1990

The Preconditions for Home Rule

Louis Michael Seidman

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol39/iss2/4

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
THE PRECONDITIONS FOR HOME RULE

Louis Michael Seidman*

I. THE PARADOX OF SOVEREIGNTY

Events too recent to require detailed recounting illustrate once again some ancient if forgotten truths: Real sovereignty is indivisible, irrevocable, and unconditional. Home rule on good behavior is a contradiction of 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.

Fifteen years ago, it was easy to overlook these hard facts. After a long struggle, the District of Columbia seemed poised on the brink of true political equality. On the local level, for the first time in generations, an elected Council and Mayor controlled the District with broad jurisdiction over its affairs. Indeed, as some contemporary opponents of the Home Rule Charter pointed out, the new District of Columbia government combined powers traditionally wielded by both state and city officials. In some respects, the District had greater undivided power than either the cities or the States in the remainder of the country.

* Professor of Law, Georgetown University Law Center. I am especially grateful to David Satter, whose ruminations about "home rule" in the Soviet Union sparked my interest in this subject. I also received important help from William Eskridge, Steven Goldberg, Thomas Krattenmaker, Gary Peller, Philip Schrag, Girardeau Spann, David Strauss, Mark Tushnet, and the participants in the Georgetown Law Center Faculty Research Workshop, all of whom made comments on an earlier draft of this article. Valuable research assistance was provided by Barry Pollack and Christine Taylor. Research for the Article was supported by a grant from the Georgetown University Law Center.


2. As Representative Nelson remarked:

H.R. 9682 creates a city-State, virtually all State legislative, executive, and judicial authority [is] transferred to the local 'home rule' government. I know that my home State of Minnesota, where I served in the legislature . . . did not delegate the type of authority we are delegating here in the bill to the city of St. Paul . . . .

On the national level, a constitutional amendment had established the right of District residents to participate in Presidential elections, and the District's delegate to Congress gave it a voice, albeit not a vote, in legislative affairs. To many contemporary observers, these measures constituted an obvious precursor to full District representation in national affairs.

Of course, advocates of home rule disfavored continued congressional veto power over the District's laws, the important restrictions on the jurisdiction of the District's Council, federal control over the local judiciary, and the

---

3. Section 1 of the twenty-third amendment to the United States Constitution provides:

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

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

U.S. CONST. amend. XXIII, § 1.

4. The District of Columbia Election Act creates a “Delegate to the House of Representaties from the District of Columbia” who has a “right of debate, but not of voting” and who “shall have all the privileges granted a Representative by section 6 of Article I of the Constitution.” 2 U.S.C. § 25a (1988).

5. See, e.g., Suffrage at Last, Wash. Post, Dec. 25, 1973, at A22, col. 1:

To those who have insisted for so long — as we have — that Washingtonians should be accorded the democratic rights of full citizenship, this grant of a modified franchise is not fulfillment, not the true home rule, that other American communities enjoy. But it is a genuine opportunity for the people of the nation’s last colony to seize new local initiative toward that end.

6. Section 602(c)(1) of the Home Rule Act requires the Council to transmit all but emergency measures to Congress where they can be disapproved within a thirty-day period by a concurrent resolution passed by both Houses of Congress. Home Rule Act, supra note 1, § 602(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)). Section 602(c)(2) of the Act formerly permitted a one House veto within thirty days of measures amending titles 22, 23, and 24 of the D.C. Code. However, the Supreme Court declared one and two house vetoes unconstitutional. See INS v. Chadha, 462 U.S. 919 (1983). In response to Chadha, Congress amended the Home Rule Act to require action by both Houses and the President to veto a District statute. See Home Rule Act, supra note 1, § 602(c)(2) (codified as amended at D.C. CODE ANN. § 1-233(c)(2) (1987)).

7. See, e.g., Home Rule Act, supra note 1, § 603(a), reprinted in 1 D.C. CODE ANN. at 27 (Supp. 1989) (affirming Congress' authority to authorize and appropriate the total budget of District of Columbia Government); Id. § 603(b)(1), reprinted in 1 D.C. CODE ANN. at 28 (Supp. 1989) (limiting the District's authority to issue general obligation bonds); Id. § 603(c), reprinted in 1 D.C. CODE ANN. at 28-29 (Supp. 1989) (imposing requirements on District budget submitted to Congress).

8. The Home Rule Act creates a Judicial Nomination Commission consisting of members appointed by the President, the Board of Governors of the District of Columbia Bar, the Mayor, the District's Council, and the chief judge of the United States District Court for the District of Columbia. Id. § 434(a), reprinted in 1 D.C. CODE ANN. at 1-11 (Supp. 1989).
requirement of congressional approval of every line of the District's budget. But the District nonetheless seemed to have come a long way from the days when it amounted to a mere plaything for a few oligarchs who served as city commissioners under the not always benevolent guidance of the chairmen of the House and Senate District Committees. The vestiges of the old colonial status seemed just that — insignificant concessions to the necessity of political compromise and temporary accommodations that would last only so long as the gradual but inexorable process toward complete emancipation went forward.

Even from the perspective of fifteen years hindsight, this judgment is not altogether wrong. Certainly, citizens of the District fare much better today than they did in the days when Congress accorded the whims of Representative Natcher the status of law. But the limitations on the District's autonomy are neither so temporary nor so insignificant as they once appeared. The District's march toward full emancipation no longer seems inexorable. Both the legislative and constitutional paths to statehood are blocked, at least for now, and presently no discernible national constituency for change

Section 434(d)(1) provides that in the event of a vacancy in the local courts, the Commission shall submit a list of three nominees to the President who, in turn, selects one of them for submission to the Senate for confirmation. *Id.* § 434(d)(1), *reprinted in 1 D.C. CODE ANN.* at 13 (Supp. 1989). If the President fails to select a nominee from the list within sixty days, the Commission is empowered to appoint a person on the list to fill the vacancy. *Id.*

9. See *id.* § 603(a), *reprinted in 1 D.C. CODE ANN.* at 27 (Supp. 1989). The Act also makes clear that Congress retains "the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution. . . ." *Id.* § 102(a), *reprinted in 1 D.C. CODE ANN.* at 177 (1981). Even if the Act did not contain this language, it is doubtful that Congress could constitutionally divest itself permanently of this Article I power. For a discussion, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 381. As a practical matter, this reservation of authority means that Congress need not comply with the thirty day veto provision envisioned by the Act. Congress retains the power at any time to enact legislation that would preempt and thus rescind measures enacted by the District Council. Recently, Congress attempted to utilize this residual power to amend the District's Human Rights Ordinance. See *infra* notes 30-40 and accompanying text.


In 1983, while the amendment was still pending ratification, the District applied to Congress for statehood. The House District Committee favorably reported a statehood bill in 1987, but it was never brought to a vote. The Senate has never taken any action on the application. For fuller account, see Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U.L. REV. 311-17 (1990).
exists. Worse still, recent events make the threat of retreat from home rule far more real than the promise of advance.

Even in the halcyon days immediately after enactment of the Home Rule Charter, Congress never entirely gave up meddling in local District affairs.\textsuperscript{11} Yet recent congressional encroachments have changed in character as well as in number.\textsuperscript{12} No longer content to use the congressional veto power intended to vest it with residual control over District affairs, Congress has increasingly resorted to appropriations riders to control everything from the minutiae of city government\textsuperscript{13} to vital city policies regarding matters such as nondiscrimination\textsuperscript{14} and regulation of the District's own employees.\textsuperscript{15}

This new congressional interest in the District raises several points of note. First, many, although not all, of these recent measures clearly fall

\begin{footnotes}
\item 12. See generally Schrag, supra note 10, at 313-16.
\end{footnotes}
outside any conceivably legitimate ambit for congressional involvement. Congress has not limited itself to cases concerning District statutes that impact on federal policy or on the States. Perhaps Congress can justify the ban on a commuter tax\textsuperscript{16} or on the use of federal funds to pay for abortions\textsuperscript{17} on this federal policy basis. However, the forced repeal of the District's antidiscrimination law\textsuperscript{18} and the prohibition on the use of District funds for abortion\textsuperscript{19} surely cannot be justified on the grounds that these actions further federal policy. Congress' conduct in these areas can only be understood as a frontal assault on the core principle of home rule.

Second, recent congressional meddling in District affairs especially insults and demeans the District's residents because it has so little to do with the District itself. Congressional grandstanding on issues like homosexual rights in the District is obviously intended for national consumption.\textsuperscript{20} It offers members of Congress a free vote on morality issues to satisfy vociferous local constituencies. Members of Congress may vote freely because of the District's marginal status. It would be bad enough if District residents were being governed by an entity over which they lacked control. But they are not so much being governed as being made an example of. Precisely because Congress appears largely indifferent to the welfare of its citizens, the District serves as a convenient symbol that Congress can manipulate without cost.

Finally, each congressional encroachment on home rule does damage that extends far beyond the abrogation of the particular policy favored by District residents. Each such encroachment reinforces the conditional, revocable nature of the "rights" accorded District residents. With each encroachment, the District's Council and the Mayor effectively receive a clear message that they may act only so long as they stay within acceptable bounds. Once Congress effectively conveys this message, it no longer needs to actually utilize its power of rescission. The credibility of the threat suffices to destroy home rule.\textsuperscript{21}

\textsuperscript{18} Armstrong Amendment I, supra note 14, at 102 Stat. at 2269-14.
\textsuperscript{21} The District Council's recent abandonment of a proposed gun control bill illustrates the point:

The D.C. Council yesterday backed away from a confrontation with Congress by shelving — and possibly killing — its controversial bill to hold handgun manufacturers financially liable for injuries and deaths caused by shootings . . . .

At its first reading two weeks ago, the legislation was approved by an 8 to 4 vote, but at least three council members who had supported the bill or were noncommittal
Here, of course, we return to the point with which I began — the indivisibility of sovereignty and the unconditionality of true freedom. Yet embedded within these truths lies an important paradox. For the United States Constitution has as a defining characteristic the creation of a web of overlapping sovereign entities, and the lesson of our political history is that grants of freedom are never truly irrevocable.

The remainder of this Article is devoted to exploring the ramifications of this paradox. The Article argues that real emancipation for the District, when it finally comes, will be grounded on political and cultural, rather than legal, change. The essential precondition for freedom rests upon a built-in system of unconscious inhibitions against domination — inhibitions that center on an implicit recognition of the equal moral worth of the people who reside in the District of Columbia. The nature of these inhibitions, rather than legal protection, makes a grant of sovereignty unconditional. Until this precondition is met, legal protections — including those that accompany statehood — mean nothing. When the precondition is met, legal protections are superfluous.

