DEMONOCRACY OR DISTRUST? RESTORING HOME RULE FOR THE DISTRICT OF COLUMBIA IN THE POST-CONTROL BOARD ERA

The District of Columbia has faced major fiscal and management challenges over the past two decades. Prompted by ineffective schools, violent crime, and lackluster city services, middle-class families have poured across the District border into the Maryland and Virginia suburbs. This exodus has caused the District's tax base to deteriorate, which has led to an even less effective local government. In 1995, Congress, which has exclusive jurisdiction over the District of Columbia, passed the District of Columbia Financial Responsibility and Management Assistance Act, which shifted responsibility for most vital city functions from the popularly elected Mayor and Council to a presidentially appointed five-member control board. This legislation was followed by the National Capital Revitalization Act of 1997, which, in exchange for partial relief of the District's financial burdens, further reduced local control over many government agencies.

Although most observers concede that the fiscal and management problems that have plagued the District warrant drastic measures, it is unclear whether this is a typical temporary financial control board or a first step toward permanent federal intervention in District governance. If history is any guide, Congress, which has altered the structure of District governance numerous times in the past two hundred years, might well find the District in fiscal crisis again.

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4 See D'Vera Cohn, Most High-Priority Services Get Low Ratings in Poll, WASH. POST, July 24, 1997, at J1.
7 See U.S. CONST. art. I, § 8, cl. 17.
11 See, e.g., id. §§ 11033, 11012, 11701-04, 11711-16, 111 Stat. at 723-74, 735, 780-82, 782-86.

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years, will undoubtedly consider the permanent curtailment of home rule as one of its options.

This Note argues that Congress should exercise its power to provide the District with more, not less, autonomy after the current fiscal crisis has been resolved. The permanent curtailment of home rule in the District would not only be short-sighted from a policy standpoint, but also would both fly in the face of American democratic principles and ignore the intent of Congressional jurisdiction over the District. Although democracy is often blamed for the problems of the District, structural inequities in the relationship between the District and Congress are a major cause of the District’s troubles. Congress should design post-Control Board home rule for the District of Columbia that balances fidelity to American democratic principles with the need for effective management and fiscal health of the city that hosts the federal government.

Part I of this Note outlines the series of structural changes Congress has made to the governance of the nation’s capital. Part II explores the theory of home rule and examines how American democratic principles, the original understanding regarding the governance of the federal seat of government, and practical considerations all support home rule. Finally, in Part III, this Note suggests ways Congress can design post-Control Board home rule that not only would give the District the fiscal tools to succeed in its unique role as the nation’s capital, but also would comport with American democratic values.

I. A HISTORY OF THE GOVERNANCE OF THE DISTRICT OF COLUMBIA

In 1783, the Continental Congress at Philadelphia was besieged by Continental Army soldiers demanding back pay. Although no violence ultimately transpired, Pennsylvania officials refused to offer assistance to the legislative body during the conflict, which fueled sentiment for the establishment of a federal city over which Congress would have exclusive jurisdiction. In 1787, the Constitutional Convention produced a clause in the Constitution giving Congress exclu-

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13 Home rule has been defined in two ways: “the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government”; and “a particular method for distributing power between state and local governments.” Terrance Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 644–45 (1964).


15 See O’CLEIREACAIN, supra note 6, at 6 (“The District’s long-term fiscal problems stem largely from its very nature as the nation’s capital.”).


17 See id. at 30–34.
sive power over a federal district that was to serve as the capital of the United States.\textsuperscript{18}

A. \textit{First Era of Home Rule: 1820–1871}

In 1820, after almost two decades of experimentation,\textsuperscript{19} Congress responded to concerns about District residents' lack of political power by providing for the direct election of the mayor.\textsuperscript{20} Accompanying this provision was a vast expansion of the District's legislative authority.\textsuperscript{21} With these enhancements, the federal city experienced its first era of home rule. Although District residents were still denied national suffrage, the home rule form of government endured for fifty years.\textsuperscript{22}

This first era of home rule came to a close in 1871, when Congress imposed the territorial form of government upon the District.\textsuperscript{23} Significantly, the territory of the District of Columbia finally received nominal representation when it was granted a nonvoting delegate to Congress.\textsuperscript{24} However, this representation came at the expense of local control. Although there was an elected House of Delegates,\textsuperscript{25} the President appointed the governor,\textsuperscript{26} the governor's council,\textsuperscript{27} the Board of Public Works,\textsuperscript{28} and the Board of Public Health.\textsuperscript{29}

\textsuperscript{18} See U.S. CONST. art. I, § 8, cl. 17. The District Clause gives Congress the power "[t]o 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." \textit{Id.}

\textsuperscript{19} Between 1802 and 1820, the District enjoyed several forms of local government, all of which conferred upon the citizens of the District only partial political rights. \textit{See generally Joan T. Thornell, Staff of House Comm. on the District of Columbia, 101st Cong., 2d Sess., Governance of the Nation's Capital: A Summary History of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973 (Comm. Print 1990) [hereinafter Governance of the Nation's Capital].}

\textsuperscript{20} See Act of May 15, 1820, ch. 104, 3 Stat. 583, 584.

