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Domination, Democracy, and the District: The Statehood Position

Jamin B. Raskin

COMMENTARY

DOMINATION, DEMOCRACY, AND THE DISTRICT: THE STATEHOOD POSITION

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"To secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."
Declaration of Independence

Albert Camus once wrote: "One day a slave who has been taking orders all his life suddenly decides that he cannot obey some new command . . . ," and so he says, "no more."[1] The moment of break through recognition and defiance described by Camus has arrived to topple dictators and repressive political regimes everywhere, speading democratic practices and the spirit of freedom throughout the world. This moment may also be approaching finally in the District of Columbia, the Nation's Capital, where Congress in 1862 first abolished slavery in the United States, and the Nation's last colony, where the movement against second-class citizens and for statehood is slowly gaining political momentum in 1990. This Commentary sets forth the case for District of Columbia statehood in constitutional and legal terms.[2] It explains why no legislative reform of the current legal regime will suffice to vindicate principles of American federalism as they relate to citizens living in the District of Columbia. This Commentary also attempts to refute Professor Seidman's double-barreled argument that statehood for the people of the District would be superfluous because "current legal doctrine,

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1. A. CAMUS, THE REBEL 13 (A. Bower trans. 2d ed. 1956).

2. For the more explicitly political argument for District of Columbia statehood, see Jackson, *Foreword: The State of New Columbia — A Call for Justice and Freedom*, 39 CATH. U.L. REV. 307 (1990).

properly understood, already provides the District with many of the protections that supposedly would come with statehood" and would be ineffective because "statehood standing alone would not provide a significant legal bulwark against congressional domination."[3] In fact, this Commentary argues, current legal doctrine provides the District with practically *none* of the protections that accompany statehood, and statehood would provide substantial, if not complete, insurance against congressional domination and discrimination. This Commentary then considers the strategic suggestions of Professor Schrag for the statehood movement[4] and proposes an alternative path. This path would continue the statehood initiative process presently in motion and accelerate it with mass organizing and public protest to dramatize and transform the District's oppressed condition.[5] Finally, this Commentary evaluates as an intermediary strategy for obtaining statehood the plan recently proposed by Representative Stan Parris of Virginia to give District residents the right to vote in federal elections in the State of Maryland.

I. THE CONSTITUTIONAL AND LEGAL THEORIES SUPPORTING STATEHOOD

"The tangled web of democracy in the District of Columbia is not easy to sort out or unravel."[6] It is abundantly clear, nonetheless, both as a matter of constitutional interpretation and American political history, that the constitutional provisions and federal law governing the District of Columbia guarantee national political domination of the local population. The United States Constitution's district clause, article I, section 8, clause 17, states that Congress shall exercise "exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ."[7] This categorical constitutional grant of power permits a double form of political domination by Congress that has given rise to the District population's intimate historical familiarity with arbitrary rule, colonial insult, and official contempt.[8]

3. Seidman, *The Preconditions for Home Rule*, 39 CATH. U.L. REV. 371 (1990).

4. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U.L. REV. 311, 350 (1990).

5. *See infra* notes 82-97 and accompanying text.

6. United States v. Cohen, 733 F.2d 128, 149 (D.C. Cir. 1984) (Mikva, J., concurring).

7. U.S. CONST. art. I, § 8, cl. 17.

8. The District population's mistreatment at the hands of Congress is well-known. *See* Schrag *supra* note 4, at 312-16. For example, four years after African-American males were given the right to vote in local elections, the Congress, in 1871, simply abolished the elected mayor and council, replacing them with a governor and council appointed by the President.

First, its constitutional "plenary power" over the District affords Congress complete authority to exercise "powers as local sovereign . . . ."[9] The congressional role of "local sovereign" displaces and supplants whatever rights of political autonomy might be secured to District residents by the tenth amendment, the republican guaranty clause, or any other right arguably inherent in the existence of a local community of American citizens.[10]

The delegation of legislative power to the District of Columbia Council through the District of Columbia Self-Government and Governmental Reorganization (Home Rule) Act[11] leaves these essential dynamics of power intact because this delegation is "neither complete nor irrevocable."[12] Section 601 of the Home Rule Act reserves to Congress "the right, at any time, to exercise its constitutional authority as legislature for the District on any subject . . . including legislation to amend or repeal any law in force in the District . . . and any act passed by the Council."[13] Moreover, in a more fundamental sense, Congress always retains its plenary constitutional authority and thus can simply abolish the Home Rule Act itself.[14]

Second, the United States Constitution's district clause has also been interpreted to give Congress the authority to treat District residents differently than the residents of the other fifty states from the standpoint of federal legislation.[15] In *United States v. Cohen,* the United States Court of Appeals

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GOVERNMENT OF THE DISTRICT OF COLUMBIA, HISTORIC HIGHLIGHTS 9 (1986). Congress did not see fit to give District residents the right to vote for President until 1961. *Id. See also* U.S. CONST. amend XXIII.

9. *Cohen,* 733 F.2d at 141, 144. The District clause has been interpreted to give "Congress near-plenary authority over the structure of the government in the District." Clark v. United States, 886 F.2d 404, 406 (D.C. Cir. 1989). *See also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 485 U.S. 50, 76 (1982); Palmore v. United States, 411 U.S. 389, 397-98 (1973).

10. The tenth amendment does not furnish a source of indigenous rights for American citizens living within the District because it provides only that the "powers *not delegated to the United States by the Constitution* . . . are reserved to the States respectively, or to the people." U.S. CONST. amend X (emphasis supplied). Meanwhile, the republican guaranty clause applies only to the people of the "states." U.S. CONST. art. IV, § 4. Even Judge Mikva, perhaps the most sympathetic judge the people of the District have on the bench, concurs with that conclusion. *See Cohen,* 733 F.2d at 146. With these general grants of democratic local power removed, the powers claimed by way of the District clause easily prevail over any other claim to inherent rights of self-government.

11. Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. CODE ANN. at 175 [hereinafter Home Rule Act].

12. *Clarke,* 886 F.2d at 407.

13. Home Rule Act, *supra* note 13, § 601.

14. *Clarke,* 886 F.2d at 407. The prospect of Congress abolishing home rule is neither unprecedented, *see* HISTORIC HIGHLIGHTS, *supra* note 8, at 9, nor currently unthinkable, *see* 135 CONG. REC. H4918 (daily ed. Aug. 2, 1989) (statement of Rep. DeLay).

