March 2019

A Proposal to Win the District of Columbia a Partial Vote in the House of Representatives

Mary M. Cheh

Follow this and additional works at: https://digitalcommons.law.udc.edu/udclr

Part of the Constitutional Law Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation

This Article is brought to you for free and open access by Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law.
A PROPOSAL TO WIN THE DISTRICT OF COLUMBIA A PARTIAL VOTE IN THE HOUSE OF REPRESENTATIVES

Mary M. Cheh *

INTRODUCTION

Unlike many citizens of the United States, citizens of the District of Columbia are denied a vote in the national legislature. Not only are they denied a voting representative on matters of national scope and importance, but Congress may control all facets of local governance for the 700,000 residents of the District. This anomalous situation arises from Article I, § 8 of the Constitution, which grants Congress power to “exercise exclusive Legislation in all Cases whatsoever over such District.”

The historical reasons for Article I authority are well documented and have scant connection to twenty-first century circumstances. However, the power of Congress over the District and the disenfranchisement of its citizens remains the predominant political reality of the nation’s “last colony,” the District of Columbia (“D.C.” or “District”). Congress may regulate every aspect of local D.C. governance from parking regulations to the expenditure of local funds.

For decades, District residents have advocated for voting rights and local control of their affairs. In truth, only full statehood will put District residents on equal footing with all other United States citizens. While fighting for statehood, however, any number of proposals have come forward to secure voting representation in Congress and to establish control of local affairs. The District has made some progress, but all meaningful voting reform attempts have failed. District residents would be forgiven for expressing despair or giving up, but they are resilient and continue to seek change, even if incrementally.

This paper suggests a new initiative. It calls for the D.C. Council, under its “Home Rule” authority granted by Congress, to amend a federal law, “The District of Columbia Delegate Act,” (“Delgate Act”) and give the District’s delegate to the House of Representatives the authority to

---

* Elyce Zenoff Research Professor of Law, George Washington University Law School; Member, Council of the District of Columbia. I would like to thank Anthony Catalino, J.D., 2010, University of Wisconsin Law School, for his research assistance.

1 U.S. CONST. art. I, § 8.


3 U.S. CONST. art. I, § 8 cl. 17.

4 Id. at 69.


vote in that chamber—but exclusively on issues that apply to the District (“The Voting Proposal”). The proposal is modest, and it may not work. It might even be counterproductive if, as some may argue, baby steps dilute the full power of the District’s grievance. However, it offers a means of securing at least a partial vote for the District’s delegate in the House of Representatives, it keeps the issue of the District’s degraded democracy in public view, and incrementalism has its virtues.

1. BACKGROUND

The validity of the new Voting Proposal depends on two congressional statutes, namely, the 1970 Delegate Act and the 1973 District of Columbia Home Rule Act (the “Home Rule Act” or “HRA”). The 1970 Delegate Act gave the District of Columbia a non-voting delegate to the House of Representatives and provided that the elected position would be filled by the citizens of the District every two years.

The office of the delegate has a long history and has existed for the Territories for hundreds of years. Even before the adoption of the Constitution, the Congress of the Confederation created the office of the Delegate to Congress. The Northwest Ordinance, passed in 1787, anticipated that non-state territories would ultimately become states. But, in the interim, it provided that the territorial legislatures could, “elect a Delegate to Congress who shall have a seat in Congress with a right of debating, but not of voting.” Since the passage of the Northwest Ordinance and continuing until today, the delegates to Congress, whether from the Territories or the District of Columbia, regardless of what other privileges or responsibilities were assigned to them, were denied the right to vote. This denial reflected a basic structural principle that only member states, actual states, would have the privilege of voting in Congress. To confer voting on non-states after the adoption of the Constitution would have been at odds with the delicate balance of representation accorded the states in the new charter. The Northwest Ordinance was reenacted after the Constitution was adopted and, although it included some changes, no changes were made to the delegate no-voting rule.

In perfect conformity with how the office of the delegate was treated in all other contexts, the 1970 D.C. Delegate Act states that “[t]he people of the District of Columbia shall be represented in the House of Representatives by a Delegate . . . who shall . . . have a seat in the House of

7 Delegate Voting Rights Amendment Act of 2019, B23-0032 (Jan. 8, 2019) (copy appended to this Article). The origin of this proposal comes from Mr. Walter Smith, Executive Director of D.C. Appleseed, a non-profit organization focused on developing solutions in the areas of D.C. democracy; education and youth; health and environment; and jobs and economic opportunity.
12 1 Stat. 50 (1789).
13 Id. at 52 (emphasis added).
Representatives, with the right of debate, but not of voting.

Thus, the D.C. delegate was granted the rights and privileges of other members of Congress but was not permitted a floor vote on any legislation. The new Voting Proposal calls upon the Council of the District of Columbia to amend this federal statute and confer voting rights to the delegate, but only concerning matters applying exclusively to the District. One might wonder: how can the local D.C. Council amend a federal statute? The answer lies in the second relevant statute passed by Congress, namely, the Home Rule Act.