\textsuperscript{21} See Governance of the Nation's Capital, supra note 19, at 41 (describing expanded legislative power to collect taxes, regulate public health, license and regulate commerce, develop infrastructure, impose fines for violations of ordinances, establish and maintain a public school system, and, with the President's consent, improve public land).

\textsuperscript{22} Although the home rule form of government remained essentially intact between 1820 and 1871, the political geography of the District of Columbia did undergo one significant change. The city of Alexandria, which had been ceded by Virginia to form part of the federal district, was retroceded in 1846, reducing the District of Columbia by one-third and leaving the cities of Washington and Georgetown. \textit{See id. at 41; Whit Cobb, Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital, 99 DICK. L. REV. 527, 557–58 (1995).}

\textsuperscript{23} See An Act to Provide a Government for the District of Columbia, 16 Stat. 419 (1871). Congress also consolidated the cities of Washington and Georgetown into one municipal entity, the District of Columbia. \textit{See id. § 1, 16 Stat. at 419.}

\textsuperscript{24} See id. § 34, 16 Stat. at 426.

\textsuperscript{25} See id. § 5, 16 Stat. at 420–21.

\textsuperscript{26} See id. § 2, 16 Stat. at 419.

\textsuperscript{27} See id. § 5, 16 Stat. at 420.

\textsuperscript{28} See id. § 37, 16 Stat. at 426–27.

\textsuperscript{29} See id. § 26, 16 Stat. at 424–25.
The territorial system of government was short-lived, however, because the presidentially appointed Board of Public Works bankrupted the city by mismanaging a comprehensive infrastructure improvement initiative.\textsuperscript{30} Congress responded to the financial crisis by abolishing the territorial government.\textsuperscript{31} By 1878, Congress had taken away local control of the District entirely, installing a three-commissioner board to manage the city.\textsuperscript{32} The commissioner system, with few minor changes, remained in place for nearly a century. District residents thus had no voice in local or national government,\textsuperscript{33} and were ruled by unelected commissioners who were appointed by a President for whom the residents could not vote.\textsuperscript{34}


In 1967, President Lyndon Johnson responded to the increasing ineffectiveness of the commissioner system with a plan to reorganize the District government. The plan called for one presidentially appointed mayor/commissioner and a nine-member presidentially appointed city council.\textsuperscript{35} This small, but significant, movement toward home rule was complemented in 1970 by the establishment of a nonvoting delegate from the District of Columbia to the United States House of Representatives.\textsuperscript{36} Despite strong opposition to home rule from Southern congressmen hostile to the political empowerment of the majority-


\textsuperscript{31} See Governance of the Nation’s Capital, supra note 19, at 43.


\textsuperscript{33} See Katherine A. Markwell, Note, Home Rule for the District of Columbia Without Constitutional Amendment, \textit{3} GEO. WASH. L. REV. 205, 210 (1934–1935). Congress reconsidered the form of government in the District of Columbia on many occasions. See Governance of the Nation’s Capital, supra note 19, at 44–54. However, as white flight and black migration made the District increasingly African-American, efforts for greater local autonomy were often complicated by the racial attitudes of key members of Congress, who had great influence over the governance of the District of Columbia. See Charles Wesley Harris, Congress and the Governance of the Nation’s Capital: The Conflict of Federal and Local Interests 5–7 (1995); Philip G. Schrag, Behind the Scenes: The Politics of a Constitutional Convention 11–14 (1985).

\textsuperscript{34} The District of Columbia was granted suffrage in the electoral college in 1961. See U.S. Const. amend. XXIII.


black District, 37 Congress finally approved home rule legislation in 1973. 38

The 1973 Home Rule Act returned a measure of local autonomy to the District of Columbia after almost one hundred years of governance by federally appointed officials. 39 Still, there were serious limitations on self-governance. 40 Although "[w]hen it passed the Home Rule Act, Congress vested broad legislative power in the District of Columbia Council in order to relieve itself of "the burden of legislating upon essentially local District matters," 41 Congress nonetheless exercised great oversight and control over the District's legislative process. In addition to requiring that all laws passed by the Council remain in a holding pattern for a thirty-day period, during which Congress could veto the legislation by a joint resolution, 42 Congress expressly reserved the right to legislate for the District. 43

Furthermore, despite the grant of power to the Council to pass laws regarding "all rightful subjects of legislation within the District," 44 there were enumerated categorical restrictions on local legislative power. 45 Congress also exercised considerable control over the District's budget. The District could recommend an annual budget but could not levy taxes or appropriate funds to meet those budgetary objectives. 46 As a result, the local government "had to act like [a] federal agency, justifying each line item to the House and Senate Committees on Appropriations." 47 In addition, the District was often subject to appropriations riders that allowed Congress to force

37 See Harris, supra note 33, at 5–6; Schrag, supra note 33, at 13. Race has played a role in the District's political status throughout its existence. See generally Constance McLaughlin Green, The Secret City: A History of Race Relations in the Nation's Capital 80 (1967) (discussing the history of race relations and politics in the District of Columbia).