15. *See Cohen,* 733 F.2d at 139.

for the District of Columbia Circuit held that discriminatory federal treatment of District residents triggers neither fifth amendment "strict scrutiny" nor "intermediate scrutiny," but merely "rational basis scrutiny."[16] The court then punctured even this weak standard of review, stating that, "in a sense the Constitution itself establishes the rationality of [a discriminatory] classification, by providing a separate federal power which reaches only the present group."[17] The court came to this circular conclusion by considering the constitutionality of legislation that discriminates against District residents through the lens of congressional powers instead of from the standpoint of individual rights. Judge Mikva, in his concurrence, remarked that the

> majority transforms Congress' 'plenary power' over the District of Columbia into a talisman that gives Congress carte blanche to treat District inhabitants as appropriate specimens for all sorts of experimental national legislation . . . . Congress is ceded virtually unfettered authority to single out District of Columbia inhabitants for disparate treatment under federal statutory schemes.[18]

16. *Id.* at 132-36. In *Cohen*, the court upheld the congressionally-enacted District statute that required the committal to mental institutions of District criminal defendants acquitted by reason of insanity. *Id.* at 138-39.

17. *Id.* at 139.

18. *Id.* at 141, 144. A schizophrenic social vision of the District of Columbia informs the majority decision in *Cohen*. At times, the local population is implicitly likened to children, *id.* at 135 ("even if one accepts the thesis that the class in question is residents of the District of Columbia, the mere lack of the ballot does not establish political powerlessness, or, if it does, political powerlessness alone is not enough for 'suspect class' status. *Minors, for example, are not a suspect class.*") (emphasis supplied, citations omitted), or other historically disfavored and oppressed groups, such as American Indians. *Id.* at 139. But, at other times, the court seems to take judicial notice of Washington's power elite, a social stratum the existence of which apparently renders the rest of the populace's need for rights unnecessary. *Id.* at 135 ("It is, in any event, fanciful to consider as 'politically powerless' a city whose residents include a high proportion of the officers of all three branches of the federal government, and their staffs."). The court's apparent bedazzlement by an elite group "within which the most politically powerful members of society are particularly likely to be included" blocks its attention from the fact that the District population is overwhelmingly made up of ordinary citizens who neither occupy high federal office nor work in the Federal Government. The District's history of political domination would indicate that the effectively disenfranchised local population, which is majority African-American and plagued by the nation's highest illiteracy rate, highest high school drop-out rate, and highest infant mortality rate, should be considered a "suspect class" within the meaning of *Plyer v. Doe* for the purpose of equal protection. The District population, which did not even vote in presidential elections until 1961, has "historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " Plyer v. Doe, 457 U.S. at 217 n.14 (quoting San Antonio Indep. School Dist. v. Roderiquez, 411 U.S. 1, 28 (1973)). But, of course, the court finds otherwise, splitting the District population into two parts, infantalizing one and glorifying the other.

Therefore, from the standpoint of both basic self-governance and the right of equal treatment as a political community, the relationship of the District to Congress does not at all resemble the relationship of the States to Congress. Nor is the relationship even comparable to the unequal and imbalanced relationship of other American cities to the State legislatures which charter them. The inhabitants of other cities at least vote for representatives to their State legislatures and thus possess a kind of interlocking check against state abuse of local prerogatives and interests.[19] But District residents have no voting representation in the national legislative body that ultimately controls their land, their laws, and even their lives. Without any meaningful voice in the legislative process, without the semblance of participatory equality, the people of the District have no check against legislative tyranny.[20]

The federal disenfranchisement, subjugation, and taxation of the District population plainly offend the root principle of democracy enshrined in the Declaration of Independence: that all just powers derive from the consent of the governed.[21]

It should be axiomatic by now that, because the constitutional structure assures federal domination over the District, there can be no truly effective or durable reform of the current system. As Professor Seidman correctly notes before coming to very different conclusions than are reached here, "Real sovereignty is indivisible, irrevocable, and unconditional."[22] Of course, as Seidman recognizes, sovereignty is often quite divided, tentative, provisional, and conditional. But District citizens, living even under the expanded home rule suggested by Professor Schrag,[23] cannot be sovereign to any meaningful degree within the structure of congressional control created by the District clause. Even if the District went from congressional scape-

19. The Supreme Court has long held that all municipal power is derivated from the state, and that state legislative power is plenary except if limited by State or Federal Constitution. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted to them."); Williams v. Mayor of Baltimore, 289 U.S. 36, 40, 53 (1933) (stating that a municipal corporation possesses "no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator").

20. Indeed, the District of Columbia Court of Appeals inadvertently suggested the better analogy for the political situation of District residents in *Cohen*. There the court justified the different treatment of the District under federal law by comparing congressional power over the District population to congressional power over the the American Indian population. *See Cohen*, 733 F.2d at 139. America's Indian population has, of course, been subject to brutality, systematic displacement, slaughter, and governmental oppression.

21. The Declaration of Independence (U.S. 1776).

22. Seidman, *supra* note 3, at 371.

23. *See generally* Schrag, *supra* note 4.

goat to congressional darling overnight and Congress magically granted all of the reforms suggested by Professor Schrag,[24] the continuance of the population's federal legislative disenfranchisement and Congress' final control over local legislation would still render the local populace more subjects than citizens. At any rate, the "piecemeal approach" of struggling to gain greater autonomy in six spheres of "diminished political rights" is politically unlikely to succeed, easily reversible if it did, potentially damaging to the cause of statehood in the meantime, and essentially unthreatening to the structure of political subjection of the District population.[25]

In the final analysis, however, the simple fact that the citizens of the District have already decided to seek complete and lasting political equality by way of statehood rather than to place their eggs in the shaky basket of piecemeal reform constitutes the dispositive departure point.[26] To acquire the political rights enjoyed by American citizens living in the fifty states, the

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24. *Id.* at 322-45.

25. Schrag's useful taxonomy identifies the areas of "diminished rights" as: "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." *Id.* at 322.

But, given the current condition of federal-District affairs, legislative reform in any of these areas can only be regarded as extremely unlikely. The timid posture of constantly seeking minor concessions in a colonial context invites contempt and reinforces the basic power dynamics at work. Each bill to expand local control over criminal prosecution will be an opportunity for grandstanding about the crime rate in the District, just as every request for greater legislative autonomy will be an invitation to revisit the pre-arrest adventures of Mayor Barry. LaFraniere, *Barry Arrested on Cocaine Charges in Undercover FBI, Police Operation; Sources Say Mayor Used Crack in Downtown D.C. Hotel Room,* Wash. Post, Jan. 19, 1990, at A1, col.1. The piecemeal reform agenda could in fact expose the people of the District to more ridicule and more legislative interference than they presently experience.

Even if Congress approved piecemeal reforms, the people of the District still would not enjoy full political rights, either as American citizens or as an American city or State. For example, if Congress provided that, for local laws involving the criminal code or 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" instead of the petition of one member, that still leaves in place the basic structure of control. Congress could still repeal District of Columbia legislation, a possibility that the inhabitants of no other American city must face.

At any rate, under the current regime, what reforms Congress giveth so can it taketh away. Reforms under a vertical power relationship are inherently unstable and never should be considered as a long-term solution. As Professor Schrag correctly notes:

> 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.