The strategy for elaborating on these points primarily consists of a double-barreled attack on the proposition that statehood would significantly alter the District's status. Section II of this Article argues that current legal doctrine, properly understood, already provides the District with many of the protections that supposedly would accompany statehood. Section III then spells out the mirror image of this proposition: statehood standing alone would not provide a significant legal bulwark against congressional domination.

---

changed their minds after warnings that the bill could needlessly antagonize Congress at a time of fragile support for home rule.


> The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . .

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interests of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

See also THE FEDERALIST No. 47 in id. at 299-307 (examining the separation of powers under the Constitution).
I do not mean to suggest that the struggle for statehood is therefore pointless or unnecessary. But in the final section, I argue that the importance of that struggle is widely misunderstood. The struggle itself, rather than the outcome of the struggle, has transformative political potential. By confronting the rest of the country with the morally anomalous status of the District, statehood advocates can help to mold the preconditions for home rule. Statehood alone will not create those preconditions. Statehood, when it is finally achieved, will symbolize that the District's residents have already won the battle.

II. Domination and the District: A Constitutional Case Study

The recent wave of congressional interference with District affairs has not gone without legal challenge. In an extraordinary lawsuit filed by all thirteen members of the District's Council, the Council argued that Congress lacked the constitutional authority to enact the "Armstrong Amendment," which ordered the Council to revise local law so as to exempt religious institutions from the statutory ban on discrimination against homosexuals. In *Clarke v. United States*, a panel of the United States Court of Appeals for the District of Columbia Circuit held that the congressional action violated the free speech rights of members of the Council and affirmed the order of the United States District Court for the District of Columbia which had entered summary judgment for the plaintiffs. In response, Congress bypassed both the Council and the court of appeals opinion by inserting a new

24. Section 145(c) of the amendment, which Congress included as part of the District of Columbia Appropriation Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269 (1988), stated:
   (b) None of the funds appropriated by this Act shall be obligated or expended after December 31, 1988, if on that date the District of Columbia has not adopted subsection (c) of this section.
   (c) Section 1-2520 of the District of Columbia Code (1981 edition) is amended by adding after subsection (2) the following new subsection:
   "(3) Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any educational institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition-
      "(A) the use of any fund, service, facility, or benefit; or
      "(B) the granting of any endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief."
version of the Armstrong Amendment, which directly amended the District of Columbia Code, into the District's annual appropriations statute.\textsuperscript{27}

Although Congress ultimately succeeded in circumventing the court of appeals decision, the court's opinion retains one enduring virtue: it puts to rest a nonsequitur that has recurrently plagued discussion of the District's legal status. Just because Article I grants to Congress the power to "exercise exclusive Legislation"\textsuperscript{28} over the District, it does not follow that Congress can do anything it chooses. The District clause power, like all of Congress' Article I powers, is subject to restraints contained in the rest of the Constitution.\textsuperscript{29} Although the court does not go nearly so far, properly understood, these restraints sweep broadly indeed, providing the District with protection against violations of home rule that virtually equal the protections the District would enjoy as a state.

\textit{Clarke} provides a case study for the purpose of cataloguing some of these restraints. Although they are drawn from diverse sections of the Constitution, they stand for a single overarching constitutional principle: Congress may not enact legislation that is the product of the political impotence of the District and its residents. Although Congress has the constitutional authority to legislate, it lacks the constitutional authority to dominate.

\begin{itemize}
\item \textsuperscript{27} Armstrong Amendment II, \textit{supra} note 14, at 103 Stat. at 1284. Congress included the amendment as part of the District of Columbia Appropriation Act, 1990, Pub. L. No. 101-168, 103 Stat. 1267 (1989). The amendment contained the following:
\begin{itemize}
\item (b) Section 1-2520 of the District of Columbia Code (1981 edition) is amended by adding after subsection (2) the following new subsection:
\begin{itemize}
\item "(3) Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any education institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition—
\item "(A) the use of any fund, service, facility, or benefit; or
\item "(B) the granting of any endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief."
\end{itemize}
\end{itemize}
\end{itemize}

\textit{Armstrong Amendment II, \textit{supra} note 14, 103 Stat. at 1284.}

\begin{itemize}
\item \textsuperscript{28} U.S. Const. art. I, § 8, cl. 17.
\item \textsuperscript{29} \textit{Clarke}, 886 F.2d at 410:
\begin{itemize}
\item Congress' authority over the structure of local government in the District of Columbia is indisputably broad, but it is not boundless. Congress has the discretion to create institutions of government for the District and to define their responsibilities only 'so long as it does not contravene any provision of the Constitution'\ldots. This limitation on Congress' powers is merely an instance of the general principle that the Government may not disregard the strictures of the Constitution when conferring discretionary benefits.
\end{itemize}
\end{itemize}

\textit{Id.} (citing \textit{Palmore v. United States}, 411 U.S. 389, 397 (1973)).
Before turning to doctrinal particulars, two preliminary caveats are in order. First, it is not my intention to spell out these constitutional arguments in full detail. The purpose of what follows is to be suggestive rather than definitive. That purpose will be achieved by demonstrating that a wide range of plausible arguments exists that, when fully fleshed out, bear the potential of significantly restraining congressional authority over the District.

Second, I make no claim that any of the arguments below compels a particular result. Nor am I prepared to predict that these arguments would actually succeed before any particular court. Rather, my claim is that there are respectable strands of existing constitutional doctrine, text, and tradition that support the arguments. Stated another way, the arguments catalogued below provide the means for a sympathetic judge, who wished to do so, to reach the desired conclusions while remaining well within the bounds of standard contemporary constitutional discourse. Whether a particular judge would desire to do so depends precisely on the extent to which that judge recognizes the claim of District residents to equal moral worth. To find these arguments plausible, the judge herself must have internalized the beliefs that represent a precondition to home rule. As Part III will make clear, no constitutional text or doctrine of its own force will produce that internalization.

A. The Facts

Understanding the various arguments that might be advanced in support of the result in Clarke demands several additional background facts. Clarke grew out of a controversy concerning enforcement of the District’s Human Rights Act—a statute that was itself subject to congressional veto under the Home Rule Charter and that broadly prohibits discrimination in employment, housing, public accommodations, and education on a wide variety of grounds unrelated to individual merit, including sexual orientation.

A group of Georgetown University students filed suit under the ordinance claiming that Georgetown discriminated against its homosexual students. Georgetown University responded that its treatment of homosexual students

31. The Act prohibits discrimination based upon “race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place or residence or business.” Id. § 1-2501.
rested on religious conviction and that applying the ordinance to its conduct would violate the University's first amendment free exercise rights.  

In *Gay Rights Coalition v. Georgetown University*, the District of Columbia Court of Appeals held that Georgetown need not officially recognize gay student groups, but that the Human Rights Act did require Georgetown to provide facilities and services to gay student groups that equalled those provided to other student groups. Moreover, the court held that, as so construed, the statute was consistent with the free exercise clause.

After the court of appeals decision, the University entered into negotiations with the students. The parties entered into a consent decree that embodied the court's mandate while, in the University's view, fully respecting its religious orientation and tradition. Accordingly, both the University and the students elected to forego their right to seek United States Supreme Court review.

Apparently unwilling to allow Georgetown University to decide for itself what protected its religious freedom, Senator Armstrong thereupon succeeded in attaching to the District's appropriations act a rider that would have effectively overruled *Georgetown*. The rider prohibited the expenditure of any funds appropriated to run the District government unless the District Council amended the Human Rights Ordinance in precisely the manner specified by Congress. The proposed amendment stated that any educational institution "affiliated with a religious organization or closely associated with the tenets of a religious organization" could lawfully and discriminatorily deny benefits to persons "engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief." Rather than comply with the terms of the rider, members of the District's Council filed suit.

Two broad categories of argument were available to attack the amendment: some arguments relating to the unusual procedure Congress utilized to work its will and other arguments relating to the substance of what Congress commanded. Ultimately, however, both types of argument stem from

33. *Id.*
34. *Id.*
35. *Id.* at 39.
36. *Id.*
39. See supra notes 23-24 and accompanying text.
the overarching anti-domination principle that precludes congressional action premised on the District's lack of political power.

B. Procedural Arguments

1. Home Rule and Free Speech

Any catalogue of the arguments available to the Clarke plaintiffs must begin with the argument that actually prevailed in the court of appeals. The court held that it need not reach questions concerning the power of Congress to enact the Armstrong language directly because compelling members of the Council to introduce and vote in favor of the Armstrong language violated their right to free speech.42

Superficially, the first amendment free speech guarantee might seem an implausible source for an argument against the Armstrong amendment. The court of appeals opinion appears not to understand the nature of what philosophers call performative utterances.43 True, Congress effectively commanded members of the District Council to say certain words. But it did so because of what the words did rather than because of what they communicated. Congress made no effort to control what Council members said about the Armstrong amendment. Congress left the Council free to denounce or ridicule it. Congress was concerned only that the Council enact the amendment language into law. The very fact that Congress compelled the Council to do so deprived this act of whatever communicative significance it might otherwise have had.44 Indeed, if the circuit court is correct that compelled

42. Clarke, 886 F.2d at 417.
44. In United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), rev'd on other grounds sub nom. Spallone v. United States, 110 S. Ct. 625 (1990), the court upheld a district court order requiring city council members to vote for an ordinance that the city had agreed to enact as part of a consent decree. The court held that the first amendment argument advanced by members of the council "require[d] no extended discussion." Id. at 457. Assuming arguendo that voting was entitled to first amendment protection as symbolic speech, the court concluded that:

the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred. . . . The council members remain free to express their views on all aspects of housing in Yonkers. But just as the First Amendment would not permit them to incite violation of federal law, . . . it does not permit them to take action in violation of such law.

Id. (citations omitted).

The Clarke court distinguished Yonkers on the ground that Yonkers' refusal to pass ordinances required by the consent decree was "itself an illegal act." Clarke, 886 F.2d at 415 n.12. In contrast, "the refusal of the appellees in this case to enact the legislation contained in the Armstrong Amendment would not be illegal — or even subject to legal penalty but for the Armstrong Amendment. . . ." Id. This analysis suggests that the result in Clarke would
official acts violate free speech guarantees, then it would seem to follow that the court would lack the constitutional authority to order a trial judge who thought that the Armstrong amendment was constitutional to enter judgment for the plaintiff.