39 See Louis Michael Seidman, The Preconditions for Home Rule, 39 Cath. U. L. Rev. 373, 373 (1990) ("On the local level, for the first time in generations, an elected Council and Mayor controlled the District with broad jurisdiction over its affairs.").

40 For an overview of the provisions of the 1973 Home Rule Act, see Governance of the Nation's Capital, cited above in note 19, at 28–37.


43 See id. § 601, 87 Stat. at 813.

44 Id. § 302, 87 Stat. at 784.

45 See id. § 602, 87 Stat. at 813. Most notably, the District was forbidden to levy a commuter tax on Maryland and Virginia residents who work in the city. See id. § 602(a)(6), 87 Stat. at 813. There were also restrictions on legislating in such specific areas as building height regulation. See id. § 602(a)(6), 87 Stat. at 813.

46 See id. § 602, 87 Stat. at 813.

47 Schrag, supra note 33, at 14.
controversial policy decisions on the District.\(^48\) Further, the federal government maintained its presence in the local criminal justice system by retaining a United States Attorney to prosecute many crimes in the District and providing for presidential appointment and Senate confirmation of District of Columbia judges, who function essentially like state court judges.\(^49\)

C. Control Board Era: 1995–present

Although home rule had suffered setbacks in the late 1980s because of greater congressional interference with local legislation,\(^50\) all indications in the early 1990s pointed toward a greater degree of home rule. A new administration in District government seemed to have the blessing of Congress,\(^51\) and prominent politicians and political activists came out in support of greater local autonomy.\(^52\) Furthermore, a new president had been elected after having endorsed political rights for the District during his campaign,\(^53\) and had made certain political concessions early in his first term that seemed to support greater home rule.\(^54\) Finally, although D.C. statehood legislation failed in the House, the measure did come to a floor vote and garnered significant support.\(^55\)

However, a combination of events occurred that reversed the tide of support for increased home rule. First, the reelection of Marion Barry as mayor of the District sapped congressional and presidential support for home rule.\(^56\) Second, the Republican party swept the 1994

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\(^{49}\) See Pub. L. No. 93-198 § 433(a), 87 Stat. at 795.

\(^{50}\) See Schrag, supra note 48, at 311 ("For proponents of home rule for the District of Columbia, the situation has gone from bad to worse.").


\(^{53}\) See Henderson, Ragland & Sanchez, supra note 52.


congressional elections in both Houses of Congress, which left the pro-home rule president considerably weakened.57

In addition to the political fallout from the 1994 elections, the District faced a worsening urban crisis. In response to substandard public schools, inadequate city services, and high crime rates, the city's middle-class families sought refuge in the Maryland and Virginia suburbs.58 Along with the middle-class families went the heart of the tax base, thus increasing the fiscal burden on those remaining in the District.59

As the District’s population continued to decrease,60 the city's bond ratings plummeted,61 and courts began to place city agencies in receivership.62 By early 1995, it was clear that the creation of a control board was imminent. To that end, Congress passed and the President signed the District of Columbia Financial Responsibility and Management Assistance Act of 1995,63 which set up a control board to rescue the District from its fiscal crisis.64 The Control Board set out to address the fiscal crisis and the mismanagement and inefficiency of government in the District of Columbia. Despite understandable hostility from local residents and politicians,65 the Board thus far has enjoyed some degree of success in managing the District’s finances.66

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57 See Dan Bals, A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses for First Time Since '50s, WASH. POST, Nov. 9, 1994, at A1. One of the first moves of the new Republican majority was to eliminate the District Delegate's vote in the Committee of the Whole in the House of Representatives, a privilege the Delegate had enjoyed since 1933. See Vernon Loeb, House Strips D.C. Delegate of Symbolic Floor Vote, WASH. POST, Jan. 5, 1995, at B1. The House also reduced the District of Columbia Committee to a subcommittee. See id.

58 See sources cited supra notes 2–5.

59 See sources cited supra note 6.


63 Pub. L. No. 104-8, § 101, 109 Stat. 97, 100-01. This legislation was followed by the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, which further reduced local control over District governmental functions.

64 The Board is made up of five unpaid members with staggered terms. All must have financial and management expertise and have a primary residence or operate a business in the District of Columbia. See Pub. L. No. 104-8, § 101(b)(1), (b)(3), (c)(1), (c)(4), (d), 109 Stat. at 100-01. The members of the Board are selected by the President after consultation with key congressional committee leaders and the District Delegate. See id. § 101(b)(2), 109 Stat. at 100.