Schrag, *supra* note 4, at 332.

26. *See* H.R. REP. NO. 305, 100th Cong., 1st Sess. 18-20 (chronology of New Columbia's petition for statehood).

people living under congressional rule must escape the geographic and political boundaries of the District of Columbia and form their own State. This is the emancipatory political project defined by the nascent state of New Columbia, whose citizens ratified the constitution by referendum on November 2, 1982, and sent it to Congress in September 1983.[27]

The current statehood bills before the House of Representatives and the United States Senate would redraw the lines of the District of Columbia so that the District would include only the so-called "Federal Enclave," which includes the White House, the Capitol Building, the congressional office buildings, the United States Supreme Court Building, the principal federal monuments, and other federal buildings.[28] The remaining land mass between the District and Maryland would be recognized by Congress and admitted to the American union as the State of New Columbia.[29] It is important to note the exact structure of this solution because the effect of the proposal is not, as popularly supposed, to promote the District of Columbia to statehood, but rather to negotiate a kind of popular exodus from congressional domination into statehood by radically restricting the land taken in by the boundaries of the District of Columbia.[30]

The statehood solution, therefore, does not assume that congressional control over the seat of the Federal Government amounts to an inherently negative or oppressive constitutional feature, unique though it may be in the constitutional designs of contemporary democratic states.[31] In fact, the district clause had an intelligible genesis in the Founders' concern that no individual State dominate through proximity and police power the workings of the National Government. This concern was apparently heightened in June 1783 when an unruly band of disgruntled Revolutionary War soldiers who had not been compensated for their services threatened Congress. Ignoring

27. CONSTITUTION OF THE STATE OF NEW COLUMBIA, 1 D.C. CODE ANN. at 72-116 (Cum. Supp. 1989).

28. H.R. 51, 101st Cong., 1st Sess. (1989). Congress fixed the Federal enclave boundaries in District of Columbia Self-Government and Governmental Reorganization Act, § 3739(a)-(f), Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. CODE ANN. at 175, 235-41 (National Capital Service Area).

29. Senators Kennedy and Simon are expected soon to introduce similar legislation in the Senate.

30. For a provocative examination of the political meaning of the Exodus story, see WALZER, EXODUS AND REVOLUTION (1986). The shrewd and skeptical questions raised by Edward Said in *"Michael Walzer's Exodus and Revolution: A Canaanite Reading,"* in E. SAID & C. HITCHENS, BLAMING THE VICTIMS (1988), however, provide a haunting look at the dark side of "exodus politics" and liberation through statehood. Both images of the statehood process should be contemplated by statehood advocates.

31. The United States is the only nation on earth that denies representation in its National Legislature to citizens living in the Capital City. D.C. STATEHOOD COALITION, TO FORM A MORE PERFECT UNION: D.C. STATEHOOD NOW! (1990) [hereinafter STATEHOOD NOW!].

the call from Congress, the Governor of Pennsylvania refused to dispatch its State militia to suppress the protest. This fateful event influenced the Framers' decision to carve out a relatively small piece of land, "no greater than ten miles square," that would be the "Seat of Government" under the exclusive control of the Congress.[32] This arrangement was suitable in 1800 when the States were in fact much stronger, the Federal Government much weaker, and the District of Columbia had only 3,200 residents. The District's meager population amounted to generally part-time residents overwhelmingly composed of federal office-holders. It could not have qualified for statehood even if the residents constituted a self-identified, independent political community because at that time, statehood required 60,000 citizens and 30,000 for the establishment of a congressional district.[33]

What made sense in 1800, however, is insensible and indefensible today. Far from being weak and vunerable, the Federal Government now represents a large entity sprawling all over Virginia and Maryland (not to mention other states), as well as the District. The District of Columbia boasts a population larger than each of five other States. It has a diverse economy and a vibrant local political community seeking full political rights through statehood. The Foreword by Reverend Jesse Jackson captures the modern realities of the District that make statehood the most satisfactory solution.[34] As Professor Schrag so carefully demonstrates, and as the Committee on the District of Columbia found in 1987,[35] the Constitution does not bar passing statehood for New Columbia while reserving to Congress exclusive jurisdiction over the newly drawn District of Columbia. We can thus reconcile the basic citizenship rights of District citizens with the Framers' contemplation of physical and political distance between individual States and the Federal Government.

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32. *Id.*; *see also* U.S. CONST. art. I, § 8, cl. 17.

33. STATEHOOD NOW!, *supra* note 31.

34. Jackson, *supra* note 2. Assuming the injustice of the disempowerment and effective disenfranchisement of the people of the District, it is still possible, of course, to arrive at political conclusions other than statehood. Professor Schrag usefully canvasses the alternatives to statehood, finding that retrocession to Maryland, recently proposed by Congressman Ralph Regula, is probably not politically viable, despite Governor Schaefer's recent statements welcoming a return of the lands Maryland ceded to the Federal Government in 1788. Schrag, *supra* note 4, at 318-20; Baker, *Schaefer Invites the District to Reattach Itself to Maryland,* Wash. Post, Feb. 26, 1990, at A6, col.1. But Professor Schrag's instincts on this question seem generally more sound: The majority of District residents favor statehood, as established by the referendum in 1981, and evince no enthusiasm about "returning" to Maryland, while most Marylanders seem to be taking the position that one Baltimore is enough. Schrag, *supra* note 4, at 320 & n.5. The possibility of a new state composed of "Montgomery and Prince George's Counties in Maryland, and the northern counties of Virginia" seems even more farfetched. *Id.* at 321.

35. H.R. REP. NO. 305, 100th Cong., 1st Sess. 21-23.

II. THE PARAMOUNT IMPORTANCE OF STATEHOOD

As the foregoing suggests, statehood represents the only authentic form of political equality for American citizens living in the District of Columbia. Professor Seidman very well describes the accelerating interference with the affairs of the people of the District over the last several years, the continuing and humiliating price of life in the "Seat of Government."[36] Yet, Seidman exerts considerable energy to diminish the meaning and importance of statehood. He argues that "current legal doctrine, properly understood, already provides the District with many of the protections that supposedly would accompany statehood"[37] and that, at any rate, "statehood standing alone would not provide a significant legal bulwark against congressional domination."[38] These claims, divorced from legal and political reality, are simply too clever by half and cannot survive critical scrutiny.

