Woodrow Wilson High School swimming pool cannot be used after 9 p.m.207

General Provisions:

"[A]ll vouchers covering expenditures of appropriations . . . shall be audited before payment . . . ."208

An amount specified within this Act for particular purposes shall be considered the maximum amount which may be expended for said purpose or object.209


207. 1975 Appropriation, 88 Stat. at 826.


No appropriation shall be used in connection with any regulation of the Public Service Commission requiring the installation of taxicab meters.210

No funds are available for payment of electric rates in excess of 2 cents per kilowatt-hour for street lighting.211

No funds shall be obligated for payment to any permanent employee if the total number of D.C. employees exceeds 39,619.212

No funds appropriated for educational purposes may be used for partisan political activities.213


**Human Resources:**

$13,733,000 shall be available for the "care and treatment of the mentally retarded at Forest Haven." 214

**General Provisions:**

No funds shall be available for compensation to persons performing public affairs or public relations services unless approved by a resolution of the D.C. Council. 215


**Capital Outlay:**

No funds appropriated for the Washington Civic Center shall be obligated until the plans submitted by the Mayor and the Council are approved by the House and Senate Subcommittees on D.C. Appropriations. 216

No funds appropriated for the construction of the University of the District of Columbia shall be obligated until the master plan is approved by the Mayor, the Council, and the House and Senate Committees on Appropriations. 217


**General Provisions:**

No funds shall be paid for any judgment entered against the District of Columbia as a result of the 2 cents per kilowatt-hour limitation. 218

No funds are available for the compensation of any D.C. employee "whose name and salary are not available for public inspection." 219

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No funds in this appropriation shall be available "to support or defeat legislation pending before Congress or any State legislature." \(^{220}\)


**Human Support Services:**
No funds shall be available for the summer youth jobs program until the House and Senate Subcommittees on D.C. Appropriations have approved the plan submitted by the Mayor and the Council detailing expenditures. \(^{221}\)

**General Provisions:**
No funds shall be expended for the compensation of any D.C. employee "whose, name, title, grade, salary, past work experience, and salary history are not available for inspection" by the House or Senate Appropriations Committee or their representatives. \(^{222}\)

No Federal funds may be used to perform abortions unless the mother is endangered, or a victim of rape or incest, and where the incident has been reported promptly to the police or the public health service. Contraceptives and procedures for termination of ectopic pregnancy are exempted. \(^{223}\)

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**Governmental Direction and Support:**
Only "$500,000 of this appropriation shall be available for settlement of property damage claims not in excess of $1,500 each and personal injury claims not in excess of $5,000." 224

**General Provisions:**
No funds shall be expended for consulting services hired through procurement contracts unless expenditures of those contracts “are a matter of public record and [are] available for public inspection,” except where governed by existing law, “or under existing Executive order issued pursuant to existing law.” 225


**Governmental Direction and Support:**
No funds “appropriated for the Office of Financial Management shall be apportioned and payable for debt service for short-term borrowing on the bond market.” 226
The D.C. Retirement Board shall provide Congress with “a quarterly report of the allocations of charges by fund and of expenditures of all funds.” 227

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**Economic Development and Regulation:**

The District will establish a special fund to assure that any funds "available to the Lottery and Charitable Games Control Board shall be derived from non-Federal" District revenues.\(^{228}\)

**Lottery and Charitable Games Enterprise Fund:**

The D.C. Auditor "shall conduct a comprehensive audit on the financial status of the Fund," and shall provide the report to the Mayor, the D.C. Council Chairman, and Senate and House Subcommittees on D.C. appropriations.\(^{229}\)

There shall be no advertising of lottery or charitable games on public transportation and at their stops and stations.\(^{230}\)

The advertising, sale, operation, or playing of these games is forbidden in "the Federal enclave, and in adjacent public buildings and land controlled by the Shipstead-Luce Act, . . . as well as in the Old Georgetown Historic District."\(^{231}\)

The Lottery Board shall make an annual report to the House and Senate Subcommittees on D.C. Appropriations at the end of the year detailing receipts and disbursements of the Board.\(^{232}\)

**Public Education System:**

This appropriation is not available to subsidize the education of nonresidents at the University of the District of Columbia (UDC) unless the UDC Board of Trustees adopts a tuition rate schedule for nonresidents at a level no lower than the nonresident tuition rate charged at comparable schools in the metropolitan area.\(^{233}\)


\(^{229}\) 1982 Appropriation, 95 Stat. at 1175.