Yet despite these difficulties, the court's opinion makes some sense when read against the backdrop of the anti-domination principle. The court is surely correct that there is something especially offensive and demeaning about Congress forcing the District Council to do its dirty work. The court proceeds on the assumption that Congress had the constitutional power to enact the Armstrong language directly into law.\textsuperscript{45} Requiring the Council to do so, despite its opposition, seems gratuitously insulting.

Of course, no clause in the Constitution outlaws gratuitous insult. But an important element of our free speech jurisprudence rests on the impropriety of deliberate efforts to degrade individuals by compelling them to recognize the correctness of views they do not share. The free speech clause is premised on a preference for persuasion through the free exchange of ideas, rather than domination through the exercise of raw power.\textsuperscript{46} Thus, the government may not short-circuit the persuasion process by the simple expedient of forcing individuals to pledge allegiance to the flag,\textsuperscript{47} utter loyalty oaths,\textsuperscript{48} or display a state slogan on their license plates.\textsuperscript{49} Coercive measures

change if Congress first required repeal of the Human Rights Ordinance and then, in separate legislation, required Council members to vote for the repeal. Whether Congress effects its will in one enactment or two does not seemingly matter.

\textsuperscript{45} See Clarke, 886 F.2d at 414. Although this assumption is challenged below, see infra notes 51-54 and accompanying text, the point is that the Armstrong amendment is vulnerable even if Congress could have effected its will in another way. Indeed, Congress' supposed ability to amend District law directly supports the view that it has no valid interest in compelling the Council to vote for the repealer.

\textsuperscript{46} For a classic statement of this view, see Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

\textit{Id.} at 375.


of this sort are insulting precisely because they treat their targets as objects to be manipulated rather than as intellectually autonomous individuals capable of deciding for themselves the truth of the speech the state wishes to compel.  

The District Council, unlike individual citizens, is subservient to Congress. Therefore, some may think that these cases are distinguishable. In particular, Article I expressly gives Congress the authority to dominate the District. Thus, even though the State may not force citizens to declare their allegiance to it, an appellate court can order the court below to enter a mandate after a successful appeal. Unlike citizens and the State, trial and appellate courts are in a hierarchical relationship. Similarly, Congress is under no obligation to persuade an administrative agency exercising delegated power to do its will. On the contrary, delegated power is constitutionally legitimate precisely because Congress restraints the discretion of administrators through the imposition of standards.

But although the appropriate constitutional pigeonhole for the District's Council is far from clear, it should be obvious that the Council is not just an administrative agency. A popularly elected legislature is responsible to its constituents. The Constitution does not compel Congress to establish such a body. Perhaps Congress can, if it wishes, establish a federal dictatorship for the District. On this view, Article I provides Congress with authority to enact the Armstrong language or any other constitutionally permissible statute. But what it cannot do is establish a “Potemkin Village” version of democracy.

50. For an argument that measures of this sort are unconstitutional because they constitute an irrational effort to coerce internal preferences, see Seidman, Rubashov’s Question: Self Incrimination and the Problem of Coerced Preferences, 2 Yale J. Law & Hum. 149 (1989).

51. U.S. Const. art. I, § 8, cl. 17 (Congress has power “[t]o exercise exclusive legislation in all cases whatsoever, over such District . . . .”).


53. Indeed, Supreme Court decisions have suggested that even administrative agencies are not mere tools of Congress, but rather retain a sphere of constitutionally protected autonomy. See, e.g., Bowsher v. Synar, 478 U.S. 714, 722 (1986) (“The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”)

54. As the Clarke court argued:
Through the Home Rule Act, Congress has furnished the District with a democratic form of government and vested the legislative power of this government in the Council. Therefore, members of the Council are “legislators” in every traditional sense. As such, they enjoy broad First Amendment protections in discharging their responsibilities. . . . Unless and until Congress restructures District government to divest the Council of its legislative functions, it must respect the broad First Amendment rights that the Council members enjoy by virtue of their status as legislators.
A generation ago, the Supreme Court held that even though the Constitution does not require that state officials be chosen by popular election, if the States choose to accord the franchise to its citizens, the elections must be genuine.55 A state could not take advantage of the legitimacy that comes with popular sovereignty without creating the reality of that sovereignty. Similarly, Congress cannot dominate the District while pretending that an autonomous city council governs the District. Having established the illusion of a popularly elected legislature with authority to legislate for the District, Congress cannot then tell the Council what legislation to enact.

In summary then, the Armstrong amendment violates free speech principles because it constitutes an impermissible effort to short-circuit the process of free debate by commanding allegiance to a political position. This sort of compulsion is appropriate for entities in hierarchical relationships with each other, but not for morally autonomous entities. Congress has the constitutional authority to impose hierarchy on the District if it chooses to do so. However, it lacks the authority to enjoy the privileges of such a hierarchy while maintaining the illusion of autonomy.

2. Home Rule and Conditional Spending

The argument above focuses on Congress' use of the District Council to accomplish its own objectives. A closely analogous argument centers upon the use of the appropriations process. Congress did not simply order the District Council to enact the Armstrong language. In form, at least, it gave the Council a choice. It could either enact the Armstrong language or forego its entire appropriation for the year.56 This was, to be sure, the kind of "choice" that The Godfather understood. Is it the kind of choice that the Constitution permits?

---

55. See, e.g., Kramer v. Union Free School Dist., 395 U.S. 621, 628-29 (1969). In Kramer, the Supreme Court reasoned:

The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. . . . However, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'

Id. (quoting from Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966)).

After fifty years of argument, the constitutional status of conditional spending measures remains ambiguous. The confusion began with Justice Roberts' opinion in United States v. Butler, which held that Congress exceeded its spending powers by offering to pay farmers to reduce their productive acreage. In a characteristically murky opinion, Justice Roberts seemed to say that the withholding of a benefit amounted to unconstitutional coercive pressure designed to accomplish objectives beyond Congress' powers. In so holding, the Court relied upon the "obvious" distinction between a statute "stating the conditions upon which moneys shall be expended" and "[a statute] effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."

Unfortunately, this distinction has turned out to be less obvious than Justice Roberts imagined, and later courts have capitalized on its diaphanous quality to cut back substantially on Butler. Yet Justice Roberts' underlying insight—that in a welfare state, there is often no meaningful distinction between the withholding of benefits and the imposition of burdens—remains an important one. Moreover, the core holding of Butler, that Congress lacks unlimited power to extend its writ by purchasing compliance, remains the law.

In South Dakota v. Dole, the Supreme Court recently summarized the limits on Congress' spending power in the course of upholding a statute that conditioned a portion of federal highway funds on the willingness of States to adopt a minimum drinking age. The Court held that conditional grants are constitutional only if they meet three requirements: First, the grants

---

57. For two recent efforts to make sense of the confusion, see Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989), and Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988).
58. 297 U.S. 1 (1936).
59. Id.
60. Id. at 72. Justice Roberts further complicated matters by asserting that the conditional spending would be unconstitutional even "if the plan were one for purely voluntary cooperation." Id.
61. Id. at 73.
63. This point has not escaped the attention of one of the most perceptive opponents of the welfare state. "The new constitutional order thus comes to us bereft of the old common law baseline, and without a new baseline to replace it. Given this legal void, it is quite impossible to say that a certain reform introduces either a subsidy or a penalty that needs to be constitutionally justified." Epstein, supra note 57, at 99.
65. Id. at 207-08.
must be in pursuit of the general welfare (although the Court indicated that Congress had very substantial, perhaps even unlimited, leeway in defining this term); second, the conditions under which Congress provides the money must be spelled out unambiguously to provide the recipient with a clear choice of whether to accept the condition; and, third, the conditions must be related to the federal interest in the particular project or program.

How does the Armstrong amendment fare under this tripartite test? Obviously, appropriations to run the District government are in the "general welfare," and although it may be less than obvious that the condition benefiting religiously affiliated educational institutions serves the common good, it is extremely unlikely that a court would invalidate the condition on this basis. Moreover, there is nothing even mildly ambiguous about Congress' imposition of the condition. But the amendment runs afoul of the third Dole requirement. The Armstrong amendment did not simply deny the District funds to finance enforcement of the Human Rights Ordinance; it precluded the District from spending any money for any purpose. Perhaps a restriction on the expenditure of funds to enforce the ordinance against religious schools would vindicate the federal interest in religious freedom. But, there is no federal interest in ending garbage collection, police protection, and public education in the District. Cutting off funds for these purposes amounts to nothing more than an effort to coerce District officials. It is domination, pure and simple. As the Dole Court acknowledged, the exact contours of the "relatedness" requirement are unclear, but if the requirement has any meaning at all, the total termination of all funding for any purpose must violate it.

Some may argue, however, that Congress' special powers over the District make cases like Dole and Butler inapposite. The Supreme Court decided Butler at a time when the Court believed that constitutionally mandated principles of federalism deprived Congress of the direct power to control the acreage of farmers. Against this backdrop, the Court held that Congress could not accomplish indirectly (through conditional spending) a result that

66. Id. at 207.
68. See Dole, 483 U.S. at 207-08; see also Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion) (Federal Government may exact non-discriminatory user taxes upon the states that approximate the states' fair share of benefits accrued from the federal program); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294-96 (1958).
69. Dole, 483 U.S. at 208.
Preconditions for Home Rule

could not be achieved directly by legislative fiat. 71 Similarly, in Dole, the Court assumed arguendo that the twenty-first amendment deprived Congress of the power to interfere directly with state regulation of the consumption of alcoholic beverages. 72

However, Congress faces no similar constraint against legislation for the District. Under the District clause of Article I, Congress could have directly amended the Human Rights Ordinance. 73 Given this fact, it seems odd to say that Congress could not have achieved the same objective by conditioning spending on the willingness of the District Council to adopt the amendment.