Seidman contends that statehood represents the wrong focus because congressional legislation regarding the District of Columbia must already obey "a single overarching constitutional principle: Congress may not enact legislation that is the product of the political impotence of the District and its residents. Although Congress has the constitutional authority to legislate, it lacks the constitutional authority to dominate."[39] Regardless of the attractiveness or intelligibility of this principle, it is wholly without basis in the law of the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court, in its current conservative disposition, almost certainly would reject it. In *Cohen,* the court of appeals restated its acceptance of not only complete congressional control by Congress over the District's local affairs but Congress' power to develop federal policies that treat District residents differently from other citizens. The court subjected federal legislation discriminating against the District to a "mere rationality test" under the equal protection clause and embraced the tautological principle that "in a sense the Constitution itself establishes the rationality" of classifications that discriminate against the District "by providing a separate federal power which reaches only the present group."[40]

Thus, in doctrinal terms, the "constitutional authority to legislate" for the District actually *encompasses* "the constitutional authority to dominate" it. Seidman's attempt to draw a legal distinction between legislation and domi-

36. Seidman, *supra* note 3, at 373-75. Such interference takes the form of both direct congressional veto of D.C. legislation and the use of appropriations riders to control the particulars of local affairs. *Id.*

37. *Id.* at 376.

38. *Id.*

39. *Id.* at 378.

40. United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984).

nation in this regard represents a bit of jurisprudential wishful thinking neither grounded in extant constitutional law nor capable of any principled *a priori* definition. From a political standpoint, all legislation by a foreign sovereign, whether benevolent or hostile in the eyes of local resident, by definition constitutes a form of domination. From the perspective of Congress, all of its District legislation is simply "legislation"; from the perspective of District residents, it is all "domination."

Thus, *all* congressional legislation concerning the local affairs of the people of the District "is the product of the political impotence of the District and its residents."[41] The people of no other city or State must endure the rule of Congress over local matters like a commuter tax, a tax on non-resident income, the hours swimming pools are to be open, the spending of local monies on abortion, and the like.[42] The people of no other city or State must endure federal policies that discriminate against them as unequal to other American citizens. The District population would not endure these indignities and injustices either if not for its own "political impotence."

As a normative matter, Seidman correctly anticipates both methodological and philosophical objections to his thesis favoring the justiciability of legislation that crosses the line to domination. "Such an effort," he concedes, "requires judges to imagine a fully representational hypothetical political process with participants authentically committed to discovering and implementing the public good. Then judges must predict what legislation such a process would produce."[43] Leaving aside the epistemological problem of predicting the result of a process that never existed and never will exist, the legislation-versus-domination thesis misreads the proper function of the judicial branch. The judicial branch does not determine whether specific legislative results live up to a hypothetical "best legislative solution" (whatever that may be), but rather judge whether those results violate defined constitutional rights or boundaries. A court simply has no institutional competence to overturn a "bad" or imperfect legislative result that is within the authority of the legislature to pass.

Seidman's position encloses no limiting principle to constrain judicial activism. Based on his theory, any court with procedural jurisdiction could overturn any legislation that the judge believes does not sufficiently implement the hypothetical "public good." But turning judges into super-legislators contradicts the premise of both representative and participatory democracy, in which the prevailing assumption is that the public good

41. Seidman, *supra* note 3, at 378.

42. *See generally* Schrag, *supra* note 4, at Appendix.

43. Seidman, *supra* note 3, at 402.

emerges from an actual, as opposed to hypothetical, public dialogue informing the electoral and legislative processes.[44] At any rate, the hypothetical public good, the one envisioned by citizens meeting in John Rawls' "original position"[45] can never quite be achieved because the "veil of ignorance" concealing from citizens their personal fortunes does not exist at any actual point in history. But our constitutional system gambles that the open and imperfect processes of the legislative branch capture the spirit of the common good and democratic progress better than the politically impervious and inscrutable process of judical review.

Professor Seidman, however, is still right, as a matter of constitutional law, to observe that the District power, "like all of Congress' Article I powers, is subject to restraints contained in the rest of the Constitution."[46] But surely he is wrong to conclude from this observation that "properly understood, these restraints sweep broadly indeed, providing the District with protection against violations of home rule that virtually equal the protections the District would enjoy as a State."[47]

To see why Seidman is right as to his first assertion and wrong about his second, consider the following hypothetical (and not-so-hypothetical) examples. The United States Congress could not constitutionally bar African-Americans from use of the swimming pool at the Woodrow Wilson High School in Northwest Washington because federal racial discrimination violates the fifth amendment. In this sense, the citizens of the District possess the same federal constitutional rights as the citizens of other states. But the Congress can, *and did,* close the swimming pool at the Woodrow Wilson High School to the general public after 9:00 p.m.[48] In this sense, the citizens of the District as a political community surely lack the same "protection against violations of home rule" enjoyed by citizens of the States.

We can quickly reproduce the examples. The Congress could not impose the death penalty on District taxicab drivers who place meters in their cabs

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44. *See, e.g.,* BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989) (a conservative and not altogether compelling rendering of this basic democratic principle).

45. J. RAWLS, A THEORY OF JUSTICE (1971).

46. Seidman, *supra* note 3, at 378. The United States Court of Appeals for the District of Columbia Circuit articulated the position in United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), that "Congress' power over the District, like all powers in our system of government, has constitutional limits . . . it is no response to contend . . . that Congress was exercising its 'plenary power' when it created . . . an irrational classification." *Id.* at 1338. The court cast some doubt on this principle generally in *Cohen* and clearly tossed it away as it relates to Equal Protection. United States v. Cohen, 733 F.2d 128, 138 (D.C. Cir. 1984).

47. Seidman, *supra* note 3, at 378.

48. District of Columbia Appropriation Act, 1975, Pub. L. No. 93-405, 88 Stat. 822, 826 (1974) (1975 Appropriation).

(it would offend the eighth amendment), but the Congress *has* constitutionally used the District power to forbid installation of meters in District cabs in the first place.[49] The Congress could not prevent women from attending law school at the University of the District of Columbia, but it could prevent the city from ever having a law school at the University of the District of Columbia. In short, the citizens of the District have almost the same constitutional rights *as individuals* as residents of the States. They lack *as a political community* the rights the people of the States have to self-governance on the local level without congressional interference, the rights the people of the States have to equal treatment by Congress under the fifth amendment, and the rights of representation in Congress to prevent national usurpations of local prerogatives.