65 See, e.g., Steve Twomey, Oh, Say Can't They See the Inequity for D.C., WASH. POST, Mar. 9, 1998, at C1.

II. WHY CONGRESS SHOULD RESTORE HOME RULE IN THE POST-CONTROL BOARD ERA

Will the creation of the Control Board mark the permanent end of home rule in the District of Columbia? Since the early twentieth century, states have created temporary financial control boards to rescue cities from fiscal crises. These boards are only temporary departures from democratic decisionmaking processes; they typically are terminated when the city has achieved a pre-determined level of financial recovery. However, history shows that Congress is willing to depart permanently from home rule in the District when it senses that a less democratic form of government might be more efficient in dealing with fiscal crises. After the District's fiscal crisis in the early 1870s, Congress used the situation to justify departure from home rule for a century.

Whatever one thinks about the Control Board, the federal emergency intervention should be merely a stopgap measure like state-created financial control boards, not the first step in the permanent curtailment of home rule. Congress acted like a state when instituting the Control Board to address the immediate financial crisis suffered by the District of Columbia. Therefore, Congress should follow the example of states and restore home rule when the immediate fiscal crisis has passed. Considerations of American democratic principles, history, and policy all support home rule for the District of Columbia in the post-Control Board era.

A. The American Home Rule Tradition

Just as Congress possesses plenary power over the District of Columbia under Article I, section 8 of the Constitution, states have plenary power over municipalities. Indeed, the proposition that state legislative authorization is the exclusive source of power for local governmental entities has enjoyed widespread acceptance in local government law. Thus, the extent of local self-government largely is a


68 See id. at 738 & n.27.

69 See Governance of the Nation's Capital, supra note 19, at 43.

70 See supra p. 2048.

71 See O'CLEIREACAIN, supra note 6, at 150 ("In the current fiscal crisis the federal government has stepped in, establishing a control board with emergency powers and providing emergency services. In doing so, it has followed the state model of governance and home rule.").

72 See Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (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 entrusted to them.").

function of state constitutional and statutory provisions protecting municipal home rule. 74

Although home rule for municipalities is a creature of state law and can be severely limited — or not granted at all — states overwhelmingly have chosen to endow local governments with home rule. 75 Local government has long been the keystone of the American governmental tradition. 76 This continuing tradition of local government 77 is closely tied to the concept of home rule. 78 Because “the principle of local self-government . . . lie[s] at the foundation of American political institutions,” 79 the federal government should, like the states, remain committed to local government and restore home rule to the District after dissolving the Control Board.


74 See 2 Sands, Libonati & Martinez, supra note 73, § 13.01, at 1. Home rule powers are derived from either general grants of autonomy, subject to enumerated limitations, or specific grants of enumerated powers and concomitant implied powers. See id. § 13.03, at 11. The former model, sometimes referred to as imperium in imperio, relies upon the judiciary to interpret the scope of activity authorized by state constitutions or home rule statutes. See Kenneth Vanlandingham, Constitutional Municipal Home Rule Since the AMA (NLC) Model, 17 Wis. & Mary L. Rev. 1, 1–2 (1975). The latter model relies more heavily upon the state legislature to determine the substantive parameters of home rule powers. See id. at 2–3.

75 See Frug, supra note 73, at 71 ("[M]ost state constitutions have been amended to provide for municipal home rule."); Joseph F. Zimmerman, State-Local Relations: A Partnership Approach 26 (1995) (noting that 37 states grant home rule powers to cities through constitutional provisions and 34 grant additional powers by statute).

76 See Hannah Arendt, On Revolution 253–59 (1963) (discussing Thomas Jefferson's endorsement of local government); 1 Alexis de Tocqueville, Democracy in America 63 (Phillips Bradley ed. & Henry Reeve trans., Vintage Books 1945 (1835) ("Municipal institutions constitute the strength of free nations. . . . A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty."); Local Government Autonomy, supra note 73, at 27–29 (discussing the tradition of American local government dating back to the colonial era).

77 See Local Government Autonomy, supra note 73, at iii.

78 The Supreme Court observed this connection in a nineteenth-century case:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Stoutenburgh v. Henrick, 129 U.S. 637, 638 (1889).

79 Howard Lee McBank, The Doctrine of an Inherent Right of Local Self-Government, 16 Colum. L. Rev. 299, 299 (1916). The District has long been seen as a municipality. See Metropolitan R.R. Co. v. District of Columbia, 132 U.S. 231, 234 (1889); Walter Fairleigh Dodd, The Government of the District of Columbia 57 (1909) (stating that the District is a "federal municipal corporation, occupying the same position with reference to the government of the United States as that occupied by state municipal corporations with reference to state governments").
B. The Tradition of Support for Home Rule in the District

Support for home rule in the District can be traced to the Founding period. James Madison, responding to the many concerns about the political status of the residents of the proposed federal capital, argued that District residents "will have had their voice in the election of the Government which is to exercise authority over them" and that "a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them."\(^{80}\) Thus, when the District Clause was accepted by the Constitutional Convention and ratified by the states, there was arguably a background understanding of commitment to home rule.\(^{81}\) Accordingly, even though it enjoyed such a broad constitutional grant of power over the District of Columbia, Congress initially took a laissez-faire stance toward local District affairs.\(^{82}\) Clearly, the Framers did not intend to deny District residents local suffrage.\(^{83}\)

In the early nineteenth century, President James Monroe articulated the dilemma posed by denial of self-government in the cradle of American democracy:

> By the Constitution the power of legislation is exclusively vested in the Congress of the United States. In the exercise of this power, in which the people have no participation, Congress legislates in all cases directly on the local concerns of the District. As this is a departure, for a special purpose, from the general principles of our system, it may merit consideration

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\(^{81}\) See id. ("In accepting the principle eventually written into the Constitution, that Congress must be supreme in the federal district, no one had equated sacrifice of state power with cancellation of political rights of citizens of the future federal territory.").