There are two response to this argument. First, the structure of the Dole opinion 74 strongly suggests that the Supreme Court viewed Congress' spending powers as limited even in circumstances where Congress could accomplish the same result directly through use of some other Article I power. The first half of Justice Rehnquist's opinion for the majority addressed the requirements that the spending clause be imposed without regard to any additional obstacles that might be posed by the twenty-first amendment. In this section of the opinion he spelled out the tripartite test. 75

Only after demonstrating that the statute in question satisfied these three requirements did Justice Rehnquist turn to the "remaining question:" "[w]hether the twenty-first amendment constitutes an 'independent constitutional bar' to the conditional grant of federal funds." 76 The Court held that the "independent constitutional bar" requirement does no more than prohibit the Federal Government from using spending to induce the states to engage in activities that would themselves be unconstitutional or from utilizing such extreme financial inducements that "pressure turns into compul-

---

71. See United States v. Butler, 297 U.S. 1, 74 (1936). Thus, in reaching its decision, the Court relied upon the fact that the regulation of acreage was within the power reserved to the states: "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance." Id.

72. 483 U.S. at 206. See also U.S. Const. amend. XXI § 2 ("The transportation or importation into any State Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

73. See, e.g., Palmore v. United States, 411 U.S. 389, 397 (1973). In Palmore, the United States Supreme Court held that congressional legislative power over the District of Columbia is plenary. "Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." Id. See also Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

74. 483 U.S. at 207-08.

75. See supra notes 64-68 and accompanying text.

76. Dole, 483 U.S. at 209.
Clearly, however, these additional requirements apply only in circumstances where an independent constitutional bar exists, whereas the first three requirements are applicable more generally.

There are good reasons why Congress' spending powers should be limited even in circumstances where some other head of power would enable Congress to achieve directly the same objective. Limitations on spending authority serve to reinforce the political protections that operate as the principal safeguard against congressional overreaching. Conditional spending is particularly insidious because it often allows Congress to legislate without clearly confronting the policy implications of its conduct and the political costs associated with interference with local home rule. By creating the illusion that it is doing no more than expanding the range of choice, Congress can circumvent federalism limits that might be politically impregnable if it sought to achieve the same objectives by direct coercion.

Each of the three requirements imposed by the Supreme Court serve to reestablish the political restraints that conditional spending weakens. Thus, the general welfare requirement confronts Congress with the need to justify its program in terms of the common good. Although not judicially enforceable, the requirement focuses the attention of Congress on its constitutional obligation not to override local control unless necessary to serve some national public policy objective.

Similarly, the "clear statement" rule with regard to the conditions requires Congress to bear the additional political costs of candor when it limits local control. By forcing Congress to articulate its purpose, the rule tends to prevent imposition of conditions that are the product of a back room deal between private interest groups—the sort of deal that could not be publicly defended if its terms were made explicit.

Finally, the "relatedness" requirement serves to protect against conditions that amount to no more than the exercise of power over local entities rather than efforts to advance some federal interest that transcends local concerns. Insisting that the condition relate to the purposes of the program to which it attaches provides assurance that Congress rationally linked the condition to a public policy objective. Without the relatedness requirement, Congress could use the threat of a fund cut off as a lever to change local policies that

77. Id. at 210-11.
78. See supra notes 64-66 and accompanying text.
79. See, e.g., Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1691-92 (1984) ("[T]he general welfare provision of the spending clause was designed to ensure that public resources would be devoted to broad social interests.").
have no nexus with national concerns. Congress could, in other words, dominate rather than legislate.\textsuperscript{80}

The manner in which the Armstrong amendment finally became law makes clear that these dangers are not merely hypothetical. Had Congress not utilized the appropriations process to work its will, the House and Senate District committees, which weigh the federal interest against the imperatives of home rule and determine public policy questions for the District, might have considered the amendment.\textsuperscript{81} Instead, Congress attached the amendment to an omnibus appropriations measure on the floor of the Senate at the final hour.\textsuperscript{82} Congress had no need to focus on the federal interest that justified congressional intervention because it did not relate the restriction to the specific purposes for which it was appropriating the money. Furthermore, because all of the District's funding was at stake, Congress could

\textsuperscript{80} The relatedness requirement is thus closely linked to both neo-republican and public choice theories of politics. As Professor Sullivan argues:

A civic republican might defend the Court's attention to the germaneness of condition to benefit in the unconstitutional conditions context by arguing that benefits with extraneous conditions attached are living proof of defective legislative process. They are products of logrolling, or provisional alliances between factions with different agendas. Only exercises of raw power, rather than deliberation over the common good, engender such hybrid legislative creatures.

Sullivan, \textit{supra} note 57, at 1471.

Similarly, for public choice theorists, the ability to impose extraneous conditions increases the risk that rent seeking factions will capture the coercive power of government. See \textit{Farber \& Frickey, The Jurisprudence of Public Choice}, 65 \textit{Tex. L. Rev.} 873, 907 (1987) (rent-seeking activities of special interest groups may undermine indirectly public confidence in the democratic process); Epstein, \textit{supra} note 57, at 21-25 (indepth discussion of inequities in benefit distribution which can result from rent-seeking activities of powerful interest groups); Sullivan, \textit{supra} note 57, at 1473 (germaneness requirement helps check rent-seeking activities).

Unfortunately, however, effective use of a relatedness requirement requires some preexisting agreement on the appropriate purposes of particular government programs. For a discussion, see Seidman, \textit{Reflections on Context and the Constitution}, 73 \textit{Minn. L. Rev.} 73, 77-78 (1988) (discussing a variety of congressional purposes). For a more comprehensive critique, see Sullivan, \textit{supra} note 57, at 1473-77 (discussing various theories of germaneness).

\textsuperscript{81} Rule XXI of the House of Representatives and Rule XVI of the Senate make amendments proposing general legislation out of order when attached to appropriations measures. \textit{See W. Brown, Rules of the House of Representatives, H.R. Doc. No. 248, 100th Cong., 2d Sess. Rule XXI (1988); L. Slack, Senate Manual, S. Doc. No. 100-1, 100th Cong., 1st Sess. Rule XVI (1988).} Ironically, when the constitutionality of the Armstrong amendment was challenged, the Federal Government defended it on the ground that these rules would have prohibited the use of appropriations measures to accomplish "general legislation." Clarke \textit{v. United States}, 886 F.2d 404, 414 (D.C. Cir. 1989) (citing Brief of the United States Senate as Amicus Curiae at 9-10). But the relatedness requirement is important precisely because it forces the legislature to debate the substantive appropriateness of a restriction rather than utilizing the simple expedient of conditioning essential funds on subservience to the will of Congress.

\textsuperscript{82} Armstrong Amendment I, \textit{supra} note 14, 102 Stat. at 2269-14.
use its power to dominate the District without squarely confronting the implications of its actions for home rule.\textsuperscript{83}

All of the above suggests that even if Congress could have imposed directly the Armstrong amendment under its District clause power, it could not do so through a conditional spending measure. Moreover, there is also a second response to the argument that Congress' spending and direct powers are coextensive. While no constitutional principle guarantees the right of District citizens to an unamended Human Rights Ordinance, there is a strong argument that District citizens did have a constitutional right to the money that Congress withheld.

It is important to understand that the Armstrong amendment would have gone beyond simply cutting off federal funds for the District. All money spent by the District Government, including money raised by local taxes, must be appropriated by Congress, and therefore all funds for all governmental functions would have been unavailable.\textsuperscript{84} The District of Columbia Government would simply have ceased to function.

In recent years, the contention that there is a constitutional right to minimal government services has not fared well in the Supreme Court.\textsuperscript{85} Once again, however, the District clause puts this argument in a special light. Under that clause, Congress is authorized to displace an existing state government in a territory ceded to it.\textsuperscript{86} Implicit within the right to accept the cession is an obligation to create a government to stand in the stead of the government that Congress displaced.

\textsuperscript{83} This is not to say that either the Senate and House rules or the relatedness requirements constitute impermeable barriers. In fact, after the court of appeals invalidated the Armstrong amendment, \textit{Clarke}, 886 F.2d at 417, Congress reenacted it as a rider to the District's annual appropriations in the form of a direct amendment to the District of Columbia Code. \textit{See} Armstrong Amendment II, \textit{supra} note 14, § 141, 103 Stat. at 1284 (amending \textit{D.C. Code Ann.} § 1-2520 (1981 & Supp. 1989)). However, this subsequent history hardly demonstrates that the limitations on conditional spending are pointless. It may be appropriate to erect special political barriers to certain forms of legislation even though those barriers will on occasion be overcome.

For a discussion of mechanisms by which Congress can avoid its own rules concerning legislating through appropriations measures, see Schrag, \textit{supra} note 10, at 333-35.

\textsuperscript{84} The District of Columbia Code makes clear that Congress must authorize and appropriate all funds for the District's budget, even when those funds are raised by local taxes. \textit{D.C. Code Ann.} § 1-233 (1987). The Armstrong amendment, in turn, conditioned the appropriation of all these funds on the Council's revision of the Human Rights Ordinance. Armstrong Amendment II, \textit{supra} note 14, 103 Stat. at 1284.

\textsuperscript{85} \textit{See}, \textit{e.g.}, \textit{DeShaney v. Winneabago County DSS}, 109 S. Ct. 998, 1003 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.")

\textsuperscript{86} \textit{U.S. Const.} art. I, § 8, cl. 17.
The new government may not be obliged to perform any particular services. For example, the government would have no duty to provide housing for the homeless or a specified level of police protection. However, the constitutional language surely indicated that the Framers intended for Congress to establish some sort of government. There is no indication that the Framers meant to permit Congress to return the federal district to a Hobbesian state of nature. Yet this is precisely the result that the Armstrong amendment would have achieved had it taken effect.

Nor will it do to respond that the Armstrong amendment would not take effect so long as the District Council capitulated by enacting the required language. The right of District residents to some form of government is unconditional. If it is unconstitutional for Congress to leave the District without any form of government, then surely it is unconstitutional as well for Congress to get its way by threatening to do something that it is not permitted to do.

C. Substantive Arguments

The analysis above is all premised on the unusual method that Congress utilized to overturn the Human Rights Ordinance in the first Armstrong amendment. Congress’ direct amendment of the ordinance in response to the court of appeals decision in Clarke rendered these arguments moot. Congress’ power over even the District, however, faces other substantive limits and these limits render even the second Armstrong amendment vulnerable to constitutional attack.

1. Establishment

The second Armstrong amendment leaves intact the District’s Human Rights Law insofar as it applies to educational institutions that are not religiously affiliated. The amendment thus accords special benefits solely on the basis of the religious affiliation of the institution. Given the District of Columbia Court of Appeals decision in Gay Rights Coalition v. Georgetown University, these special benefits cannot be defended on the ground that they are constitutionally compelled under the free exercise clause. Can the benefits be defended against the charge that they are constitutionally prohibited under the establishment clause?