The predicate for the Home Rule Act is Congress’ sweeping authority to legislate for the District of Columbia. Again, under Article I, § 17, Congress may act in all respects as the local legislature for the District. Thus, Congress may pass not only laws applicable to the District to the same extent as may apply to any of the states, but may also “exercise exclusive Legislation in all Cases whatsoever, over such District.” Congress acts as the state, county, and local government of the District of Columbia. Pursuant to this expansive, plenary municipal authority over the District, Congress has for many years had a direct hand in governing the District, down to the minutest aspects of administration. However, in 1973, to “relieve Congress of the burden of legislating upon essentially local District matters,” and “[s]ubject to the retention by Congress of the ultimate legislative authority over the nation’s capital,” Congress passed the District of Columbia Home Rule Act.

Under the 1973 Home Rule Act, Congress created a local governance structure for the District with an elected mayor, an elected thirteen-member council, and various agencies, commissions, and boards. Congress granted the District a considerable scope of local governance. The Home Rule Act declares that “the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act.”

Despite this broad grant, Congress made it abundantly clear that any and all congressional delegations of local governance were (and are) subject to the retention by Congress of full authority, at any time, to recover and exercise its complete, plenary control over the District. In sweeping language, the Home Rule Act states:

---

15 Id. The District’s delegate has several powers. Under House Rules, the delegate may: serve on and vote in Committee; be appointed to any select committee and to any conference committee; debate on the floor of the House; in debate, call a member to order; make any motion except the motion to reconsider; make a point of order; move an impeachment; be recognized to object to the consideration of a measure, or to a unanimous-consent request to concur in a Senate amendment; and make reports to committees. H.R. Doc. No. 114-192, at 387-90 (2017).
16 U.S. CONST. art. I, § 8 cl. 17.
17 D.C. CODE § 1-201.02 (2001).
18 Whole areas were reserved and not placed under District control such as the courts, criminal prosecutorial authority through the United States Attorney, and other areas, including various entities and bodies such as the National Zoo, the National Guard, the Washington Aqueduct, and the National Capital Planning Commission. Moreover, the law also created islands of autonomy and independence for certain agencies and authorities such as the Public Service Commission and the Board of Elections. See generally, Home Rule Act, supra note 9.
19 D.C. CODE § 1-203.02 (2001) (emphasis added).
Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.\textsuperscript{20}

In addition, under § 602, the legislative authority granted to the District under the Home Rule Act is subject to ten specific limitations.\textsuperscript{21} Prominent among these limitations is that the District shall have “no authority to . . . enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District”\textsuperscript{22} and legislation that it enacts must be submitted to Congress for thirty calendar days during which time Congress may disapprove of such legislation.\textsuperscript{23}

The Voting Proposal raises a variety of legal questions involving the interpretation of the Constitution, the Delegate Act, and the Home Rule Act, as well as the interplay of each with the other. Since the Voting Proposal depends on establishing that Congress delegated to the Council its authority to confer partial voting rights on the D.C. delegate, the first question is whether Congress itself has the constitutional authority to give the delegate voting rights. Second, assuming that Congress could legislatively effect such a change, did Congress delegate that authority to the

\textsuperscript{20} \textit{Id.} § 601.

\textsuperscript{21} \textit{Id.} § 601.

\textsuperscript{22} \textit{Id.} § 602(a)(3).

\textsuperscript{23} \textit{Id.} § 602(c)(1).
local District government? Finally, if Congress could and did authorize the D.C. Council to amend the Delegate Act to give the D.C. delegate a partial vote, what does it mean to limit that vote to matters applying exclusively to the District?

II. THE CONSTITUTIONAL QUESTION

The Supreme Court has never ruled on Congress’ authority to give a non-state a right to vote in the House or the Senate. Still, the issue has engaged prominent scholars and lawyers as a result of proposals debated in Congress. In 2007, the House of Representatives approved H.R. 1905, the District of Columbia House Voting Rights Act (“House Voting Rights Act”), which would have given the District’s delegate a vote in the House. The bill would have increased the size of the House by two members, from 435 to 437, one to account for the District’s voting delegate, and one for the state of Utah, which, population-wise, was in line for another representative. There was considerable support for the bill, and members of both houses, at different times, voted in favor of conferring voting rights on the D.C. delegate (but never achieved final passage either time). The House Voting Rights Act raised a fundamental question, which is central to the Voting Proposal presented in this paper: did Congress have the constitutional authority, by simple majority vote and without relying on a constitutional amendment, to confer voting rights on the delegate? The members of Congress who voted in favor of the bill obviously believed they had the authority to do so, but there were no direct judicial precedents and hearings on the bill, and legal commentary revealed a distinct division of opinion.