\(^{82}\) See Dodd, supra note 79, at 27–30. Even as Congress began to drift from those early principles in the early 19th century, there were expressions of support for the principles of home rule and self-government. See, e.g., Andrew Jackson, State of the Union Address (1831) ("Is it not just to allow them at least a delegate to Congress, if not a local legislature, to make laws for the District, subject to the approval or rejection of Congress? I earnestly recommend the extension to them of every political right which their interests require and which may be compatible with the Constitution."); Martin Van Buren, State of the Union Address (1837) ("Separated by the Constitution from the rest of the Union, limited in extent and aided by no legislature of its own, it would seem to be a spot where a wise and uniform system of local government might have been easily adopted. This District has, however, unfortunately been left to linger behind the rest of the Union."); James C. Polk, State of the Union Address (1845) ("The people of this District have no legislative body of their own and must confide their local as well as their general interests to representatives in whose election they have no voice and over whose general conduct they have no control.").

\(^{83}\) See Roy P. Franchino, The Constitutionalism of Home Rule and National Representation for the District of Columbia, Part I: Historical Considerations and Home Rule, 46 Geo. L.J. 207, 214 (1958) (finding in the District Clause "no intent on the part of the authors of the Constitution to violate the American principle that couples representation with taxation, by excluding residents of the District from voting participation in the local and national assemblies"). In fact, home rule power "was exercised, without question as to its legality, by the residents of the divisions of the District for over seventy years until the [commissioner system] of government was established." Markwell, supra note 33, at 205.
whether an arrangement better adapted to the principles of our government and to the particular interests of the people may not be devised.84 This type of support for home rule continued through the twentieth century, with several influential presidents supporting local autonomy and political equality for the District of Columbia.85 Although home rule has only been realized in fewer than 100 of the District’s 200 years, it has been a consistent and important background consideration since the District’s establishment. This tradition of support for home rule in the District of Columbia underscores the radical nature of any movement toward increased federal control.

C. The Weakened Rationale for Congressional Exercise of Exclusive Jurisdiction Over the District

Federalism “is at the center of American governmental action.”86 Every federation must determine the way its seat of government will be governed.87 It is undisputed that Congress has plenary power over the District.88 Although Congress has exclusive jurisdiction over the federal seat, the popular rationales for the exercise of federal control over local District affairs are not compelling. In the United States, the relationship between the District of Columbia and the federal government is largely a creation of the times in which it was forged.89 Concerns about the political integrity of the federal seat of government led to the District of Columbia’s ironic status as the disenfranchised capital of a nation that holds democratic and republican principles as sacred.90

Given the danger in which the early Congress found itself, the decision to place the District under the exclusive jurisdiction of Congress was a necessary departure from democratic principles.91 However, “there is reason to believe that the District itself has outlived the conditions that might once have justified its status.”92 The federal government is no longer a weak player in the state-federal power struggle,

84 James Monroe, State of the Union Address (1818).
85 See Harris, supra note 33, at 5 (describing presidential support since 1878 for greater local autonomy in the District, including that from Presidents Eisenhower, Kennedy, Johnson, and Nixon).
89 See supra p. 2046.
90 See Bowling, supra note 16, at 34.
92 Id. at 1222.
particularly after the adoption of the Fourteenth Amendment.\textsuperscript{93} State sovereignty does not pose as serious a threat to national sovereignty as was feared during the founding period.\textsuperscript{94} Without the intense state-federal rivalry that marked the nation’s formative years, there is no longer a persuasive rationale for a federal district where Congress exercises exclusive legislation over local affairs.\textsuperscript{95}

Another argument for federal control of the District is the inability of the local residents to govern themselves. Some commentators have argued that the District of Columbia’s fiscal woes are the result of democracy gone bad.\textsuperscript{96} Less, not more autonomy for the District, the argument goes, is the way to ensure effective management and fiscal health.\textsuperscript{97} Some have even expressed the sentiment that District residents are being, and should be, punished for choosing the leaders elected during home rule.\textsuperscript{98} This view both implicitly suggests the dangerous and un-American principle of political censorship and ignores an essential characteristic of American democracy: “a democratic government, notwithstanding its faults, may be best fitted to produce the prosperity of this community. . . . [T]he great advantage of the Americans consists in their being able to commit faults which they may afterwards repair.”\textsuperscript{99}

Stronger local government not only comports with American democratic principles, but also may enhance the District’s ability to reverse the trend of mismanagement that has plagued the city by allowing those most greatly affected by governmental decisions to have a hand in managing the city.\textsuperscript{100} Certainly, local leaders must shoulder a good deal of the blame for the adversity the District has faced during the home rule era. However, home rule itself should not be eviscerated because of this adversity. Although imposition of the Control Board

\textsuperscript{93} See, e.g., Leach, supra note 86, at 39 (describing the weakened position of the states in the wake of the Fourteenth Amendment).