\(^{230}\) Id.

\(^{231}\) Id.

\(^{232}\) Id.

**Capital Outlay:**

The Mayor shall not request "the advance of any moneys for new general fund capital improvement projects without the approval by resolution" of the D.C. Council.234

**General Provisions:**

"At the start of the fiscal year, the Mayor shall develop an annual plan" for borrowing from the U.S. Treasury. After each quarter, the Mayor will report to the Council and Congress "the actual borrowing and spending progress compared with projections."235

The Mayor shall not spend any monies borrowed for capital projects on operating expenses.236

No funds appropriated in this act may be used to implement a personnel lottery for hiring fire fighters or policemen.237

No funds appropriated may be used to transport any wastes generated by the D.C. municipal waste system for disposal at any public or private landfills, except those currently used in Virginia or Maryland, "until the appropriate State agency has issued the required permits."238


No Federal funds shall be obligated or expended to procure passenger autos with an EPA estimated MPG average of less than 22, except for security, emergency rescue, or armored vehicles.\textsuperscript{239}


**Water and Sewer Enterprise Fund:**

All restrictions applying to general fund capital improvements under the heading of Capital Outlay “shall apply to projects approved under this heading.” (E.g., expiration of authorization at the end of the fiscal year, no advance monies unless prior approval by a D.C. Council resolution.\textsuperscript{240}

**Federal Payment to the District of Columbia:**

None of the Federal payment shall be available until there are at least 3,880 uniformed permanent officers of the Metropolitan Police Department, excluding officers hired after August 19, 1982, under standards other than those in effect at that time.\textsuperscript{241}

**General Provisions:**

“The Mayor shall not borrow any funds” from the United States Treasury unless he has prior approval by resolution from the D.C. Council, “identifying the projects and amounts to be financed with such borrowings.”\textsuperscript{242}


"None of the funds appropriated . . . may be obligated or expended by reprogramming except pursuant to advance approval" under the procedure set forth in House Report 96-443, which accompanied the D.C. Appropriation Act of 1980.243


Public Safety and Justice:
The staffing levels of the Fire Department units shall be maintained according to Fire Dept. Rules and Regs. Article III, section 18 as then in effect.244

General Provisions:
Amends section 303(b) of the D.C. Self-Government and Government Reorganization Act to provide that amendments ratified by the registered electors shall take effect in 35 days, excluding weekends, holidays, and days when either House of Congress is not in session, after submission unless there is passed a joint resolution to the contrary within that period. In any case, a joint resolution passed and transmitted to the President within the 35-day period will repeal the amendment.245
Amends the second sentence of section 412(a) to read: "Except as provided in the last sentence of this subsection, the Council shall use acts for all legislative purposes."
Amends the last sentence of section 412(a) to state that resolutions are to be used "(1) to express simple determinations, decisions, or directions of the Council of a special or temporary character; and (2) to approve or disapprove proposed actions" by administrative agencies in accordance with previous legislation. Much legislation must specifically authorize use of resolutions and the resolutions must be designed to implement that act.247

244. 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,738 (1984)).
245. Id. (citing H.R. CONG. REP. No. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,382 (1984) (§ 131(b))).
246. Id. (citing H.R. CONG. REP. No. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,382 (1984) (§ 131(c)(1))).
Amends the second sentence of section 602(c)(1) to read that except as provided by paragraph (2), acts of the Council become law after 30 days, excluding weekends, holidays, and any day when neither House is in session because of "an adjournment sine die, a recess of more than three days, or an adjournment of more than three days." Any joint resolution passed by Congress within the 30 day period repeals that act upon becoming effective.\footnote{248}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,382-83 (1984) (§ 131(d))).}

Amends the third sentence of section 602(c)(1) by inserting "joint" in lieu of "concurrent."\footnote{249}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(e))).}

Amends the first sentence of 602(c)(2) to read that any act transmitted "with respect to any Act codified in title 22, 23, or 24" of the D.C. Code shall take effect 60 days after transmittal to the Speaker of the House and the President of the Senate. A joint resolution passed and sent to the President within the 60-day period shall repeal that act when it becomes law.\footnote{250}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(f))).}