Professor Seidman's avoidance of these fundamental political and legal realities reduces the utility of his intriguing treatment of *Clarke v. United States.*[50] Seidman employs *Clarke* as a "case study" to demonstrate the proposition that constitutional side restraints already operate to "provide[ ] the District with many of the protections that supposedly would accompany statehood."[51] Mobilizing a number of constitutional arguments to his position, Seidman argues that even if Congress had enacted the Armstrong amendment directly instead of unconstitutionally coercing members of the District's council to vote for it, the new law would have been struck down. Although this outcome is uncertain, Seidman produces compelling argu-

49. *See* 1975 Appropriation, 88 Stat. at 827; District of Columbia Appropriation Act, 1976, Pub. L. No. 94-333, 90 Stat. 785, 791 (1975) (1976 Appropriation); District of Columbia Appropriation Act, 1977, Pub. L. No. 94-446, 90 Stat. 1490, 1494 (1976); District of Columbia Appropriation Act, 1978, Pub. L. No. 95-28, 92 Stat. 281, 287 (1977) (1978 Appropriation); District of Columbia Appropriation Act, 1979, Pub. L. No. 95-373, 92 Stat. 699, 704 (1978) (1979 Appropriation); District of Columbia Appropriation Act, 1980, Pub. L. No. 96-93, 93 Stat. 713, 717 (1979) (1980 Appropriation); District of Columbia Appropriation Act, 1981, Pub. L. No. 96-530, 94 Stat. 3121, 3126 (1980) (1981 Appropriation); District of Columbia Appropriation Act, 1982, Pub. L. No. 97-91, 95 Stat. 1173, 1180 (1981) (1982 Appropriation); District of Columbia Appropriation Act, 1983, Pub. L. No. 97-378, 96 Stat. 1925, 1931 (1982) (1983 Appropriation); District of Columbia Appropriation Act, 1984, Pub. L. No. 98-125, 97 Stat. 819, 825 (1983) (1984 Appropriation); Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984)) (1985 Continuing Appropriations) (1985 Appropriation); Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (1986 Continuing Appropriations) (1986 Appropriation).

50. 886 F.2d 404 (D.C. Cir. 1989).

51. Seidman, *supra* note 3, at 376. This argument is especially overstated since the United States Court of Appeals for the District of Columbia Circuit's decision *Clarke v. United States* was based on the narrow holding that the Armstrong amendment, which required members of the District council to vote a certain way, violated their first amendment "right to vote freely on issues as they arise." *Clarke,* 886 F.2d at 411.

ments that the law would violate the establishment clause.[52] And yet this elegant bit of lawyering begs the central question. While the establishment clause might prevent Congress from exempting only religiously-based educational institutions from the jurisdiction of the District of Columbia Human Rights Act, no extrinsic constitutional principle could keep the Congress from simply repealing the entire Human Rights Act or abolishing the District's council altogether. This is the omnipresent threat, the deep reality, that Seidman avoids but that makes the current regime anti-democratic and ultimately intolerable.

It is true, as evidenced by *Clarke,* that this or that victory in court occasionally can be won against federal interference with local affairs that violates other constitutional rights or principles. Perhaps "competent lawyering could produce comparable, albeit different, arguments to combat other threats to home rule."[53] But understanding the severe limitations of this approach is more important. *Even if the District successfully litigated every case in which Congress violated the constitutional rights of its citizens, the citizens of the District as a political community would have nothing like the political rights of the citizens of a State.* The basic assumption of both the District clause and the Home Rule charter is that Congress has the authority to legislate on any local matters in any way it deems fit within the side constraints of other constitutional principles. The District's best friend on the District of Columbia Circuit, Judge Mikva, captures this fundamental reality:

> When . . . Congress acts in its purely local capacity, courts simply do not possess the tools or the standards to police the congressional action via anything other than the constitutional strictures ordinarily applicable to state legislative action, *even if the disenfranchisement of District residents makes it just as likely that Congress has acted without due regard to the interests of those residents in passing local, as well as national, legislation.* If there is 'bite' to the 'ten miles squared' provision it is in this respect . . . ."[54]

Thus, Seidman's approach of litigating federal injuries to citizens of the District will work only in exceptional cases, like *Clarke,* when other constitutional rights are offended.[55] In this way, nothing will be achieved against

52. Seidman, *supra* note 3, at 399-400. Seidman's arguments about equal protection and due process are far less compelling given the emasculation of the principles as applied to the District. *See supra* notes 56-63 and accompanying text.

53. Seidman, *supra* note 3, at 400.

54. United States v. Cohen, 733 F.2d 128, 146 (D.C. Cir. 1984) (Mikva, J., concurring) (emphasis supplied).

55. Even there, Seidman probably overstates his case, given the steady judicial retreat from the doctrine of "unconstitutional conditions." *See* L. TRIBE, AMERICAN CONSTITU-

the ordinary course of congressional legislation for District affairs. More to the point, combatting "threats to home rule" in court constitutes an essentially defensive and timid posture that does not equal self-government and never will achieve statehood or equality. As a political strategy for liberation from the antiquated arrangements of the District clause, this approach invests far too much faith in litigation while ignoring the central political processes already set into motion by the statehood initiative.

Professor Seidman's eagerness to deduce an "anti-domination" principle from a generally unavailing body of constitutional case law leads him to somewhat surprising results, such as his solemn assurance that "[T]he Constitution does not permit the government to show contempt for its citizens even when, indeed, *especially* when, they are excluded from the political process."[56] Professor Seidman cites no live authority for this remarkable proposition in the text of the Constitution or constitutional case law.[57] But, absent specific constitutional prohibitions, much of American constitutional history cuts in exactly the opposite direction with respect to official state contempt for excluded or minority citizens.

Consider, for example, the Supreme Court's pro-slavery, anti-African-American *Dred Scott* decision;[58] its upholding of the racist detention and internment of Japanese-Americans in *Korematsu v. United States;*[59] its approval of anti-sodomy statutes as applied to homosexuals in *Bowers v. Hardwick;*[60] or almost any case relating to the rights of American citizens living in prison. All of these major decisions have permitted "the government to show contempt for its citizens even when, indeed, *especially* when, they are excluded from the political process."[61] Indeed, the Supreme Court would not have handed down any of these three decisions against those generally *included* in the political process: white heterosexual Americans not living in prison. In *Bowers,* the Supreme Court went so far as to read into the challenged state statute a nonexistent qualification limiting application of the

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TIONAL LAW 681-85 (2d ed. 1988) (discussion of the "now somewhat eroded twentieth century doctrine of 'unconstitutional conditions' ").

56. Seidman, *supra* note 3, at 400.

57. The only citation is to United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), but *Cohen* essentially overruled this decision. In *Cohen,* the court held that "[w]e do disapprove . . . the rationale expressed in that decision . . . that distinctive legislative treatment of the District is 'particularly suspect' and thus requires more than a rational basis to support it. We reject that concept whether applied to legislation that is assertedly 'local' or assertedly 'national' . . . ." *Cohen,* 733 F.2d at 136 n. 12.

58. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

59. 323 U.S. 214 (1944).

60. 478 U.S. 186 (1986).

61. Seidman, *supra* note 3, at 400; *see also supra* text accompanying notes 47-48.

statute to homosexuals.[62] As a general matter, official contempt for citizens excluded from the political process has been permitted absent a violation of an extrinsic constitutional prohibition or right.[63]

Professor Seidman's "anti-domination" principle makes good democratic politics but bad constitutional law, and the two ought not be confused. Those seeking freedom from unjust arrangements should approach courts with a deadly sober recognition of what is possible and what is not. What is clearly not possible is abolition of the current regime of domination through appeal to vague constitutional principles in the court. What is possible, however, is statehood, and the statehood movement is currently engaging in the decisive battle against political domination.