Those who believed Congress did not have the authority, by simple legislation, to give the delegate a vote in the House invoked the “Composition Clause,” Article I, § 2, clause 1, which says:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have

24 But see Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) (holding that a rule in the House of Representatives granting the delegates of the Territories and the District a vote in the Committee of the Whole did not violate the various delegate acts nor the U.S. Constitution, but only because the vote was considered “symbolic.”).


the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. 28

Article I, § 2, clauses 2 and 3, make similar explicit references to “States” in setting the qualifications of Representatives and how they shall be apportioned among the states. 29 Also, quite clearly, the District is not a state, so the argument against giving the delegate a vote rested on the textualist view that voting representation in the House was conferred only on citizens of actual “States.” 30

In this debate, supporters of the House Voting Rights Act did not, and could not, claim the District was intended to be a state within the terms of the Composition Clause. Their argument was, instead, that Congress, as the complete and exclusive legislative authority for the District under Article I, § 8, clause 17 (the “District Clause”), is empowered to confer voting rights on the District. 31 This position was buttressed by reliance on history and generally analogous precedent, which are instructive but not fully dispositive. 32

The supporters noted that, although the Composition Clause itself did not confer representation on citizens of the District, nor even mention the citizens of the District, neither did it “preclude Congress from legislating to provide representation in the House.” 33 Congress, with the encouragement of the Supreme Court, 34 has legislatively directed that “State” as used in various constitutional provisions shall include the District of Columbia. The principal case on which the supporters rely is National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., (“Tidewater”). 35

Tidewater concerned a 1940 congressional statute that extended diversity of jurisdiction in federal courts to citizens of the District, even though the language of Article III, § 2 provided only for diversity of jurisdiction “between citizens of different States.” 36 The defendant relied on the 1805 case, Hepburn v. Ellzey (“Hepburn”), where the Supreme Court said that constitutional provisions, including the Composition Clause, Article I, § 2, 37 using the word “State” meant only members of the Union, or states as such. Crucially, the Supreme Court in Hepburn said that

29 Id. at cl. 2 and 3.
31 See Judiciary Comm. Hearing, supra note 27, at 3-6 (statement of Viet Dinh Professor of Law and Co-Director Asian Law & Policy Studies Georgetown University Law Center).
32 See judiciary Comm. Hearing, supra note 27, at 4-6.
36 Id. (emphasis added).
whether District citizens should be able to sue in federal court under diversity of citizenship is “a subject for legislative, not for judicial consideration.” Taking that cue, Congress passed legislation in 1940 permitting diversity access to federal courts “between citizens of different States, or citizens of the District of Columbia . . . and any State or Territory.” The Supreme Court upheld that law under Congress’ plenary power to address the welfare of District residents under the District Clause, which includes the power to expand the adjudicatory functions of the federal courts to include District residents suing in diversity.

In addition to permitting the District to be treated like a state for diversity of citizenship jurisdiction, Congress has, for example, legislatively treated the District as a state under the Twenty-first Amendment’s regulation of commerce “among the several states,” and apportionment of taxes under Article I, § 2, clause 3. Even without congressional legislation, the Supreme Court considered the District a state for the purposes of various individual liberty guarantees.

_Tidewater_ and other cases do not stand for the proposition that Congress can legislatively include the District wherever the Constitution uses the words “State” or “States.” Rather, whether the District may be legislatively treated as a state depends on “the character and aim of the specific provision involved.” Opponents of the congressional power to confer voting rights on the District have argued that Congress itself has recognized that its authority to treat the District as a state has limits. In giving the District three electoral votes for president, Congress acted via the constitutional amendment process rather than relying on simple legislation. That action was not surprising since Article II, as modified by the Twelfth Amendment, prescribes the electoral system of electing a President and provides numerous references to “States,” (e.g. “Each state shall appoint ... a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled ...”). Thus, the Twenty-third Amendment to the Constitution proceeds to give the District “[a] number of electors of President and Vice President ... to which the District would be entitled if it were a State, but in no event more than the least populous state.” Those arguing that Congress can confer a vote on the District’s delegate respond that Congress chose the constitutional route to give the District electors, but it did not have to.

---

38 _Hepburn_, 6 U.S. at 453.
40 _Tidewater_, 337 U.S. at 591. A plurality held that Congress could permit the District to be treated like a state while the concurrences went further and said that constitutionally the District should be considered a state for the purposes of establishing jurisdiction.
44 See Dinh, supra note 27, at 20-21. A plurality held that Congress could permit the District to be treated like a state while the concurrences went further and said that constitutionally the District should be considered a state for the purposes of establishing jurisdiction.
45 See Dinh, supra note 27, at 20-21. A plurality held that Congress could permit the District to be treated like a state while the concurrences went further and said that constitutionally the District should be considered a state for the purposes of establishing jurisdiction.
46 Whether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.” D.C. v. Carter, 409 U.S. 418, 420 (1973).
47 U.S. CONST. art. II, § 1, cl. 2 (amended 1804).
48 U.S. CONST. amend. XXIII, § 1.
49 Dinh & Charnes, supra note 33, at 20-21.
The question then becomes, is there something special about the Composition Clause? Why might it be inappropriate to permit Congress, under its expansive, broad, and plenary power, to act as the legislature for the District of Columbia, to include the delegate as a voting member of the House of Representatives? The answer for opponents is that the Composition Clause is an essential, foundational aspect of the federalist plan created by the Constitution. States wanted to ensure that the existence of the national government would be closely tied to the States, as such, and that only the citizens of actual states would be able to elect members. The idea that Congress could create a voting member or even voting members from the District (other territories, military bases, or other federal enclaves) and, to that extent, upset or manipulate the delicate balance of representation, was not contemplated or tenable.49

Closely examined, granting the delegate a vote only in the House of Representatives would not upset the federalism plan of the Constitution. That plan is anchored in the division between the House of Representatives, where the number of Representatives is determined by population, and the Senate, where each state, regardless of population, has two Senators. This was the genius of the Great Compromise, whereby large populous states and states with smaller populations (but states nonetheless), would each have a form of representation favoring their circumstances. Giving the delegate a vote only in the House maintains that fundamental plan and, at the same time, permits expression of our government’s most basic and essential value: democratic rights for all enfranchised citizens.