\textsuperscript{94} See id. at 39–40. Protection of federal areas is also no longer a valid justification for federal control of the District. Important and sensitive federal installations such as the Pentagon, see Cobb, supra note 22, at 588–89, are located on federal lands across the border in Maryland and Virginia without any discernible threat to federal interests from state action, see id. at 597–606.


\textsuperscript{96} See, e.g., Will, supra note 14, at A21.

\textsuperscript{97} See id.

\textsuperscript{98} See id. ("The withdrawal of popular sovereignty is condign punishment for those District voters who have elected many charlatans and demagogues, including Marion Barry for a fourth time, after prison."))

\textsuperscript{99} J De Tocqueville, supra note 76, at 246–47.

was perhaps a necessary measure, permanent withdrawal of home rule would be anathema to the principles of self-government:

Home rule on good behavior is a contradiction in terms. A people who holds the power of self-determination only so long as what it determines meets the approval of a superior entity is not free. Self-government that is subject to rescission whenever rescission meets the needs of those in power is not self-government at all.101

American democracy has survived the election of and governance by "charlatans and demagogues"102 from across the nation throughout its history.103 In fact, District residents tolerated governance of the city by such public officials during decades of federal control.104 Instead of blaming democracy for the District's troubles, Congress should seek to bolster democracy by enhancing the political autonomy of the District under home rule.

III. ENHANCING THE POLITICAL AND FISCAL EFFICACY OF DISTRICT OF COLUMBIA HOME RULE IN THE POST-CONTROL BOARD ERA

The question remains how Congress can balance fidelity to American democratic principles with the need for fiscal health in the District of Columbia. This delicate balance can be achieved not through a radical departure from fundamental republican governmental norms, but through a recognition and rethinking of the political and fiscal relationship between the District and Congress. Instead of using the current fiscal crisis as a justification for permanently diminishing the political autonomy of the District of Columbia, Congress should view it as an opportunity to enhance home rule in a way that will bolster both the political and fiscal viability of the nation's capital.105

A. Enhancing Political Autonomy

Perhaps the most compelling justification for congressional control of local affairs is the need to protect against local interference with federal interests. In governing federal capitals, "there is always a conflict of interests between the national government and the people who live in the capital city."106 Although Congress undoubtedly requires

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102 Will, supra note 14.
103 See Jamin B. Raskin, Reform Without Representation, WASH. POST, Aug. 3, 1997, at C1 (recalling prominent, but flawed, political leaders).
104 See HARRIS, supra note 33, at 6; SCHRAG, supra note 33, at 11–13 (recounting the history of racially charged decisionmaking by members of Congress overseeing the District before home rule).
105 Cf. SCHMECKEBIER & WILLOUGHBY, supra note 100, at 2 ("Under the plenary power granted to it, Congress may set up such form of government for the District as it sees fit.").
106 ROWAT, supra note 87, at xi.
the power to protect the political integrity of the federal seat of government, Congress's exclusive jurisdiction over the District does not require that it legislate over essentially local matters not affecting the national interest. 107

Policies that arguably do not implicate the national interest normally should be determined through the legislative processes of those whom they affect. 108 However, without substantial local autonomy, District residents are subject to the policy choices of members of Congress who are not politically accountable to them 109 and who often have no connection with the largely urban population of the District of Columbia. 110 Consequently, Congress has used the District as a testing ground for policies that might not have survived the legislative process for nationwide application, but can be forced upon the disenfranchised residents of the District of Columbia. 111

107 Congress, while ostensibly legislating for the District in the national interest, has sometimes used the District to further ideological positions for national consumption. See Harris, supra note 33, at 1–2.
108 Indeed, there are compelling examples of Congress legislating for the District of Columbia in areas of national policy. In 1862, Congress passed legislation abolishing slavery in the District, preceding the Emancipation Proclamation by a year. See Green, supra note 30, at 274–75. In 1866, Congress disfranchised black males in the District a full three years before the ratification of the Fifteenth Amendment. See Green, supra note 37, at 77–80. These situations can be said to serve the national interest because the object of the legislation was the protection of fundamental rights. However, when fundamental rights are at stake, there is no need for Congress to sing out the citizens of the District of Columbia; these rights are shared by all Americans.
109 The District is subject to the legislative will of Congress in three distinct ways: Congress may expressly deny the power to legislate in certain areas; it may require a thirty-calendar-day veto period before any District law may become effective; and it must approve all appropriations. See Schrag, supra note 48, at 328–30.
111 See Harris, supra note 33, at 2. As one commentator explained:
In twenty years of home rule in the District, the federal interest has been defined largely on a case-by-case basis, in ways generally tailored to the preferences of specific legislators and/or state or regional concerns. Many of the decisions imposed on the District by Congress in the name of the federal interest have really been driven by disguised parochial or ideological objectives.