There is a complex and not altogether consistent body of law concerning the extent to which the Government may constitutionally accord special

---

88. 536 A.2d 1, 39 (D.C. 1987); see also supra notes 30-41 and accompanying text.
privileges to religious organizations as a means of accommodating religious belief. The extent to which the Constitution permits such accommodation in cases where it is not constitutionally compelled remains unsettled. One principle, however, is clear: Congress may not specially benefit religious institutions in circumstances where the benefit does not serve to accommodate religious belief.

Yet the Armstrong amendment provides just such a benefit. The amendment grants all religious institutions a special right to discriminate against gays regardless of whether the institution has a religious basis for the discrimination. Thus, a Quaker school with no religious objection to homosexuality nonetheless enjoys a special statutory privilege to fire homosexual teachers simply because the school is religiously affiliated. This sort of unvarnished preference for religion over nonreligion in circumstances where the preference does not serve to accommodate religious belief clearly violates establishment clause principles.

It does not follow, of course, that all applications of the Armstrong amendment violate the establishment clause. But interestingly, the amendment appears to be unconstitutional if applied to the specific case that motivated its passage. Following Georgetown, Georgetown University and the plaintiffs entered a consent decree whereby the University agreed to provide equal facilities and services to gay students. The University publicly stated that the terms of the consent decree are consistent with Catholic tradition.

89. For a summary, see G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, Constitutional Law 1418-23 (1986).

90. Compare, e.g., Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987) (upholding constitutionality of exception to ban on employment discrimination for religious corporations with respect to employment of individuals of a particular religion to perform work connected with the carrying on by such corporation of its activities) with Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (invalidating statute providing that no person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on that day). See generally McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1 (setting forth a framework to distinguish legitimate accommodations for religion from unwarranted benefits for religion).


We find unpersuasive the District Court's reliance on the fact that § 702 singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions . . . , it has never indicated that statutes that give special consideration to religious groups are per se invalid . . . . Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

483 U.S. at 338 (emphasis added).
and doctrine. Hence, application of the Armstrong amendment to Georgetown would violate the establishment clause.

Moreover, even with regard to institutions that have religious objections to the equal treatment of homosexuals, the Armstrong amendment raises important establishment clause problems. The amendment leaves intact the statutory ban against discrimination based upon race, color, religion, national origin, sex, age, marital status, personal appearance, family responsibilities, matriculation, political affiliation, and physical handicap even in circumstances involving religious motivation for these other varieties of discrimination. Thus, the Armstrong amendment treats unequally different religious groups based upon Congress’ approval or disapproval of their beliefs. Groups that believe that homosexuality constitutes sinful behavior have a special exemption from their statutory responsibilities. On the other hand, groups that believe that interracial marriage is sinful (race), that God intended women to remain at home to raise a family (sex and matriculation), that men or women performing certain religious functions should remain celibate (marital status), or that individuals should wear distinctive religious garb (personal appearance) enjoy no such exemption. This sort of preference for one religious belief over another, like the preference for religion over nonreligion, violates core establishment clause principles.

2. Due Process

Not content to authorize discrimination against those who actually engage in homosexual conduct, the authors of the Armstrong amendment extended
their exemption to persons "promoting, encouraging, or condoning" such conduct.\textsuperscript{94} Nor is the amendment limited to the promotion, encouragement, or condonation of actual homosexual conduct. Its ambit extends to homosexual "lifestyle, orientation, or belief."\textsuperscript{95} Read literally, the Armstrong amendment authorizes discrimination against an individual who has homosexual urges that are never acted upon (orientation) or even a homosexual "belief," whatever that is, that does not rise to the level of an orientation. Worse yet, the amendment appears to authorize discrimination against a heterosexual who silently condones a homosexual belief.

If the amendment imposed governmental discrimination on these grounds, no doubt it would be unconstitutional. Fundamental and uncontroversial constitutional principles shield individual belief and orientation from government scrutiny and disapproval.\textsuperscript{96} Of course, the Armstrong amendment does no more than authorize private discrimination. It might therefore be thought that the state action doctrine would shield the amendment from constitutional attack. But despite the private source of the discrimination, the State is the entity that is distinguishing between individuals based upon their orientations or beliefs, and this distinction is simply irrational. No imaginable legitimate basis exists on which a State could become involved with what "orientation" or unacted upon belief an individual possesses. Thus, although Congress might repeal the Human Rights Ordinance altogether,\textsuperscript{97} it cannot distinguish between those covered and not covered in a fashion that irrationally trenches upon private orientations and beliefs.

\section*{Equal Protection}

In a series of cases decided over the past two decades, the United States Supreme Court has held that the government violates equal protection principles when it restructures its political system in a fashion that impairs the ability of minorities to secure legislation in their interest.\textsuperscript{98} The most recent articulation of this proposition came in a case raising issues closely analo-

\begin{footnotesize}
\begin{footnotes}
\textsuperscript{94} Armstrong Amendment II, \emph{supra} note 14, at 103 Stat. at 1284.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{See, e.g.,} Stanley \textit{v. Georgia}, 394 U.S. 557, 566 (1969) ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.")
\textsuperscript{97} \textit{See supra} notes 30-41 and accompanying text.
\textsuperscript{98} \textit{See Washington v. Seattle School Dist.}, 458 U.S. 457 (1982); \textit{Hunter v. Erickson}, 393 U.S. 385 (1969) (amendment to city charter that required any ordinance enacted by the city council regulating property based on race to be approved by a majority of the electors held an unconstitutional impediment to equal protection); \textit{Reitman v. Mulkey}, 387 U.S. 369 (1967) (affirming the judgment of the California Supreme Court that held that a state statute authorizing racial discrimination in the housing market significantly involved the state in private discrimination).
\end{footnotes}
\end{footnotesize}


In *Seattle*, the City of Seattle decided voluntarily to embark upon a program of extensive busing to increase racial balance in its schools.100 In response to this program, the citizens of Washington adopted a state-wide initiative that terminated the use of mandatory busing and deprived local jurisdictions of the power to use busing to remedy de facto racial segregation not violative of the Constitution.101 The school district brought suit alleging that the initiative violated the fourteenth amendment. The Supreme Court acknowledged that Seattle had no constitutional obligation to embark upon the busing program in the first place, and further acknowledged that the city could abandon the program even after it started, but nonetheless held that the initiative violated the equal protection clause.102

Writing for a five justice majority,103 Justice Blackmun reasoned that the state wide initiative amounted to more than a mere repeal of the Seattle program. The initiative, the Court held, had the effect of erecting special barriers for racial minorities attempting to secure legislation in their interests.104 Whereas citizens favoring other school programs could work their will by persuading the Seattle School Board to adopt their point of view, the initiative singled out the advocates of racial balance and forced them to prevail in a new state wide initiative before they could secure relief.105

In most important respects, the Armstrong amendment resembles the initiative invalidated in *Seattle*. In both cases, a local jurisdiction embarked on a voluntary plan to protect the interests of a minority group. In neither case did the beneficiaries of the program enjoy a constitutional right to this protection. In both cases, a larger jurisdiction, enjoying hierarchical authority over the local jurisdiction, enacted a measure to repeal the plan. And in

100. Id. at 461.
101. Id. at 462-64. See also Wash. Rev. Code § 28A.26.010 (1981) (granting students the right to attend the school that is geographically nearest the student’s residence).
103. Justice Blackmun delivered the opinion of the Court in which Justices Brennan, White, Marshall, and Stevens joined.
104. 458 U.S. at 470.
105. Id. at 474-75.
both cases, this repealer effectively restructured the political process in a fashion that specially disabled the minority group.

Thus, advocates of a wide variety of measures relating to education and nondiscrimination need only convince a majority of the District Council to enact legislation favoring their interests. However, just as advocates of racial integration bore the special burden of prevailing on a state wide basis in Seattle, advocates of gay rights bear the unique burden of persuading Congress to repeal the Armstrong amendment.

Seattle does seem to present a stronger case for the plaintiffs in one respect: the case involved a racial minority and therefore might be thought to engender suspect class analysis. Although the Justices have not yet squarely addressed the question, the present Supreme Court probably would not hold that homosexuals constitute a suspect class or that laws disadvantaging them automatically trigger strict scrutiny.

Although this distinction weakens the claim of opponents of the Armstrong amendment, it does not destroy it. Interestingly, the Seattle initiative was also racially neutral. The initiative politically disadvantaged advocates of integrated schools. As the Court acknowledged, this class, like the class of opponents of integration, consisted of whites and blacks. It may also be true that the primary beneficiary of integration is the class of racial minorities. Yet this fact, even if it is true, demonstrates no more than the disproportionate racial impact of the Seattle repeal. And, the Court has made plain that disproportionate racial impact alone is insufficient to generate heightened scrutiny when the challenged classification is facially neutral.

Thus, the result in Seattle cannot be explained on the theory that the initiative discriminated racially. Rather, the result depends upon the Court’s perception that support for the initiative derived, at least in part, from a

106. Thus, although the Supreme Court struck down an ordinance erecting special barriers to statutes outlawing racial discrimination in Hunter v. Erickson, 393 U.S. 385 (1969), the Court declined to invalidate a statute establishing similar barriers to the construction of low income housing in James v. Valtierra, 402 U.S. 137 (1971). The Court held that the statute involved in James did not racially classify because it “require[d] referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.” Id. at 141.

107. Arguably, the Court implicitly resolved this question in Bowers v. Hardwick, 478 U.S. 186 (1986). In Bowers, although purporting to address only a due process attack on Georgia’s sodomy statute, the Court upheld the act as applied to homosexuals while leaving open the question of its constitutionality as applied to heterosexuals. Id. at 188 n.2.

108. Seattle, 458 U.S. at 472.

109. See, e.g., Washington v. Davis, 426 U.S. 229, 248 (1979) (refusing to invalidate qualifying test for District of Columbia police officers merely because the test had a disproportionate impact on racial minorities).
desire to use political power to entrench existing power relationships. Even if the proponents of busing were not all white, there was an unacceptable risk that prejudice against powerless subgroups in the population motivated the advocates of the initiative. Rather than engage in meaningful dialogue with these subgroups, the State of Washington simply restructured the political process to make it unnecessary to bargain with them.\textsuperscript{110}

It need hardly be demonstrated that fear of association with homosexuals, like fear of association with blacks, often stems from prejudice.\textsuperscript{111} And although there are both heterosexual and homosexual advocates of the Human Rights Ordinance, the Armstrong amendment, like the \textit{Seattle} initiative, effectively ends the political bargaining over a matter vital to a scorned minority group.\textsuperscript{112} Both measures stack the political deck in advance so as to permit the untrammeled exercise of political power.