Moreover, as persuasive as the “integrity of the Composition Clause” argument might be in some contexts, the nature of the current proposal is especially designed to escape its force. The Voting Proposal would only permit the delegate to vote on matters exclusively related to the District of Columbia. As such, the balance of representation and voting on national, regional, or other matters affecting other states would not be implicated, and the compromises negotiated to maintain that balance would not even remotely be jeopardized. The Voting Proposal would not permit the District delegate to vote on any issue affecting the States as such or affecting the States and the District collectively.50

III. THE STATUTORY INTERPRETATION QUESTION


50 Opponents of Congress granting the District a vote in the House of Representative also add that such an action could have several perhaps unintended, but nevertheless quite disruptive, consequences. Consider: why just one vote, and not several, and, why not a delegate or delegates in the Senate with one or more votes? And if voting rights are granted by Congress, they can be also taken away, and thus, numbers could always be subject to change and used by factions to enhance or manipulate their own strength. After all, Congress, in this context, means a majority of Congress, and the ability to add or subtract votes would surely invite some mischief from time to time. As mentioned, the District Clause, U.S. CONST. art. 1, § 8, gives Congress plenary power not just over the District, but also “like Authority over all Places purchased ... for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.” Could Congress grant military personnel living on bases a voting Member or Members in the House? The precise and narrow scope of the Voting Proposal would also answer these projected difficulties because, again, the delegate would have a vote only on matters exclusive to the District itself.
Assuming Congress may constitutionally confer modified voting rights on the District’s delegate, did it, in fact, delegate that power to the District of Columbia? The new Voting Proposal rests on interpreting the Home Rule Act as authorizing the District to amend the federal Delegate Act to give the delegate voting rights on matters exclusively affecting the District. There are several steps in this statutory analysis.

First, the structure of the HRA is built on an exceptionally broad grant of legislative authority to the District with limitations on that authority to be found specifically within the HRA itself. Since no exceptions related to the D.C. delegate or the federal Delegate Act exist, the District may assume legislative authority over the voting powers of the delegate when he or she is acting exclusively on D.C. matters. The relevant HRA exceptions are that Congress always and completely retains control and may disapprove of any legislative action under the Home Rule Act; and, that the D.C. Council must transmit all legislation to Congress so that Congress may exercise its ultimate control. Most relevant of all, the District may not pass any law or amend or repeal any act of Congress “which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District.”

This provision leads to the second step in the analysis. The language “application exclusively in or to the District,” backhandedly supports the power of the District to pass laws that amend even federal statutes so long as the amendment does not affect the functions or property of the United States, and is confined to operation only in or to the District. This makes sense recalling again that Congress acts in two capacities vis-à-vis the District: nationally, as with any other state or jurisdiction, and locally, as the municipal legislature for the District. When that municipal power is delegated to the District, the District is limited to operating within the scope of that power. Any amendments to federal laws pursuant to this power must be confined to Congress’ power over the District. But if so limited, the HRA anticipates that the D.C. Council may even amend a federal law.

Courts have upheld the District’s power to amend federal law in many instances. For example, in District of Columbia v. Greater Washington Central Labor Council, the D.C. Court of Appeals held that in enacting the District of Columbia Workers’ Compensation Act of 1979, which expanded the federal administrative scheme to include coverage for both public and private sector employees, the Council did not exceed its authority to legislate upon strictly local District matters. In Myerson v. United States, the court similarly held that in amending the District of Columbia Law Enforcement Act of 1953, promulgated by Congress to include both felony and misdemeanor

---

51 The Home Rule Act declares that, “the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act.” D.C. Code § 1-203.02 (2001).
52 Id. § 602(c).
53 Id. § 602(a)(3).
charges for assaulting a police officer, the Council did not infringe on a restricted “federal function.”

However, not all locally-enacted amendments of federal law have survived. In other cases, courts have rejected the District’s attempt to amend federal statutes where the courts found that the federal law applied nationwide or that the District’s enactment encroached on matters of federal concern. For example, in McConnell v. United States, the defendant challenged the mandatory minimum sentence provision provided under the District of Columbia’s Uniform Controlled Substances Act of 1981 (“UCSA”) as exceeding the scope of the District’s Home Rule Act authority. The court reasoned that since the federal Narcotic Addicts Rehabilitation Act of 1966 (“NARA”) applied to federal defendants convicted in every jurisdiction in the United States, including but not exclusive to the District of Columbia, the trial court erred by failing to consider committing the defendant to drug rehabilitation treatment as a sentencing alternative for offenders convicted under UCSA. Accordingly, the court held that NARA precluded the District from enforcing mandatory minimum sentences against NARA-eligible offenders without the option to attend drug rehabilitation treatment, as doing so fell outside the scope of the District’s authority to “amend or repeal any Act of Congress . . . which is not restricted in its application exclusively in or to the District.”