Yet, strangely again, Professor Seidman dismisses the significance of statehood, ignoring that only through statehood have formerly locked-out and subjugated groups and regions in the United States won their freedom from federal domination and their political equality as communities.[64] Reluctantly conceding that "arguments resting on the anti-domination principle may not ultimately prevail" in court, he goes on to state that "the crucial point is this: *without such a principle, the District's status would remain unchanged even if it secured statehood.* The legal guarantee of unconditional state sovereignty also rests on the anti-domination principle. Thus, without such a principle, statehood would be useless . . . ."[65]

But the realities of the American political system do not sustain Professor Seidman's extreme skepticism about the significance of statehood. The inexistence of an inherent "anti-domination" doctrine in American constitutional law does not render statehood "useless"; it is what makes statehood *necessary.* Only the raw currency of political power achieved through statehood can protect an American community from the injuries and indignities visited upon it by an essentially foreign sovereign.[66] As the District of Columbia circuit noted in *United States v. Thompson:* "Minorities can usually

62. 478 U.S. at 188 & n.1.

63. Even with regard to the republican guaranty clause, which would most closely furnish the substance for a constitutional "anti-domination" principle, the Supreme Court from the very beginning has refused to judge whether the existing political structure is guaranteeing authentic democratic access and processes. In Luther v. Borden, 48 U.S. (7 How.) 1 (1849), the Supreme Court held that a federal court could not determine which of two competing state governments from Rhode Island was properly representative. Instead, the court held, republican representation is a political question that should be decided by the people through their representatives in Congress.

64. H.R. REP. No. 305, 100th Cong., 1st Sess. 18-20 (1987) (history of statehood).

65. Seidman, *supra* note 3, at 403.

66. Thus, the end of the brief reign of National League of Cities v. Usery, 426 U.S. 833 (1976), brought on by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *underscores,* as opposed to diminishes, the necessity for statehood: "State sovereign interests

protect themselves by playing their role in the political process and forming coalition with other groups to secure a majority."[67]

But Seidman questions the efficacy of this political insurance policy, which is perhaps the lynchpin of vertical federalism in America. He suggests that "[i]f enough representatives from other States undervalue the welfare of inhabitants of the District, or do not bother with a dialogue with District representatives concerning the public good, then they will simply outvote the District's representatives."[68] But, of course, this unlikely ganging-up scenario could apply equally to any other State. Yet Seidman worries that "District representatives might be forced to devote a disproportionate amount of their time and resources to maintaining self-government,"[69] which leads to his even more extreme anxiety that "the price of home rule might be relative disenfranchisement on other national issues."[70] Such fears seem greatly misplaced given the ready assimilation of representatives of new states into America's legislative institutions even after hysterical and racist campaigns are waged in Congress.[71]

At bottom, Seidman doubts the ability of "logrolling" to preserve New Columbia's self-determination.[72] He anticipates that the District's "representatives may be restricted by the ideological commitments of their constituents," but does not explain why this would be any worse of a problem for District representatives than for the representatives of any other States.[73] He also seems to misread the real nature of legislative logrolling when he expresses concern about its "formidable enforcement difficulties."[74] He asks: "How is the District Representative to know that the Iowa delegation will make good on its promise to support home rule in exchange for votes on farm legislation?" But votes in Congress are usually not explicitly *quid pro quo.* Rather, they flow in a succession of endlessly shifting coalitions and alliances, a fluid system that favors those who make no permanent enemies (at least without good cause). Gratuitous interference with the local affairs of another State almost always amounts to a major political blunder in the

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. . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

67. 452 F.2d 1333, 1341 (D.C. Cir. 1971).

68. Seidman, *supra* note 3, at 409.

69. *Id.* at 410.

70. *Id.*

71. *See generally* R. KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893 (1963); Wilkinson, *Land Tenure In The Pacific: The Context For Native Hawaiian Land Rights*, 64 WASH. L. REV. 227, 230 n.18 (1989).

72. Seidman, *supra* note 3, at 411-12.

73. *Id.* at 411.

74. *Id.* at 412.

"Gentlemen's Club" of the Senate. A member simply cannot afford to alienate indefinitely two of his or her colleagues in order to pursue a vendetta against the population of another State. This irrational behavior by a Senator would elevate animosity towards another State over the interests of his or her home State's constituents and, thus, his or her own chances of re-election. At any rate, why a majority of both Houses of Congress would place principle over politics by approving statehood for New Columbia and then choose to override all of the principles of constitutional federalism by intervening in the local population's affairs all over again is difficult to see. For any lingering District-bashers, the mere physical presence of New Columbia representatives on the floor of the Senate would radically change the political cost-benefit calculus attending to the politics of diatribe and denunciation.[75] This deterrent factor has even more weight given the back-up power of filibuster.

Beyond these powerful institutional constraints, representatives from New Columbia will carry with them many special advantages against the possibility of continuing federal insult, interference, and domination. First, the geographic proximity of New Columbia to the federal enclave guarantees that a strong reaction from the local population and local press corps, which doubles as the national press corps, will make the political costs of discriminatory legislation far higher than any conceivable benefit. Second, the representatives from New Columbia, likely living minutes from their offices, will theoretically devote more time to institutional and committee politics and less to constant travel back and forth across the country, increasing their importance and influence on Capitol Hill. Third, the representatives of New Columbia could make certain causes common with other representatives from the region because they will share many interests with the representatives of Maryland, Virginia, Delaware, and other similarly situated States.

Furthermore, there are more direct political checks against continuing domination. The heavily Democratic political orientation of New Columbia will certainly count in its favor, at least in today's Democratically-controlled legislative bodies. The House and Senate leadership, already committed to statehood, will surely defend nonintervention as a general matter of partisan political solidarity. Also, members of Congress seeking the Presidency will treat respectfully New Columbia's representatives. Finally, the likelihood that the foundation of New Columbia will result in the racial integration of the presently all-white United States Senate will give America's growing minority communities national legislative leaders in whom millions of Ameri-

75. The presence on the House floor of the District's non-voting delegate, Walter Fauntroy, perhaps explains why the District has fared somewhat better in that body.

cans throughout every State can place their hopes. District-bashing would assume a much different meaning given this situation.