Id.; see also Seidman, supra note 39, at 376–77 ("[M]any ... of these recent measures clearly fall outside any conceivable legitimate ambit for congressional involvement."). For instance, in 1988, Congress conditioned the 1989 appropriations bill on the repeal of four local laws passed by the D.C. Council. See Samuel B. Johnson, The District of Columbia and the Republican Form of Government Guarantees, 37 How. L.J. 333, 340 (1994); Schrag, supra note 48, at 314–15. More recently, Congress appended the 1998 District of Columbia budget bill with over 40 appropriations riders, which imposed such controversial policies as caps on tort liability, school vouchers, and forced closure of the District's public law school. See Lori Nitschke, Scrapping School Voucher Plan, Congress Clears D.C. Bill, 1997 Cong. Q. 2840. However, many of these riders were withdrawn as part of a political compromise. See id. The appropriations riders have been called the "worst of the abuses" by Congress of the District's legislative autonomy. Telephone Interview with Rep. Eleanor Holmes Norton (Apr. 10, 1998).
This problem can be addressed by establishing a clear distinction between national and local legislative interests. The lack of a clear and coherent division between federal and local interests long has been a source of political trouble for the District of Columbia.\textsuperscript{112} By distinguishing between national and local interests, Congress could allow home rule to prosper while, at the same time, protecting legitimate national interests.\textsuperscript{113} To that end, Congress should articulate clearly enumerated, legitimate national interests. It could then delegate to the District the broad power to legislate on all local matters.\textsuperscript{114} In order to respect the local autonomy of the District, Congress could agree not to intervene when legislation deals with essentially local matters.\textsuperscript{115} However, Congress could practice oversight with regard to areas of legislation affecting legitimate federal interests typical of the 1973 home rule legislation.\textsuperscript{116}

\textsuperscript{112} See Schmeckebier & Willoughby, supra note 100, at 26 (describing one of the key defects of District government as the "lack of a clear distinction between those activities and responsibilities which pertain to the District as a political subdivision and those which have to do with the national government").

\textsuperscript{113} See Gerald E. Frug, Local Government Law 157 (1st ed. 1988). Certainly, it may be difficult to distinguish interests that are national in nature, and thus appropriately subject to the oversight of Congress, from interests that are essentially local, and thus within the realm of District governance. See United States v. Cohen, 733 F.2d 128, 142 (D.C. Cir. 1984) (en banc) (Milka, J., concurring) ("[C]ongressional action respecting the District of Columbia cannot always neatly be categorized as 'local' or 'national.'"); see also Harris, supra note 33, at 263-64 (noting conflict between federal and local interests); John Stuart Mill, Considerations on Representative Government 222-26 (Currie V. Shields ed., 1958) ("[A]mong the duties classed as local . . . . there are many which might with equal propriety be termed national . . . .").

\textsuperscript{114} See Markwell, supra note 33, at 177-178; see also Dodd, supra note 79, at 58-59 (discussing an exception to the non-delegation doctrine that allows Congress to delegate local powers to the District).

The question remains whether a "local function" should be defined as an interest solely affecting the District, or as any interest not conflicting with federal interests. See Mill, supra note 113, at 222-26 ("[A]ll business purely local — all which concerns only a single locality — should devolve upon the local authorities."); Sands, Libonati & Martinez, supra note 73, § 13.01, at 1; Sandalow, supra note 13, at 661-68. The latter definition would most closely track the spirit of the Tenth Amendment. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Even with this expansive definition, there would be little reason to fear that the District would infringe upon the national interest. Absent constitutional amendment, Congress, under the District Clause, will always have the power to intervene when federal interests are threatened by District legislation. See U.S. Const. art. I, § 8, cl. 17; Schrag, supra note 48, at 344.

\textsuperscript{115} See Schrag, supra note 48, at 330-31. For suggestions on how to lessen Congress’s legislative power over the District, see Schrag, cited above in note 48, at 330-40.

\textsuperscript{116} See Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(d)-(e), 98 Stat. 1974; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 502(a), 87 Stat. 774, 813 (1973). One possible compromise would be for Congress to assert no legislative veto over District legislation unless an enumerated national interest was at stake. However, even with a workable model, it may be difficult to determine exactly which interests are national in scope and which are local. For example, one could argue that the federal government has a strong interest in the typically municipal functions of land use and public safety. See Harris, supra note 33, at 264. Likewise, the District could assert a local interest in the public transportation system,
In the same vein, Congress could agree to refrain from affirmatively legislating for the District unless it was serving a national interest, furthering a legitimate federal policy, or protecting federal interests from local encroachment. Congress should not, as it sometimes has in the past,\textsuperscript{117} interfere with the local legislative function of the District government when federal interests are not at stake.