Similarly, in Brizill v. D.C. Board of Elections and Ethics, the court determined that approval of the VLT Gambling Initiative, which permitted the D.C. Lottery and Charitable Games Control Board to grant licenses for operating virtual slot machines within the District, exceeded the legislative powers prescribed under the Home Rule Act. The Court found that the District’s initiative amounted to a complete repeal of the federal Johnson Act’s proscription that one not “manufacture, recondition, repair, sell, transport, possess, or use any gambling device” within the District of Columbia and a limited number of other jurisdictions, but not including individual states. Thus, the court held that the VLT Gambling Initiative constituted an improper “subject of initiative” as it amounted to an attempt to repeal or amend an Act of Congress that did not exclusively apply to the District.

The key questions concern the meaning of a law applying “exclusively in or to the District” and “not concerning the property or functions of the United States,” and whether the Delegate Act falls into that category. The Delegate Act by its terms applies exclusively to the District of Columbia and does not refer to any other state, territory, or jurisdiction. By its terms, it does not involve any property or programs of the federal government. Yet, there are arguments that may classify the Delegate Act, either alone or as amended by the Voting Proposal, as a statute affecting federal interests beyond the District of Columbia.

57 Id. at 214-15.
First, the effects of the law, through its application and implementation, will come within the operation of that quintessential federal body, Congress. Second, the Delegate Act confers on the delegate the same privileges as applied to other representatives under Article I, § 6, and adding the right to vote—even if only on District matters—gives the delegate a broader national platform and presence to discuss and influence measures that are national in scope. The delegate would exercise power beyond any authority ever conferred on the D.C. delegate or any delegate. In *Michel v. Anderson*,\(^6^1\) the U.S. Court of Appeals for the D.C. Circuit held that allowing delegates to vote in the Committee of the Whole in the House of Representatives violated neither the Delegate Act nor the Constitution’s Composition Clause. However, on the constitutional question, the Court found that the delegates’ votes in the Committee of the Whole were “largely symbolic” and did not confer “membership” on them.\(^6^2\) Implicitly, the outcome would have been different if a “real vote” were conferred in the Committee of the Whole, and, *a fortiori*, if a meaningful vote were conferred in the House in legislative session.

To rebut the decision that the Committee of the Whole’s decision is symbolic, it must be recalled again that Congress has a dual role with respect to the District of Columbia. First, it acts, as with all jurisdictions, as the federal legislature. Second, it acts uniquely with the District as the municipal legislature. Congress adopted the Delegate Act in this latter municipal capacity. Even though the office of the delegate operates within the national legislature, the actions of the delegate, even with a vote, are only actions affecting the District of Columbia in its municipal capacity. It is true that the Delegate Act permits the District’s delegate to exercise his or her rights and privileges—including a right to vote if granted—in the context of a body that performs federal functions. Exercising such rights and privileges may even give the delegate a national platform to discuss or influence national issues, but the delegate is still only acting in a municipal capacity and would still be prohibited from voting on any national measures in the House of Representatives. As the D.C. Court of Appeals explained in *Greater Washington Labor Council*, if a federal instrumentality administers a local D.C. program, that federal context does not “transform the function into a ‘function of the United States’ for the purposes of the Home Rule Act.”\(^6^3\) Similarly, the delegate’s performance of his or her duties in the halls of Congress does not transform the delegate’s actions into federal functions.

A second argument to deny the Council authority to amend the Delegate Act and confer voting rights on the delegate relates to statutory interpretation questions and congressional intentions with respect to the HRA. In this respect, it is at least questionable whether, in passing the HRA, Congress intended to give the District any control over the delegate. There are reasons for doubt. First, it is unclear whether the grant of even the most expansive municipal authority encompasses the office of the delegate. The delegated legislative power extends to “all rightful subjects of legislation within the District,” and the HRA was meant to “relieve Congress of the burden of legislating upon essentially local District matters.” This language would seem an odd vehicle to permit the District to control the rights and responsibilities of the delegate, even if his or her vote


\(^6^2\) *Id.* at 632.

was limited to matters exclusively affecting the District. Second, the language also seems an odd way of potentially permitting the District to curtail, as well as expand, the delegate’s rights and responsibilities. Finally, if there remains a serious question about Congress’ constitutional authority to grant the D.C. delegate voting rights, then a well-accepted rule of construction may come into play: if there are two plausible readings of a statute, one of which would raise doubts about its constitutionality, courts should prefer that reading that eliminates the doubt. That would mean reading the HRA as not giving the District authority to confer voting rights on the delegate.

Amidst these competing arguments about legislative intentions concerning the HRA and whether Congress meant to enable the D.C. Council to give the delegate a vote, there is, however, one powerful tiebreaker. That is, since all legislation passed by the Council must be transmitted to Congress to disapprove or alter, Congress itself will have the last word on its intentions. If the Council votes in favor of the Voting Proposal, Congress may, by resolution, disapprove it or take other steps to repeal it. Alternatively, Congress may do nothing and thus, accede to it.