Amends the second sentence of section 602(c)(2) to state that the provisions of such expedited procedures shall apply to these joint resolutions.\footnote{251}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(g))).}

Inserts a severability clause at the end of Part F, Title VII.\footnote{252}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,384 (1984) (§ 131(n))).}

Makes this section effective without limitation as to fiscal year.\footnote{253}{Id. (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., reprinted in 130 CONG. REC. 27,379, 27,384 (1984) (§ 133))).}


Public Safety and Justice:

Notwithstanding any other provisions of law, each employee who retired from the Fire Department before 2/15/80 and is on the date of the enactment of this Act receiving an annuity based on service with the...
Fire Department, shall receive a lump-sum payment equal to three percent of his/her annuity from the D.C. Retirement Board. 255

Up to $50,000 shall be used to reimburse Fairfax County, Virginia, for expenses incurred in relation to Lorton Prison. Reimbursement shall be made every time the District asks the County to provide police, fire, rescue and related services for escape, riots, and similar disturbances involving the prison. The District shall make a quarterly report to the House and Senate Subcommittees on D.C. Appropriations regarding the amount and purpose of any reimbursements. 256

No appropriated funds may be used to implement any plan which includes the closing of Engine Company No. 3, located at 439 New Jersey Avenue, Northwest. 257

**General Provisions:**

The Public Service Commission is authorized to order and approve streetlight deregulation as provided in its opinion and order in Formal Case No. 813, provided that the provisions of this opinion and order are ratified and declared to be in effect as of 7/12/84 and “continue to be in effect until revoked or rescinded.” 258

“‘No State, or political subdivision thereof, in which a Member of Congress maintains a place of abode for the purposes of attending sessions of Congress [shall] impose a personal property tax with respect to [any] motor vehicle owned by such Member [or spouse,] . . . unless such Member represents such State or a district in such State.’ ‘Member of Congress’ includes the delegates from Guam, D.C., the Virgin Islands, and the Resident Commissioner from Puerto Rico; ‘State’ includes D.C.; and ‘personal property tax’ means any tax imposed on an annual


basis and levied on the basis of market or assessed value. This section shall apply to all taxable periods beginning on or after 1/1/85. Designates Raoul Wallenberg Place.

None of the funds appropriated may be used to advertise for, or award payments to, contracted professional services as contained in object class 408 of the fiscal year 1986 budget at any level which would directly or indirectly exceed the 1985 level of expenditures or $21,780,000, whichever is lesser.

Criminal Justice Initiative:

$20,000,000 shall be available for a prison within the District of Columbia, provided that D.C. shall award a design and construction contract on or before 10/15/86, and that D.C. proceeds with the design and construction of the prison without regard to the availability of Federal funds.


Criminal Justice Initiative:

"[N]o funds are available for construction on the South part of Square E-1112" unless previously approved by the House and Senate Subcommittees on D.C. Appropriations.

Governmental Direction and Support:

D.C. shall "identify the sources of funding for [the] Admission to Statehood from its own locally-generated revenues . . . [and] no revenues from Federal sources [may] be used to support the operations or activities of the Statehood Commission and the Statehood Compact Commission."


Public Safety and Justice:
Within 30 days of this Act's effective date, D.C. "shall establish a free, 24-hour telephone information service whereby residents of the area" around Lorton Prison can promptly obtain information from D.C. officials regarding "all disturbances at the prison." D.C. shall advertise this service to those residents.265
No appropriated funds "may be used to implement [D.C.] Board of Parole notice of emergency and proposed rulemaking" as filed with the D.C. Register on 7/25/86.266
D.C. shall not "renovate or construct prison bed space at the Occoquan facilities of Lorton prison beyond the number of prison bed spaces . . . damaged or destroyed in the fire of 7/25/86."267

Public Education:
$1,146,000 shall be used to operate Antioch School of Law. The acquisition or merger of Antioch School of Law shall be previously approved by both the Board of Trustees for UDC and the D.C. Council, otherwise this money "shall be used solely for the repayment of the general fund deficit."268

General Provisions:
D.C. shall erect three signs on the corners of 16th and L and 16th and M Streets containing the words "Sakharov Plaza". The Soviet Embassy's new address is 1 Andrei Sakharov Plaza.269
Congress reaffirms the D.C. Council's authority to close part of 8th Street, Northwest and public alleys in Square 403.270