\textbf{b. City of Cleburne v. Cleburne Living Center, Inc.}

That the Court does not treat homosexuals as a suspect class, which would trigger heightened scrutiny, does not dispose of the potential constitutional issues. The Court's treatment of an analogous claim advanced by a group of mentally retarded citizens in \textit{City of Cleburne v. Cleburne Living Center, Inc.}\textsuperscript{113} makes clear that suspect class status will not settle the question of political domination. In \textit{Cleburne}, the Court explained at length why the mentally retarded were not a suspect class and why legislation facially discriminating against them need only satisfy a "rational basis" test.\textsuperscript{114} However, after justifying the use of rational basis, the Court nonetheless held that the exercise of raw political power over this group violated the Constitution when the contested discriminating measure reflected no more than a visceral dislike of a group of citizens.\textsuperscript{115}

\begin{flushright}
\textsuperscript{111} For a discussion, see J. Ely, \textit{Democracy and Distrust} 162-64 (1980).
\textsuperscript{112} See supra notes 53-55 and accompanying text.
\textsuperscript{113} 473 U.S. 432 (1985).
\textsuperscript{114} Id. at 442-447.
\textsuperscript{115} Id. at 448:
[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, \ldots and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some faction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."
\end{flushright}

\textit{Id.} (citation omitted) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
For two reasons, there are special risks that the Armstrong amendment violated the *Seattle-Cleburne* principle. First, although racial prejudice motivates many opponents of integration, many others have nonracial grounds for opposition. The existence of a legitimate public policy debate concerning the efficacy and wisdom of governmental efforts to end de facto segregation compounds the *Seattle* analysis.

By contrast, it is far less likely that the Armstrong amendment reflected a legitimate stance on public policy. Importantly, the antidiscrimination requirement that the Armstrong amendment nullified did not preclude educational institutions from discriminating along the statutory lines in circumstances where a nexus existed between the classification and the aims of the institution. Although the coverage of the District of Columbia Human Rights Ordinance is extraordinarily broad, its substantive prohibitions are quite narrow. The ordinance applies to discrimination on the basis of “race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, political affiliation, source of income, or physical handicap.” It does not follow, however, that exclusion of individuals in these groups necessarily violates the ordinance. The statute’s preamble states that it is aimed solely at “discrimination for any reason other than that of individual merit.” Moreover, the specific provision covering educational institutions makes it unlawful to deny access or services “to any person otherwise qualified, wholly or partially, for a discriminatory reason” based upon the forbidden categories.

The Human Rights Ordinance thus permits distinctions so long as they relate to an individual’s qualifications and are not motivated by a desire to discriminate simper. It would seem to follow that the congressional annulment of the provision did not advance any public policy that could be disentangled from mere visceral, private dislike. Rather, the Armstrong amendment only authorizes the kind of naked discrimination that the ordi-

---

117. Id.
118. Id. § 1-2501 (emphasis added).
119. Id. § 1-2520 (1) (emphasis added). The ordinance provides that it shall be an unlawful discriminatory practice:

To deny, restrict or abridge or condition the use of, or access to, any of [an educational institution’s] facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, political affiliation, source of income or physical handicap of any individual.

*Id.* (emphasis added).
nance prohibits. But *Cleburne* and *Seattle* dictate that public policy must be more than a reflection of visceral dislike and prejudice.\footnote{120. See supra notes 100-19 and accompanying text.}

There is also a second respect in which the Armstrong amendment poses a clearer case for application of the *Seattle-Cleburne* principle than *Seattle* or *Cleburne* themselves. In both *Seattle* and *Cleburne* a fancy argument is required to explain exactly how the political process was restructured so as to disadvantage a minority group. In both cases, opponents of the decisions could fairly claim that a neutral process was employed, and no restructuring had occurred. Thus, both before and after passage of the initiative invalidated in *Seattle*, the school board's actions were subject to repeal through the initiative process. That process was open to advocates of school integration as well as to its opponents. Had the votes been available, it could have been used to entrench the Seattle busing plan. Indeed, busing proponents could have used the initiative process to repeal the contested initiative. It is therefore hard to see how busing proponents can claim anything more dramatic than the loss of an election that they wish they had won.

Recasting the *Cleburne* result in political process terms presents even more problems. Perhaps the Cleburne City Council was at least partially motivated by stereotypical judgments and outright prejudice against the mentally retarded. Nonetheless, those judgments did not foreclose formal access to the political process. For all that appears in the Supreme Court's opinion, the retarded and their advocates were free to elect different representatives with different attitudes toward their interests. There are, of course, obvious respects in which mental retardation itself can prevent full political participation.\footnote{121. As Justice Marshall argued in his separate opinion in *Cleburne*: As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. Not until Congress enacted the Education of the Handicapped Act ... were "the door[s] of public education" opened wide to handicapped children. ... But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 464 (1985) (citations omitted).} In addition, sophisticated arguments drawn from political theory explain how groups with equal formal access to the ballot can nonetheless be frozen out of the process.\footnote{122. See, e.g., J. Ely, supra note 11, at 135-179.} However, those arguments are controversial, and nothing in the Court's opinion defends or even explains them.

By contrast, the political process argument regarding the Armstrong amendment is simple and uncontroversial. Congress not only partially re-
pealed the Human Rights Ordinance; it also transferred the controversy about future reenactment of the amendment to itself, a legislative body in which the District proponents of reenactment had no representation. Thus Congress formally and totally precluded further debate about the matter.

4. Anti-Domination

At first blush, the various arguments advanced above may appear both discrete and, for the most part, not subject to generalization. Even if correct, those arguments seem to be peculiarly applicable to the controversy surrounding the Armstrong amendment and, therefore, fail to demonstrate that an adequate legal foundation supports the protection of home rule over the range of cases.

There are two responses to this argument. First, even if the substantive arguments set out above are peculiarly applicable to the Armstrong legislation, there is no reason to suppose that the case itself is atypical. Therefore it is likely that competent lawyering could produce comparable, albeit different, arguments to combat other threats to home rule.

Second, and more fundamentally, the substantive arguments advanced above are neither discrete nor limited to this particular case. Although drawn from different clauses of the Constitution and applied to a particular set of facts, the arguments, on closer analysis, really amount to reiterations of a single basic theme with broad applicability.

The claim underlying each of the arguments is that the Armstrong amendment demonstrates contempt for the District and for its citizens. This contempt is expressed by the sloppy, thoughtless, and overbroad way in which Congress drafted the amendment, the backdoor means which led to its enactment, and the bullying technique Congress utilized to secure its goals. The Constitution does not permit the government to show contempt for its citizens even when, indeed, especially when, they are excluded from the political process. The proponents of the law must therefore demonstrate that the law amounts to something more than an act of domination over a powerless and despised minority. If a fully representative legislature never would have enacted the law, then the law is unconstitutional.

123. Armstrong Amendment II, supra note 14, at 103 Stat. at 1284.
124. The anti-domination principle closely tracks neo-Republican theory, which sees constitutional law as a guarantee of authentic dialogue designed to discover the public good and rejects raw political power as a legitimate ground for state intervention. See, e.g., Sunstein, supra note 79. Yet the anti-domination principle also draws upon pluralist theory, the principal modern rival of neo-republicanism. The principle reflects pluralist theory because it is premised upon a supposed failure of group representation and asks us to imagine the results of
Strands of legal doctrine concerning the District directly embody this anti-domination principle. Perhaps the clearest articulation of the principle is in an opinion written almost twenty years ago by a panel of the United States Court of Appeals for the District of Columbia. In *United States v. Thompson*, the court held that in light of the lack of congressional representation of District residents, the judiciary had a special responsibility to prevent the District from becoming "'the last plantation.'" Therefore, laws discriminating against District residents should be subject to "the strictest possible review." Utilizing this standard of review, the Court held that providing less favorable terms for release on bail for defendants charged with national crimes in the District than for defendants charged with identical crimes elsewhere in the country would violate the Constitution.

But although an anti-domination principle serves to unify the various arguments made above, the principle also makes all of the arguments vulnerable. Because all of the arguments ultimately rest upon a single principle, a judge who rejected that principle would reject each of its elaborations as well.

In fact, the anti-domination principle is vulnerable to two sorts of attack. First, a critic might question the ability of judges to make accurate distinctions between statutes that are authentic efforts to articulate public policy and those that constitute mere acts of domination. The peculiar facts of *Thompson* made an especially compelling case for a finding of domination. Congress had discriminated between defendants who were charged with identical national offenses solely on the basis of the fact that the United States attorney tried some of the defendants in the voteless District of Columbia. Yet even on these unusual facts, one could easily quarrel with the conclusion that this differentiation amounted to domination. For example,

---

126. Id. at 1346 (citation omitted).
127. Id. at 1341. The court concluded that:
   The principle of majority rule loses its legitimacy when not all the votes are counted. . . . In this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating. Therefore, discriminatory classifications affecting District residents must be subject to the strictest possible review.

128. Id.
129. Id. at 1341.
opponents of the decision could plausibly argue that a legitimate public policy supported the distinction. In the District, unlike any state, Congress controlled both the local and the national court system and, therefore, could impose uniform rules upon both.130

In situations similar to that posed by the Armstrong amendment, where no overt discrimination against District residents of the sort presented by Thompson exists, and where Congress purports to exercise its local authority, the effort to distinguish between domination and legislation becomes far more difficult and, perhaps, altogether impossible. Such an effort requires judges to imagine a fully representational, hypothetical political process with participants authentically committed to discovering and implementing the public good. Then judges must predict what legislation such a process would produce. Since no such process has ever existed, judges making such predictions are not subject to any reality testing. Therefore, more than a small risk exists that their predictions will amount to no more than a substitution of their own preference for that of the legislature.

A second sort of critique is more radical. It attacks not just the ability of judges to identify acts of domination but also the very coherence of the concept. According to this view, there is no neutral method by which one can differentiate between a legitimate resolution of a public policy dispute on the one hand and an act of domination on the other. All public policy amounts to nothing more than the assertion of power by the winners of the political struggle against the losers.131 Thus, no one resolution of a public policy dispute is normatively more legitimate than any other resolution.