IV. THE VOTING PROPOSAL IN HISTORICAL CONTEXT

District residents have persistently pressed for all of the rights and privileges of the citizens of the several states. This includes the twin goals of achieving self-governance in local affairs and full voting rights in the national legislature. Only statehood will achieve these goals fully, but the prospects for achieving statehood or even a close approximation of statehood, such as through retrocession, appear dim. In the absence of statehood, the District has pressed for other measures that would increase its local autonomy or, like the Voting Proposal offered here, confer a vote in Congress. Even if the new Voting Proposal can surmount legal obstacles, the 200-year history of efforts to give D.C. residents full democracy and local control leaves its political viability in doubt. In particular, even though District residents have achieved some measure of local governance, the effort to have full voting rights in Congress has been repeatedly frustrated. The history of the voting rights struggle is long and demoralizing.

Congress accepted the Maryland and Virginia cessions of land for the District of Columbia in 1790, and, in 1801, passed legislation transferring the seat of the government of the United States to the District of Columbia. Members of Congress were aware that, as a result of the Organic Act, D.C. residents would lose their state and national representation and have diminished control over local matters. Resolutions were introduced to retrocede all but small parts of the District back to Maryland and Virginia. During the debate regarding a resolution for retrocession, Representative John Bacon spoke for many about the need to remedy the “unrepublican” condition of the District, saying,

---

64 See The Constitutional Question, supra.
67 12 Annals of Cong. 486 (1803).
Here, the citizens would be governed by laws, in the making of which they have no voice—by laws not made with their own consent, but by the United States for them—by men who have not the interest in the laws made that legislators ought always to possess—by men also not acquainted with the minute and local interests of the place . . .

As to the alternative of Congress giving D.C. residents a measure of control over local affairs, Representative John Smilie added, “You may give them a charter but of what avail will this be, when Congress may take it away at any moment? They would continue forever to be ultimately governed by a body over whom they had no control.”

The resolutions for retrocession routinely failed until 1846 when Congress, the Virginia Legislature, and the town of Alexandria agreed to cede the county and town of Alexandria back to Virginia. From 1888, various proposals were put forward to give D.C. residents voting representation in Congress via a constitutional amendment, including the first resolution, offered in 1902 by New Hampshire Senator Jacob Gallinger, to make the District a state. None of these early initiatives bore fruit. District residents finally won some measure of democracy when, in 1961, 39 states ratified the Twenty-third Amendment of the Constitution. The amendment gave D.C. residents the right to vote for the president and vice president by granting the District the same number of electors in the Electoral College that it would be entitled to if it were a state, but in any event, no more than the number of electors in the least populous state, which is three.

In 1970, Congress passed the Delegate Act, which gave District residents the right to elect a non-voting representative to the House of Representatives. There had been a brief period in the past when residents were able to elect a non-voting delegate, dating back to 1871. At that time, Congress created the Territory of the District of Columbia and provided for a popularly elected, non-voting delegate to the House of Representatives. This lasted for three years. Nearly a century would pass before the non-voting delegate position reemerged. Nevertheless, the 1970 law offered a form of representation, and perhaps more importantly, marked a re-invigorated effort to secure voting rights in Congress, and increased calls for statehood.

---

68 Id. at 488.
69 Id. at 496.
70 S.J. Res. 132, 57th Cong. (1902).
71 U.S. CONST. amend. XXIII.
In 1980, the voters of the District of Columbia approved, by ballot initiative, the “District of Columbia Statehood Constitutional Convention Initiative of 1979.”\(^7^6\) The law created a state constitutional convention tasked to draft a constitution for the State of New Columbia.\(^7^7\) On May 29, 1982, the constitutional convention approved the state Constitution, and on November 2nd of that year, the voters of the District ratified it.\(^7^8\) In 1987, the Council approved a subsequent constitution by legislation.\(^7^9\) That same year, the District’s delegate to Congress, Walter Fauntroy, introduced the New Columbia Admission Act in the House and Senator Edward Kennedy introduced S. 293 in the Senate. The bill died in committee a year later.\(^8^0\) In 1993, Congress took up the D.C. Statehood bill, which failed in the House by a vote of 153-277.\(^8^1\) Since that vote, bills have been introduced in every Congress to grant D.C. Statehood. No congressional committee held a hearing until 2014 when the Senate Homeland Security and Government Affairs Committee held a hearing on S. 132. Nothing happened.\(^8^2\) In 2014, the D.C. Council created the New Columbia Statehood Commission\(^8^3\) to revive the D.C. Statehood effort. The D.C. Council adopted a new State Constitution on October 18, 2016, and on November 8, 2016, voters approved the Constitution and the plan for statehood by a vote of 244,134 (78.48%) supporting to 40,779 (13.11%) opposing.\(^8^4\) Nothing has come of this plan.\(^8^5\) In March 2017, D.C. Delegate Eleanor Holmes Norton introduced H.R. 1291, the Washington Admission Act with 116 co-sponsors.\(^8^6\) The resolution died at the end of the legislative session in December 2018.\(^8^7\) Delegate Norton reintroduced the bill on January 3, 2019, with 155 cosponsors, the most ever.\(^8^8\)

In the effort to secure voting rights in Congress or statehood, there have been some notable steps backward. In 1992, the House of Representatives granted D.C.’s non-voting delegate a

---


\(^7^7\) Id. § 1-123.


\(^7^9\) Id.

\(^8^0\) H.R. 51, 100th Cong. (1987).