By clearly separating national and local interests, and restraining congressional power over the latter while reserving congressional power over the former, Congress could alleviate the tensions between local autonomy and congressional exclusive jurisdiction. As a result, the District of Columbia would approximate more closely the type of home rule befitting the capital city of the world’s model democracy.\textsuperscript{118}

\textbf{B. Enhancing Fiscal Efficacy}

Even if one accepts that democratic home rule in the District is preferable to federal control, the issue of the District’s fiscal health still remains. The home rule model used prior to the Control Board made it virtually impossible for the District to address its serious financial difficulties in the way that most governments would. Certainly, Congress has a strong interest in ensuring that the nation’s capital has effective management and sound finances. However, many of the District’s problems could be addressed not through withdrawal of local control, but through reexamining fiscal policies related to the District of Columbia’s unique role in our federal system.

The District’s complicated political status as city, state, and capital adversely affects its fiscal health.\textsuperscript{119} The District of Columbia is a hy-

\textsuperscript{117} See Schrag, supra note 48, at 328–40.


\textsuperscript{119} See O’Cleireacain, supra note 6, at 6 ("The District’s long-term fiscal problems stem largely from its very nature as the nation’s capital.").
brid, resembling both a state and a city. Further, it is the fiscal relationship between the District of Columbia and Congress, and not local politics, that drives many of the problems plaguing the District today.

Although it functions like a city, the District must also provide "a range of public services that states typically provide." However, unlike states, the District is powerless to tax nonresidents who earn money within its borders — residents who use the District's services and infrastructure on a daily basis. This foregone tax revenue accounts for billions of dollars each year and has led to the subsidization of middle- and upper-class "bedroom communities" in Maryland and Virginia. Congress should reconsider its prohibition on the District negotiating a reciprocal taxing agreement with its neighbor states. Imposition of such a commuter tax may level the playing field as the District competes with surrounding suburbs for wage earners, thus increasing the District's tax base and raising tax revenues without placing an additional tax burden on its own citizens.

Another strategy for bolstering the District's beleaguered tax base might be the implementation of federal tax incentives, which could help reverse the outward flow of middle-class wage earners to suburban communities. Furthermore, Congress places various restrictions on the District that make it unable to respond to opportunities to develop commerce and increase its tax base. When promulgating regulations that hinder the District's ability to respond to commercial opportunities, Congress should determine and articulate which national interests are being served. If certain restrictions do not serve any legitimate national interest, the District should be free to compete with Maryland and Virginia for commerce. In addition, certain in-

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120 One commentator has called the District an "anomalous zone." Neuman, supra note 91, at 1201 (internal quotation marks omitted); see also id. at 1214–24.
121 O'CLEIREACAIN, supra note 6, at 159; see also Lawrence Mirel, Home Rule: Limits in the Guise of Freedom, LEGAL TIMES, Mar. 22, 1993, at 34 (stating that the District regulates "banks and insurance companies and hundreds of other operations that are usually state responsibilities").
123 See COMMISSION ON BUDGET AND FIN. PRIORITIES OF THE DIST. OF COLUMBIA, FINANCING THE NATION'S CAPITAL 1–10 (1990); O'CLEIREACAIN, supra note 6, at 9.
124 See O'CLEIREACAIN, supra note 6, at 103–11 (discussing a commuter tax for the District).
127 In this way, the District might build upon the modest commercial influx it has enjoyed in recent years as a result of business relocation to the downtown area. The MCI Center, which is located in the heart of downtown, replaced the USAir Arena, which is located in Landover,
centives might be put in place to draw businesses to the District.\footnote{128} Finally, the District should be given greater control over its own budget.\footnote{129}

There are signs that the District, slowly but surely, is rebounding from its fiscal crisis.\footnote{130} In the meantime, instead of using the Control Board as an opportunity to increase permanently congressional interference with local District affairs, Congress should enhance home rule in a way that makes the District politically and fiscally viable and gives it the tools to succeed in the long run. Reform efforts should be directed toward addressing particular structural and fiscal problems, not toward eradicating democracy in the District of Columbia.

IV. CONCLUSION

As the national seat of government, the District of Columbia has a unique status within our federal system. America serves as a role model for embryonic and struggling democracies around the globe. We set a bad example when we do not resist the impulse to curtail democracy when facing economic or political difficulties.

Although local officials must shoulder part of the blame for the District's failures, home rule should not be eliminated in the post-Control Board era. The root cause of the District's problems is not the existence of democracy, but rather a flawed system of home rule. Congress should enhance home rule in a way that vindicates American democratic principles while ensuring the fiscal stability of the nation's capital. By doing so, Congress can help make the District of Columbia a capital city of which District residents — and all Americans — may be proud.

\footnote{128} See, e.g., Robert W. Goodson, A Bid for Downtown: Business Improvement District Would Supplement City Services, LEGAL TIMES, Apr. 21, 1997, at S36 (discussing ways to improve conditions for downtown businesses).

\footnote{129} See Schrag, supra note 48, at 340–41.

\footnote{130} See Vise, supra note 66.