Governmental Direction and Support:
The funds of the Statehood Commission and the Statehood Compact Commission shall not be "used for lobbying to support or defeat legislation pending before Congress or any State legislature."271

268. Id.
269. Id. at 3341-192 (§ 132).
270. Id. (§ 133).
Economic Development and Regulation:

"[U]p to $270,000 within the 15 percent set-aside for special programs within the Tenant Assistance Program shall be targeted for the single room occupancy initiative." 272

General Provisions:

"No sole source contract with the [D.C.] government or any agency thereof may be renewed or extended without opening that contract to the competitive bidding process as set forth in Section 303 of the [D.C.] Procurement Practices Act of 1985..." 273

"Federal funds hereafter appropriated to the [D.C.] government shall not be subject to apportionment except to the extent specifically noted by statute." 274


Criminal Justice Initiative:

Construction of the prison in D.C. may not commence unless (1) "access and parking for construction vehicles are provided solely at a location other than city streets," (2) D.C. officials meet monthly with neighborhood representatives, (3) D.C. operates and maintains a free, 24-hour telephone information service for residents living in the area surrounding the prison so that they "can promptly obtain information...[regarding any] disturbances at the prison," and (4) D.C. advertise this service.275

Public Safety and Justice:

Staffing levels at two piece engine companies within the Fire Department shall be maintained according to Fire Dept. Rules and Regs. article III, section 18, until final adjudication by the relevant courts.276

Public Works:

The Taxicab Commission shall report to the Senate and House Appropriations Committees by 1/15/89 on a plan to "issue and implement regulations including but not limited to the age of the vehicles, frequency of inspection, and cleanliness of vehicles."277

276. Id. at 2269-3.
277. Id. at 2269-4.
General Provisions:

"Notwithstanding any other provision of law, for purposes of zoning regulations," the premises on squares 4302-4305 and parcels 167/64-68 are an "eleemosynary institution" in accordance with the 12/23/86 decision of the Deputy Zoning Administrator, and "the current use of the premises is within the non-conforming use of rights as permitted by [the] Certificate of Occupancy." 278

If the D.C. Council has adopted by 5/1/89 and implemented by 9/30/89, a "preference system that does not preclude the hiring of noncity residents," no funds provided or made available may be used to pay the salaries or expenses to implement or enforce a residency requirement with respect to D.C. Government employees. 279

After this Act's date of enactment, D.C. shall not dismiss any employee "currently facing adverse job action for failure to comply with the residency requirement." 280

No Federally appropriated funds shall be obligated or expended after 12/31/88 unless by that date, D.C. has not repealed D.C. Law 6-170, the Prohibition of Discrimination in the Provision of Insurance Act of 1986, or amended the law to allow for AIDS testing as a condition for acquiring all health, life and disability insurance without regard to the face value of such policies. Eligibility for coverage and premium costs shall be made according to ordinary practices. 281

No appropriated funds for the Mayor shall be expended after 1/1/89, if, "using existing powers, the Department of Human Services has not implemented a system of mandatory reporting of individual abortions performed in [D.C.}" and categories of data similar to those of the National Center for Health Statistics; provided that the reporting does not require the name of the aborting woman or the abortion provider, that their names remain strictly confidential, and that the "data be used for statistical purposes only." 282

No appropriated funds shall be obligated or expended after 12/31/88 unless by that date, the D.C. Council has amended section 1-2520 of the D.C. Code by adding the following subsection: "(3) [n]otwithstanding any other provision of the laws of [D.C.], it shall not be an unlawful discriminatory practice in [D.C.] for any educational institution that is affiliated with a religious organization or closely associated with the ten-

278. Id. at 2269-13 (§ 140(a)).
279. Id. (§ 141(a)).
280. Id. (§ 141(b)).
281. Id. (§ 143).
282. Id. (§ 144).
ets of a religious organization to deny, restrict, abridge, or condition —
(A) the use of any fund, service, facility, or benefit; or (B) the granting
of any endorsement, approval, or recognition, to any . . . persons that
are organized for, or engaged in, promoting, encouraging, or condoning
any homosexual act, lifestyle, orientation, or belief." 283

283. *Id.* at 2269-14 (§ 145(b)).