130. The Thompson Court reasoned that this argument missed the point:

It is clearly within congressional power to enact special rules for the District to deal with street crimes which it prosecutes nowhere else. But the Government would have us believe that there is justification for special rules in the District for crimes prosecuted in every federal jurisdiction. That proposition is an entirely different matter, and its truth is hardly self-evident.

Id. at 1339 (footnote omitted). However, the Thompson argument may, itself, miss the point. The District is arguably unique because Congress has the power to make uniform bail standards for “local” and “national” crimes only in the District. Cf. United States v. Cohen, 733 F.2d 128, 139-141 (1984) (Wilkey, J., concurring) (reasoning that uniform insanity procedures throughout the federal system but different in the District would accord District violators unequal protection).


The public-interest theory ... is under increasing, and increasingly effective, attack as lacking a good analytical basis and contrary to actual experience with governmental policies and programs. Many public policies are better explained as the outcome of a pure power struggle — clothed in a rhetoric of public interest that is a mere figleaf — among narrow interest or pressure groups. The ability of such groups to obtain legislation derives from their money, votes, cohesiveness, ability to make cred-
In recent years, these two arguments have led many to abandon the quest for noncontroversial normative principles outside the political process by which that process can be judged. This new skepticism diminishes substantially the chances that one or more of the previous arguments would prevail. For example, the United States Court of Appeals for the District of Columbia, in an en banc opinion written by Judge Scalia, has effectively overruled Thompson and disavowed the notion that the District’s disfranchisement justifies special judicial oversight. Judge Scalia’s argument for this result rested heavily on his skepticism concerning the possibility of discovering and implementing normative standards that exist outside of politics by which political outcomes could be judged.

Therefore, arguments resting on the anti-domination principle may not ultimately prevail. But, the crucial point is this: without such a principle, the District’s status would remain unchanged even if it secured statehood. The legal guarantee of unconditional state sovereignty also rests on the anti-domination principle. Thus, without such a principle, statehood would be useless, while with it, statehood would be unnecessary. The next section explores the reasons for this conclusion as well as the results that flow from it.

III. THE CONDITIONALITY OF STATE SOVEREIGNTY

Suppose the District of Columbia somehow managed to attain statehood. Would the fact of statehood standing alone provide additional legal protection against enactment of a new Armstrong amendment?

There was a time when the answer almost surely would have been “yes.” The United States Supreme Court thought that a line existed between national and local matters and that it was able to discern the precise location of

---

ible threats of violence or other disorder if their demands are not met, and other factors all totally unrelated to the abstract merit of the policy at issue.

Id. at 27. For a representative sample of the literature supporting this view, see Id. at 27, n.50.

132. Cohen, 733 F.2d at 128.

133. Id. at 139. For example, Judge Scalia eschewed any effort to determine whether there is a reasonable basis for treating District citizens differently from citizens in other parts of the country. Id. Instead, he was prepared to assume the legitimacy of differential treatment from the mere fact that Congress had special authority to legislate for the District. This grant of power meant that “in a sense the Constitution itself establishes the rationality of the present classification, by providing a separate federal power which reaches only the present group.” Id. Thus, at least with regard to discrimination against District residents, Judge Scalia opted for the positivist view. His position amounted to a refusal to apply any normative standard to laws that differentiate between District residents and residents of the rest of the country. Id. For the classic discussion of the positivist position, see H.L.A. Hart, THE CONCEPT OF LAW 92-93 (1981). For a discussion of constitutional positivism, see Wasserstrom & Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 87-103 (1988).
this boundary. Eventually, however, it came to be seen that the maps used to locate the boundary bore a remarkable resemblance to the platform of the Republican Party and almost no resemblance to the constitutional text. With that realization came the more or less complete collapse of the effort to enforce judicially federalism constraints against Congress.

Thus, the modern Court would ask only whether Congress could rationally believe that the regulation in question related to one of the powers entrusted to it under article I of the Constitution. For a half century, not a single congressional enactment has managed to fail this test.

Given this extremely lenient standard of review, Congress could easily justify a new Armstrong amendment as an exercise of Congress' commerce clause powers. Under current precedent, it does not matter that Congress enacted the statute primarily for a moral or social purpose. So long as the statute regulates an area that, in the aggregate, might rationally be supposed to have an effect on interstate commerce, Congress' purpose in enacting the statute is irrelevant. Such an effect could easily be found. For example, different state laws concerning homosexuality and religion might well influence decisions concerning the location of businesses and workers, thereby distorting the free flow of capital.

Perhaps this position seems unconvincing, but the argument is in fact no more farfetched than other commerce clause arguments that the Court has accepted regularly for fifty years. Moreover, even if the commerce clause argument does not carry the day, that hardly ends the matter. A new Arm-

---

135. For an account, see G. Stone, L. Seidman, C. Sunstein & M. Tushnet, supra note 89, at 166-81.
136. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").
137. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964). In Heart of Atlanta, the Supreme Court held:

[i]hat Congress was legislating against moral wrongs in many of these areas rendered its enactment no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

Id. See also Wickard v. Filburn, 317 U.S. 111 (1942) (aggregating effects to meet interstate commerce threshold).
138. The Court accepted an analogous argument with regard to the manufacture of goods by workers paid substandard wages. See United States v. Darby, 312 U.S. 100, 115 (1941).
strong amendment could also be seen as a congressional effort to implement the due process guarantee of religious freedom incorporated in section one of the fourteenth amendment and made an appropriate subject for congressional action by section five.\textsuperscript{139} And, if all else failed, a congressional funding limitation analogous to the Armstrong amendment might well survive as a legitimate exercise of Congress' spending clause authority even if the limitation was unrelated to any of the substantive areas of congressional power.\textsuperscript{140}

For a brief period, some thought that the more general principle implicit in the tenth amendment supplemented the federalism protections that the enumeration of only specific rubrics of federal authority in Article I provided. In \textit{National League of Cities v. Usery},\textsuperscript{141} the Court held that this more amorphous principle prohibited regulation of a State \textit{qua} State in circumstances where federal regulation interfered with a traditional governmental function and impinged on attributes of state sovereignty.\textsuperscript{142}

If \textit{National League of Cities} had remained good law, it conceivably might have saved a state legislature from the ultimate indignity imposed on the District's Council of being compelled to enact the statutory language of the Armstrong amendment. But the regime of \textit{National League of Cities} protected States only against federal regulation directed expressly at the States themselves.\textsuperscript{143} The states, therefore, would have been defenseless had Congress itself chosen to enact the Armstrong language.

Moreover, \textit{National League of Cities} is no longer good law. The Court squarely overruled the decision in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\textsuperscript{144} Significantly, Justice Blackmun's majority opinion in \textit{Garcia} explicitly embraced the twin critiques of the anti-domination principle outlined above. Thus, the Court rejected \textit{National League of Cities} in part because it doubted the capability of the judiciary to locate correctly the

\textsuperscript{139} See Katzenback v. Morgan, 384 U.S. 641 (1966); U.S. CONST. amend XIV, §§ 1, 5.

\textsuperscript{140} In United States v. Butler, 297 U.S. 1 (1936), the Court rejected the Madisonian position, which would have read the Constitution as limiting the congressional spending power to purposes related to the other specific heads of authority contained in article I. \textit{Id.} at 65-66. Instead, the Court embraced the Hamiltonian view, which treated the taxing and spending authority as a wholly independent grant of power. \textit{Id.} at 66. \textit{See also supra} notes 56-87 and accompanying text.


\textsuperscript{142} 426 U.S. at 840-52.

\textsuperscript{143} Thus, in Hodel v. Virginia Surface Mining Ass'n., 452 U.S. 264 (1981), the Court distinguished \textit{National League of Cities} and upheld a federal statute imposing certain requirements on strip mine operators because the statute's command ran to private individuals, rather than to the state itself. \textit{Id.} at 283-93.

\textsuperscript{144} 469 U.S. 528 (1985).
appropriate boundary between state and federal sovereignty. The Court noted that:

Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty.

In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.¹⁴⁵

At the same time, Justice Blackmun also seemed to embrace the more radical critique by suggesting that no normative standard outside of political outcomes existed to judge those outcomes.

[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.¹⁴⁶

The anti-domination principle simply cannot survive this sort of skepticism concerning the possibilities of principled judicial review. Yet, without the anti-domination principle, State sovereignty, like the District's sovereignty in the absence of home rule, is conditional and revocable.

It might still be argued that statehood would provide the District with a modicum of legal protection by disabling Congress from enforcing special rules against the District that Congress would not impose on the rest of the country. Perhaps statehood would deprive Congress of the ability to capitalize on the District's marginal status so as to "make an example" of it.¹⁴⁷

_Garcia_ provides some support for this view. Although generally disclaiming a role for the Courts in enforcing federalism limitations, Justice Blackmun hints that judicial intervention might remain appropriate in circumstances where a breakdown in the political process is the sole cause

¹⁴⁵. _Id._ at 546, 548, 550.
¹⁴⁶. _Id._ at 552.
of the federal encroachment. "Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" Unfortunately, Justice Blackmun failed to elaborate on the type of political failing he had in mind. Perhaps he conceived of a situation in which the other States took advantage of their political power to impose limitations on certain disfavored geographic areas that those States were unwilling to live with themselves.

The possibility that this sort of "equal protection for states" principle would provide meaningful protection for District home rule, is dubious, however. First, the very factors that make the District politically marginal in the first place will also sometimes allow Congress to impose uniform rules that vitally affect the District but have a minimal impact on the states. For example, only one state prohibits educational institutions from discriminating against homosexuals. Thus, Congress could give the Armstrong amendment national scope without significantly impinging on the sovereignty of the states.

Second, even if Congress singled out the District for special treatment, no Supreme Court case has held that discrimination among states is unconstitutional. On the contrary, the Court has permitted such discrimination even in the teeth of the express constitutional requirement of uniformity in the areas of bankruptcy and taxation. Moreover, the Framer's decision to include an express textual limitation in these two areas fairly implies that the

149. Currently, Wisconsin is the only state that prohibits educational institutions from discrimination against homosexuals. However, some twenty-three municipalities and counties scattered throughout the country have similar bans. See Leonard, Gay & Lesbian Rights Protection in the U.S.: An Introduction to Gay and Lesbian Civil Rights 2-3 (pamphlet published by National Gay & Lesbian Task Force).
150. See, e.g., Currin v. Wallace, 306 U.S. 1 (1939). In Currin, the Court held:
   To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power . . . such as there is with respect to the power to lay duties, imposts and excises. . . . Congress may choose the commodities and places to which its regulation shall apply.
    Id. at 14 (citations omitted). Of course, Congress' choice of areas within which it regulates must be rational. This standard, however, is easily met with regard to social and economic legislation. See generally Neuman, Territorial Discrimination, Equal Protection, and Self-determination, 135 U. PA. L. REV. 261 (1987).
Framer's did not anticipate that Congress would be so limited when it legislates in other areas.