\(^8^1\) New Columbia Admission Act, H.R. 51, 103rd Cong. (1993).


\(^8^4\) D.C. Res. 21-621, 63 DCR 13618 (2016); D.C. Bd. of Elections, General Election 2016 – Certified Results (Nov. 18, 2016), https://www.dcboe.org/election_info/election_results/v3/2016/November-8-General-Election.


\(^8^7\) See id. (sponsor introductory remarks are the latest action taken on the legislation).

qualified vote in the Committee of the Whole but revoked it in 1995.\textsuperscript{9} The Democratic Party platform in 1992, 1996, and 2000 called for statehood for the District but dropped that position in the ensuing elections beginning in 2004 and only revived it in 2016.\textsuperscript{90} The 2016 Republican Party platform opposed statehood for the District.\textsuperscript{91}

V. POLITICAL OBSTACLES

It is against this backdrop that the success of pursuing the qualified vote in the House must be assessed. It is undeniable that there is little national support for, or appreciation of, the District’s plight.\textsuperscript{92} The national political parties have wavered in their support of District voting rights. Among Republicans, there is outright hostility to voting rights, particularly statehood.\textsuperscript{93} The struggle for something as minor as having the President’s vehicle carry District license plates with the words “Taxation without Representation” illustrates the difficulties the District faces.\textsuperscript{94} So, is the Voting Proposal likely to become law? At the Council level, the measure will likely be approved. Ten of the thirteen members either co-introduced or co-sponsored the legislation,\textsuperscript{95} and the members have consistently been enthusiastic supporters of D.C. voting rights and local control.\textsuperscript{96}

The Voting Proposal, like any other D.C. law, can be disapproved by Congress. Congress has three ways to defeat any D.C. law it does not like. The first is by disapproval resolution, also known as “passive review.” Under the Home Rule Act, District laws cannot become effective until

\textsuperscript{90} See H.R. 6, 104th Cong. (1995) (repealing provisions of Rule XII of the Rules of the House of Representatives, which gave the delegate the power to vote in the Committee of the Whole).
\textsuperscript{93} See Republican Nat’l Convention, Republican Party Platform 2016 30, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL [1]-ben_1468872234.pdf (“Statehood for the District can be advanced only by a constitutional amendment. Any other approach would be invalid. A statehood amendment was soundly rejected by the states when last proposed in 1976 and should not be revived.”).
\textsuperscript{94} Indeed, many of Members have protested and even gone to jail over D.C.’s democratic plight. See, e.g., Ben Pershing, Gray, Council Members Arrested at Protest of D.C. Riders in Spending Bill, WASH. POST, (Apr. 12, 2011), https://www.washingt

15
at least thirty days after the Council transmits it to Congress. During that time, Congress can repeal the law by passing a joint disapproval resolution (with the concurrence of the President). Given the power of inertia, and, despite favorable procedural rules to hasten a disapproval movement through the process, Congress rarely accomplishes a disapproval action within the 30-day window. It would likely not manage to do so with the Voting Proposal, either. However, Congress has two other ways to defeat D.C. statutes. First, Congress can control the District’s budget to upend District laws. Congress must affirmatively approve the District’s budget and appropriate all revenue whether raised through local taxes or fees or provided through federal programs. Congress has used the appropriations process liberally to quash District initiatives by simply using line-item vetoes to end funding for programs. If the budget route does not work, Congress also has the ultimate weapon—the rider attached to any piece of legislation. A rider can simply provide that a particular D.C. law, whether newly enacted or long-standing, “is hereby repealed.”

It is impossible to predict whether Congress would use any of these means to defeat the Voting Proposal. On the one hand, members of Congress, Republicans and Democrats, have voted in the past to give the delegate a vote. In 2007, the House of Representatives voted 241-177 in favor of the District of Columbia Fair and Equal House Voting Rights Act. In 2009, the Senate followed suit, passing the law 61-37. It may be that latent support for D.C. voting rights, together with the power of inertia, will be enough to defeat a disapproval resolution. Further, there may be no

---

98 Id.
99 Originally, the Home Rule Act (Pub. L. 93-198; 87 Stat. 774; D.C. CODE § 1-201.01 et seq.) set forth a process for budget approval where the budget adopted by the Mayor and Council would be transmitted to Congress for active review—Congress had to appropriate new funds for the District for the upcoming fiscal year through the passage of an appropriations acts. In 2012, the Council passed the Local Budget Autonomy Amendment Act of 2012 (D.C. Law 19-321; 60 DCR 12135), which amended the District Charter to provide that the Council shall adopt the annual local budget by act, where it undergoes the same 30-legislative-day passive congressional review as other acts (the federal portion remains a request that goes through the congressional appropriation process). Following a legal fight with then-Mayor Gray and the Chief Financial Officer, the D.C. Superior Court ruled in 2015 that the District Charter amendment had been validly adopted. Accordingly, for both fiscal year 2017 and fiscal year 2018, the District transmitted local budget acts for passive congressional approval. Congress retains its authority over the District, however, so any Congressional Appropriations Act provisions related to the District supersede.