Of course, enumerating all of the formal and informal checks against domination of the people of one State by the representatives of the others would be impossible. But American political history strongly attests to the prevalence of these constraints. In general, the people and the representatives of states, whatever their political leanings, treat one another as equals within the constitutional system.[76] Surely this sense of common membership in a single political community was one of the benefits contemplated during the construction of the American bicameral legislative system. "If the residents of the District do not need the parochial protection of elected representatives to the Congress to participate in the logrolling that protects one state from being overrun by the others, it is hard to understand why the framers fought so hard to assure that even the smallest state was allotted two senators and at least one voting representative."[77]

Professor Seidman closes his article by suggesting that the desired "end is full incorporation of the District and its residents into the national political community" and that this end can be achieved "only if the country as a whole begins to understand that District residents are morally entitled to self-determination."[78] He sees "the demand for statehood" as "a tool for achieving that end, and the realization of statehood will signal its achievement. Yet statehood is not the end itself."[79]

However, statehood *is* the real end. Without it, the citizens of the District cannot be fully incorporated into the national political community. Professor Seidman's postulate reverses the usual order in which disenfranchised groups have won political and moral recognition. Statehood — whether that of Californians, Kansans, Lithuanians, or Israelis — is achieved through political struggle: petition, organizing, complaint, resistance, protest, civil disobedience, threats to leave political parties, revolution, and then, often, explicit deal-making. Moral recognition by other members of the national community follows the success of political struggle for membership as equals in the national community. The history of State admissions to the Union is filled with "pairs" of States admitted as a political compromise

76. This tradition of respect is founded on a strong legal and constitutional basis. As Professor Schrag points out, the states cannot cannot revoke another state's admission or diminish its political rights within the constitutional system. *See* Schrag, *supra* note 4, at 344.

77. United States v. Cohen, 733 F.2d 128, 146 (D.C. Cir. 1984) (Mikva, J., concurring in judgment).

78. Seidman, *supra* note 3, at 414.

79. *Id.*

between the parties, a formula last seen in the Hawaii-Alaska deal.[80] Mutual respect and participatory inclusion in the political community are not the preconditions for statehood. Although dividing the liberation project this way seems overly formalistic, statehood is more likely the precondition for mutual respect and participatory inclusion in the political community. Ironically, by trying to dilute the significance of statehood in favor of "the struggle itself,"[81] Professor Seidman waters down the only positive goal that can actually motivate the District population to rebel against the current legal and political regime.

III. Stepping Forward with Statehood

Recognizing the ultimate "revocability of any reform not entrenched or perpetuated either by constitutional amendment or by admission of the District to the Union," Professor Schrag understands that "statehood represents the best way of permanently securing for our fellow Americans in the Nation's Capital the political privileges that we who live in the fifty States have always taken for granted."[82]

But, as a strategic matter, Professor Schrag proposes to move the statehood process backwards. On November 4, 1980, more than 151,000 citizens from the District's eight wards voted in a referendum to approve the District of Columbia Statehood Constitutional Convention Initiative, which activated the statehood admission process.[83] This popular mandate, in which three-fifths of the voters said "aye," clearly demonstrated the will of the American citizens living in the District. Then, on November 2, 1982, over 110,000 residents participated in another referendum that ratified the New Columbia Constitution[84] which had been adopted and signed by the Constitutional Convention on May 29, 1982.[85] The District Council formally petitioned Congress for statehood on September 12, 1983, and statehood legislation was referred to the House of Representatives Committee on the District of Columbia,[86] which reported the legislation favorably on September 17, 1987.[87] At this point, with election of the "Tennessee Plan" Senators

80. *See generally* W. Hunt, Alaska, A Bicentennial History (1976).

81. Seidman, *supra* note 3, at 414.

82. Schrag, *supra* note 4, at 353-54.

83. *See* D.C. Code Ann. § 1-111 (1987) (accompanying legislative history).

84. Of the District residents voting, 52.8% voted in favor of, and 47.2% voted against passage of the Constitution. 29 D.C. Reg. 5253 (1982).

85. District of Columbia Statehood Constitutional Convention Transcript 142-52 (May 29, 1982).

86. H.R. Rep. No. 305, 100th Cong., 1st Sess. 18 (1987) (chronology of New Columbia's Petition for Statehood).

87. *Id.* at 19.

and House Representative scheduled for November, the game plan should be to step up public pressure, legislative lobbying, and mass education.

But Professor Schrag, revisiting the choice between statehood and incremental reform, believes that

> 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.[88]

But the two popular referenda that have already taken place should be sufficient to indicate that the people "really want statehood" and that they are deeply frustrated with the indignities of domination and the weakness and futility of a Sisyphean reform agenda.

Professor Schrag draws a gloomy picture of the state of the statehood cause, finding:

> 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, 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. The Council has repeatedly postponed the elections, which the people had called for in their 1980 initiative, for a Representative and Senators who would become highly visible advocates for statehood on Capitol Hill.[89]

These observations are not entirely inaccurate but they fail to capture the new political momentum of the statehood movement and the new political realities framing the question of power and powerlessness in the District.

The central backdrop to the statehood question now is an astonishing international movement towards democratic transformation that includes the dissolution of imperial and neo-colonial systems, extraordinary episodes of national liberation, the ouster of dictators, and the rapid spread of political self-determination and democratic practices.[90] With this remarkable spirit of

88. Schrag, *supra* note 4, at 352.

89. *Id.* at 351-52. (footnotes omitted).

90. The collapse of bureaucratic state socialism and communism in Eastern Europe, the steady liberalization of the Soviet Union, the recently gained independence of Namibia, the fall of Augusto Pinochet in Chile and Ferdinand Marcos in the Phillipines, and the spread of free

freedom and democracy transforming political arrangements around the world, the anomalous and oppressed situation of the people of the District cries out for action. Colonial rule in the very Capital of the Nation purportedly leading the world to democracy simply cannot survive, especially given the racial dynamics of the District's domination that are never far from the surface. The contradictions of the current situation are just too overwhelming.

At the same time, the widely publicized arrest and (self-proclaimed) repentance of Mayor Marion Barry may have the effect of ending the anti-District fervor that held sway in Congress during the last decade.[91] The close of this saddening episode will finally allow the terms of the political debate to shift from demagoguery to principle. At any rate, the judical system of this Nation rejects both guilt by association and collective guilt for individual acts. Therefore, using Mayor Barry's misfortunes as an excuse for denying democracy to the District's 650,000 citizens reflects political opportunism and a manifestation of the colonial mentality.

Last year's arrival in the District of Reverend Jackson means that these new openings will not be lost. A national political leader and two-time presidential candidate with a famous ability to make complex issues both morally and politically cogent, Reverend Jackson has made statehood a leading priority of the National Rainbow Coalition, which opened a local office in January 1990 to work full-time on the issue.[92] The first visible achievement of this statehood project was the Council's vote to proceed with the election of "shadow representatives" under the Tennessee plan, a move that had been postponed four times for apparently self-serving and narrow political interests.[93] The shadow delegation lobbying full-time on statehood for New Columbia will furnish a tremendous boost to the statehood movement. Delegate Fauntroy's decision to run for Mayor will also open up the Delegate's seat for the first time since its inception to new ideas and for new leadership to build on his accomplishments.[94]

On the national level, statehood has begun to resurface as an issue and promises to be a pivotal topic in the 1992 Presidential campaign. With supporters in every State and congressional district, Reverend Jackson and the

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and authentic elections throughout the third world all come to mind. *See* Dissent, *Revolution in Europe* (Spring 1990) (an excellent overview of the global turn towards democracy).

91. *See* LaFraniere, *supra* note 25.

92. *Jackson Opens A Drive For Capital Statehood,* N.Y. Times, Jan. 16, 1990, § 1.

93. *See D.C. Votes 'Shadow' Lobbyist; Council Clears Way for Jackson to Run for Statehood Post,* Wash. Post, Mar. 28, 1990, at A1, col.1.

94. Melton, *Fauntroy Takes the Wraps Off His Campaign,* Wash. Post, Apr. 11, 1990, at B1.

Rainbow Coalition have unique access to the national media and the Democratic leadership of both Houses of Congress.[95] By bypassing the Mayoral race, which many had urged him to enter, Reverend Jackson also will have the time and the unified political backing of District leaders needed to press his national political strategy for statehood. The apparent surge of the Puerto Rican statehood movement and President Bush's declared support for the cause (despite the fact that Puerto Ricans have not even petitioned for statehood) make very tangible the possibility of a legislative deal along the lines of the one that brought Alaska and Hawaii into the Union.

Of course, the statehood process is not, and should not be, a one-man show. But Professor Schrag overstates the disengagement of the District population. The recent proposals by conservative Republican Congressmen Regula and Parris, unlikely champions for the enfranchisement of District residents, could only have emerged at a moment when statehood appears to be gaining momentum in their eyes.[96] Their proposals have further stimulated controversy and interest in the fate of the District, not just within its borders but in Maryland and Virginia as well.

Professor Schrag is right to emphasize the absence of mass demonstrations, which is perhaps the principal missing ingredient in the current movement.[97] Delegate Fauntroy's proposal for District residents to withold federal income taxes as a form of civil disobedience was not so much wrong in principle as politically premature. Civil disobedience usually must follow a period of mass organizing and legal protest, all of the dramatic public manifestations of a people in motion for freedom. The people of the District are not yet at that point. Therefore, a series of mass demonstrations beginning with a march on Washington for Washington by Washington's residents seems in order. Such an event requires a galvanizing of students at local campuses, strong direction offered by church leaders, and a willingness by locally elected public officials to set aside narrow personal agendas for the greater good of political emancipation.

As part of the movement to equality through statehood, the people of the District should carefully consider Representative Stan Parris' National Capi-

95. Reverend Jackson will be hosting his own nationally syndicated television show beginning in the fall of 1990.

96. H.R. 4195, 101st Cong., 2d Sess. (1990), 136 CONG. REC. H646 (daily ed. Mar. 6, 1990) (legislation introduced by Rep. Regula providing the District of Columbia retrocession to Maryland); H.R. 4193, 101st Cong., 2d Sess. (1990), 136 CONG. REC. H646 (daily ed. Mar. 6, 1990) (legislation introduced by Rep. Parris providing District residents with voting rights in Maryland).

97. Schrag, *supra* note 4, at 351.

tal Civil Rights Restoration Act of 1990.[98] Although Representative Parris has traditionally been an outspoken foe of District automony, and therefore anathema in District politics, his proposal for the District's participation in congressional elections in Maryland may offer the best intermediate tactical step to full statehood for New Columbia.[99] Parris' proposal would maintain the District of Columbia Home Rule government but would provide for the District population's participation in the election of United States Senators and Representatives from Maryland and for its participation in the Maryland electoral college. The proposal would therefore eliminate the District's nonvoting delegate and would correspond with other legislation introduced by Parris that would repeal the twenty-third amendment,[100] which gives District residents representation in the electoral college.[101]

The principal advantage of this proposal is that, for the first time since 1800, the District residents would have voting representation in Congress and thereby real leverage and leadership for their statehood drive, while preserving whatever amount of integrity remains with their local government.[102] District participation in federal elections in Maryland would mean, at the very least, that a District populace unified in its support for statehood would be able to trade electoral support in Maryland Senate campaigns for their Senators' pledge to fight for statehood for New Columbia. At best, Maryland voters would elect one (or both) Senators from the District side, a Senator who could fight and vote for statehood. In addition, District residents would be exchanging one nonvoting delegate for at least one voting Representative in the House and probable participation in other Maryland House races.[103] Meanwhile, local issues would continue to be decided locally

98. H.R. 4193, 101st Cong., 2d Sess. (1990); *see also* Jenkins, *Parris Would Let D.C. Vote in Maryland Senate Race,* Wash. Post, Mar. 2, 1990, at D1.

99. Representative Parris views his proposal as a "reasonable compromise" between those individuals who are completely opposed of District of Columbia statehood and those who are strongly in favor of statehood and representation in Congress. *See* 136 CONG. REC. H617 (daily ed. Mar. 6, 1990) (statement of Rep. Parris). Statehood advocates who cannot imagine supporting Representative Parris on anything can take heart and be gratified that their work produced his sudden recognition, after several decades in public life, that District residents even *have* civil rights that need restoration.

100. H.R.J. RES. 504, 101st Cong., 2d Sess. (1990) (also introduced by Rep. Parris).

101. U.S. CONST. amend. XXIII. This latter provision has the transparently partisan consequence of removing three electoral votes from the District while adding only one to Maryland.

102. This advantage is not true of Representative Regula's proposal simply to retrocede the lands of the District, minus the Federal Enclave, to Maryland. This proposal disregards the likely wishes of both Maryland and District residents, populations which are fiercely and justifiably proud of their own historic political communities and boundaries, and is therefore probably not politically feasible.

103. *See* H.R. 4193, 101st Cong., 2d Sess. (1990).

as much as they ever were, and the statehood movement and transition process could continue, but now with the added force of serious national legislative leaders working for the cause of their electoral constituents. The statehood movement and the citizens of the District, who have not been represented in the United States Senate for 190 years, can only benefit from the enhanced political status and influence that the Parris bill would produce. This proposal is certainly not to be dismissed out of hand and should be considered seriously as a potentially crucial and major step towards statehood, but only as a step.

In the end, we must return to the justice and logic of the statehood cause. In American history, three questions are asked of a territory seeking political self-determination through statehood. "Does the territory have the prerequisite population and resources? Do the people of the territory desire statehood? Do the citizens have a commitment to democracy?"[104] As Reverend Jackson asserts, the future citizens of New Columbia, who already surpass in number the populations of each of five states, surely possess the population and resources to support statehood. The people of the District and their elected representatives have also repeatedly expressed their desire for statehood. And, as for their commitment to democracy, who could question the democratic devotion of more than 600,000 citizens who continue to pay federal taxes, fight and die for their country, and obey national laws, but in 1990 have no voting representation in Congress and no real powers of self-government? The real question to be posed is not whether the citizens of the District are committed to democracy, but whether the rest of the country is in fact committed to democracy for the citizens of the District.

104. H.R. REP. No. 305, 100th Cong., 1st Sess. 24 (1987) (summary of debate during hearings and markup).