100 See, e.g., Aaron C. Davis and Ed O’Keefe, Congressional Spending Deal Blocks Pot Legalization in D.C., WASH. POST (Dec. 9, 2014), https://www.washingtonpost.com/local/dc-politics/congressional-budget-deal-may-keep-marijuana-legalization-in-dc/2014/12/09/6dff9f16-7f2e-11e4-8882-03c08410be4_story.html?utm_term=.98acdd04d2ad. Since 1975, Congress has used more than seventy-five riders to impose restrictions on District policy initiatives. Congress has, for example, barred the District from using its own funds to pay for abortions for low income women and forced the D.C. Council to amend the D.C. Human Rights Act to permit “church related educational institutions to discriminate against people who promote or condone homosexual acts or beliefs.” More recently, in May 2017, President Trump signed into law the consolidated Appropriations Act of 2017, which included riders limiting the District’s ability to enact or implement the decriminalization of marijuana. Congress has also considered proposals to repeal the District’s Budget Autonomy Act and the Death with Dignity Act.

specific budgeting or monetary aspect of the Voting Proposal to which Congress can attach a nullifying rider.

On the other hand, Congress’ ardor for District voting rights seems to have cooled in the advent of complete Republican control of the Senate and the Executive branch. Additionally, there has been a distinct difference in the District’s success in gaining a measure of local control over its local affairs and its success in gaining a vote in Congress. Despite initiatives here and there, the District has never been successful in securing a vote for the D.C. delegate.

Of course, there may be another objective in pursuing the Voting Proposal. Even if Congress stymies the Proposal, there might be a distinct benefit in trying. The Proposal would keep the issue of D.C. voting rights in the public eye—in front of Congress and the country. It is a strategy that allows the Council of the District of Columbia to act and to take the initiative on the issue.

To know if the Voting Proposal is worth fighting for, it must be remembered how substantively modest the proposal is. First, it is a vote that Congress can snatch back at any time. Second, the vote is not a veto over any congressional legislation that harms the District; it is just one vote in the House of Representatives amidst 435 other members, and it is a vote only on matters exclusively affecting the District. How many issues this might include, depends on how many District matters Congress seeks to meddle in (i.e., the D.C. budget, hot-button social issues like abortion or aid-in-dying legislation, forcing D.C. to repeal its gun regulations, and so on). These are not minor issues; indeed, they are the most socially-sensitive matters that District residents care about. Nevertheless, it is ironic that the very modesty of the proposal, which is needed to overcome legal hurdles, is the same modesty that renders the measure applicable to a relatively small number of issues.

Ultimately, a vote is a vote, and with a broader platform for the delegate to debate and vote on matters of local significance, the more effective he or she is likely to be in derailing harmful legislation. Moreover, the national, educational experience of seeing the delegate participate and vote on the floor of the House might teach and sensitize the country to the District’s unique,
democratic disabilities. One might argue the symbolism alone makes passing the voting proposal worthwhile.\footnote{There may be practical problems with this proposal as well, that is, how will riders be handled; will the delegate have the right to strip riders out of legislation so she may vote only on parts exclusively pertaining to the District?}

**CONCLUSION**

The ultimate goal for the District should be statehood.\footnote{See, e.g., Larry Mirel & Joe Sternlieb, “... Chosen by the people of the several states...”: statehood for the District of Columbia, 23 WM. & MARY BILL RTS. J. 1 (2014).} The only complete, equitable, legal, and moral remedy for the District’s political subjugation is statehood.\footnote{See Cheh, supra note 2, at 66.} The sharpest grievance District residents have is a lack of voting rights. As mentioned, even District license plates proclaim “Taxation without Representation” or “End Taxation without Representation.”\footnote{DEPARTMENT OF MOTOR VEHICLES, END TAXATION WITHOUT REPRESENTATION TAGS, https://dmv.dc.gov/service/end-taxation-without-representation-tags (last visited Sept. 29, 2017).} If, however, the District gets a vote of some kind, despite its modesty, the claim of “no voting rights” will be diluted to: “Yes, we have a vote, but it is not a very significant vote.” It is hard to win sympathy for such a qualified claim. That is the conundrum of incrementalism. With statehood unlikely in the foreseeable future, the residents and officials of the District must ask: is it best to achieve some measure of democracy, some measure of voting participation where that is possible, or instead, to maintain the most acute grievance and hold out for full democratic rights? As one commentator put it (speaking of efforts to win greater self-government):

Statehood would provide both real power in the two Houses of Congress and genuine self-determination for District residents... 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.\footnote{Philip G. Schrag, The Future of District of Columbia Home Rule, 39 CATH. U.L. REV. 311, 350 (1990).}

In considering whether to move forward with the voting proposal, the Council will have to confront the dilemma of incrementalism. Councilmembers may conclude that any forward progress is better than inaction. They may see the incrementalism dilemma as overstated or non-existent and determine that gaining even a partial vote in the House of Representatives will make statehood more likely, not less. They may view the limited vote as a means of elevating the status of the D.C. delegate and making the injustice of the District’s condition more visible.\footnote{In one, admittedly unscientific, public reaction to the dilemma of incrementalism, participants in this D.C. Democracy During the Time of Trump Symposium, when asked, clearly favored moving forward with the Proposal.} In whatever direction events unfold, the only certainty is that District residents, denied their fundamental, democratic rights, will continue the struggle to claim them.