Finally, any effort to implement a nondiscrimination principle would have to come to grips with the very problems that caused the Court to abandon the *National League of Cities* approach in the first place. A court attempting to apply this principle would have to decide whether the state-specific legislation in fact resulted from a breakdown in the political process as opposed to the outcome of a good-faith dialogue about appropriate public policy. A court could, of course, announce a bright-line rule that prohibited facial state-specific discrimination. Congress, however, could easily circumvent such a rule by state-neutral gerrymanders. For example, Congress could pass an Armstrong amendment applicable to all states in which the federal government employs more than a certain percentage of the populace. The Court could outlaw gerrymanders as well, but any effort to distinguish between gerrymanders and legitimate classifications must rest upon some normative framework separate from the outcomes of the political process, the very kind of framework that *Garcia* rejected.

Thus, it seems to follow that even if the District were a State, with all the legal protections that statehood entails, the District's sovereignty would remain conditional and revocable and it would suffer from the same sense of powerlessness and vulnerability that accompanies its present status.

And yet this conclusion seems seriously askew. There may remain a few extreme advocates of states rights who claim that current Supreme Court precedent has effectively abrogated the sovereignty of the States. But most fair minded observers would reject the proposition that the States today are not self-governing. Although the appropriate breadth of federalism constraints on Congress remains an issue in modern political discourse, the "home rule" question is, at a minimum, less pressing for Utah or New Jersey than it is for the District.152

If the States have little more legal protection than the District, what explains this difference in perception? For the *Garcia* majority, the answer was simple: the primary protection for state sovereignty is political rather than

---

152. As Professor Choper writes:

[T]he proliferation of national programs has neither led to a centralized autocracy nor resulted in the total concentration of federal power to the exclusion of the individual states. As illustrated by the prolonged constitutional debates in Congress that delayed passage of the Sherman Act for several years and the stalled desperately needed antilynching laws and civil rights legislation for too many more, Congress has generally paid fastidious attention to the notion that certain government powers are reserved to the states.

legal. The protection is built into the structure of the federal system, and therefore does not need to be enforced from outside by judicial review.\footnote{See supra text accompanying note 146.}

The next section argues that state sovereignty is indeed a political fact. But the nature of the political protection enjoyed by the States is at once more subtle and more difficult to replicate than the \textit{Garcia} Court might have supposed.

\section*{IV. Politics and Home Rule}

On the simplest level, the political system protects state sovereignty from federal encroachment by providing for state representation in both the House of Representatives and the Senate. The residents of the District of Columbia do not enjoy this right of representation. The most immediate and dramatic consequence of statehood would be to provide the District with a Representative and two Senators who could protect the District's interest with something more than moral suasion.

It hardly follows, however, that formal representation provides adequate protection against domination. There is no "invisible hand" that magically assures that two Senators and a Representative in the House provide just the degree of political representation needed to ward off efforts to assert raw political power over District residents. If enough representatives from other States undervalue the welfare of inhabitants of the District, or do not bother with a dialogue with District representatives concerning the public good, then they will simply outvote the District's representatives.\footnote{Indeed, there is some reason to suppose that voting representation in Congress might \textit{diminish} the District's ability to withstand incursions on home rule. Ironically, the District currently enjoys a modicum of protection stemming from its disfranchisement. The lack of voting representatives allows the District to argue with special force that inroads into home rule violate fundamental postulates of democracy. Full voting representation would seal off this argument. The "equal vote" of District Representatives and Senators on legislation affecting home rule might serve to legitimate adverse outcomes that cannot presently be defended.}

Of course, there are ways in which even small minorities in Congress can assert significant political power. Senators and Representatives do more than cast isolated and discrete votes on legislation. A full description of the changes that voting representation would bring must take into account the additional political power that stems from specialization and logrolling.

Specialization occurs because members of Congress must allocate their limited time and energy. Members from the District might well choose to serve on committees affecting District affairs and to develop expertise in matters of interest to District residents. This choice would enhance their...
power to protect home rule at the expense of their influence on matters less important to their constituents. 155

Logrolling really amounts to no more than a complicated variant on the specialization theme. Members of Congress not only decide how to vote on isolated pieces of legislation but also trade votes across issues. This ability to logroll provides a measure of protection for even small minorities by reflecting the intensity of preference held by these minorities regarding particular issues. 156 Thus, District representatives might trade their votes on matters about which they care little for the votes of others on home rule issues.

Without doubt, specialization and logrolling would enhance the ability of District representatives to protect home rule. Certainly other states, even very small states, have used these techniques very effectively to achieve their ends. It is therefore possible that full voting representation for the District would make all the difference. These results, however, are not inevitable. Although other states may have been successful in magnifying their political power through logrolling and specialization, they were able to do so only because they could find partners with whom to bargain. If the barriers that separate the District from the rest of the country are high enough, a similar set of partners may simply not be forthcoming.

A. Specialization

If home rule were to remain continually under attack, District representatives might be forced to devote a disproportionate amount of their time and resources to maintaining self-government. Perhaps they could stave off the worst incursions, but only at the cost of their effectiveness with regard to other issues. By contrast, representatives from the older states certainly do not devote a comparable amount of energy to the defense of their state sovereignty. Thus, the price of home rule might be relative disfranchisement on other national issues.

Moreover, even if District representatives succeeded in strategically positioning themselves so as to exercise disproportionate power with respect to home rule issues, it is uncertain that they could be relied upon to exercise that power. The very specialization that would enhance their ability to defend home rule might also reduce their incentives to do so. This conclusion follows because transferring issues to the national level would tend to maxi-

156. For an introductory discussion of ways in which intense and concentrated preferences can prevail even when they are in the minority, see Gwartney & Wagner, Public Government, in Public Choice and Constitutional Economics 19-22 (Gwartney & Wagner, eds. 1988).
mize the power of the representatives, including representatives of the District, who specialize in those issues. Thus, the specialization of District representatives might actually contribute to the tendency to treat District issues on a national level.

B. Logrolling

Logrolling works only in circumstances where votes are required at the margin. Because the District would have only one vote in the House and two in the Senate, the margin on which it operated would be very small indeed. Unlike states with much larger delegations or with more allies, its votes would be necessary only in cases where Congress was very closely divided. Moreover, even in these circumstances, the ability of District representatives to protect home rule through logrolling would be sharply circumscribed. For a number of reasons, logrolling requires a kind of discipline that is very difficult to enforce.

Representatives proposing a logroll must have the political freedom to trade their votes in exchange for home rule protection. District representatives, however, are likely to be severely hampered on both ends of the trade. With respect to issues of little importance to the District, representatives may be restricted by the ideological commitments of their constituents. Even if a particular issue has little real impact on District residents, a vote can have important symbolic significance, and this symbolism can have real political consequences. This problem is particularly acute because logrolling has negative connotations in our political culture. A representative who makes a trade to protect home rule may face criticism that he will be unable to rebut with a candid explanation of the gains realized from the trade.

With respect to the other end of the trade, the problem is that every such issue really involves two separate questions: the home rule question, and the merits question. For example, the Armstrong amendment has caused controversy both with respect to the District's home rule and with respect to the appropriate trade off between the right of homosexuals to equal treatment and the right of religious institutions to pursue their mission.

Although the constituents of District representatives are likely to be united on the home rule issue, they will often be divided on the merits, and this division may undermine the freedom of the representatives to effect a

157. For example, the actual impact of a congressional ban on the use of District funds for abortions performed on women who have been raped may be very slight. But the ideological and symbolic significance of the ban may prevent District representatives from trading off this issue in exchange for other benefits.
logroll. Thus, when a local group loses a political struggle within the District, the group may be tempted to ally itself with national forces so as to reverse this defeat by undermining home rule. It will require extraordinary discipline to force this group to give up on the prospect of a short-term victory on the merits for the sake of a more abstract victory on the principle of home rule. Because each reversal of District policy erodes home rule only incrementally, serious free rider problems may arise with any effort to enforce home rule discipline against local groups tempted with the immediate prospect of winning on the merits.

There are also problems in enforcing discipline among the "purchasers" of votes from the District. The fact that trades are seldom completed simultaneously creates enforcement problems. The District representative cannot know that the Iowa delegation will make good on its promise to support home rule in exchange for votes on farm legislation. The ethical inhibitions against logrolling prevalent in our political culture mean that representatives seldom carefully and explicitly spell out the terms of a logroll, thereby making future claims of breach hard to prove and the bargain impossible to enforce.

To some extent, the reiterative nature of the logrolling process may mitigate the enforcement problem. Although breach might be a rational strategy under the circumstances of a single, isolated encounter, the cost of breach may be much higher when the representative must deal with his colleagues repeatedly over an extended period of time.\textsuperscript{158} But even in a "repeat game," the covert and implicit character of most logrolls still creates formidable enforcement difficulties.

Moreover, representatives from other states may have politically enforced ideological constraints against dealing with unpopular representatives from the District. This problem is especially acute because the District is widely perceived as dominated by "radical" or "fringe" elements outside the political mainstream.

As a practical matter, these constraints will exclude many Republicans from the universe of potential partners in a logroll. But District representatives will have a difficult time enforcing the terms of the deal against Democratic representatives. Even if these representatives vote against District interests, Democrats can still argue with considerable force that the main hope for District residents remains with their party. Taking retributive measures that hurt the party will thus seem self-defeating and irrational.

\textsuperscript{158} For an extended discussion of cooperative strategies that work most effectively in repeat game situations, see \textsc{R. Axelrod}, \textsc{The Evolution of Cooperation} (1984).
C. The Preconditions for Home Rule

Many of these political difficulties are substantially dissipated when one thinks about logrolling on a much broader canvas. For the States, the political protection of sovereignty does not derive principally from narrow deals cut over specific issues. Instead, there is a kind of global, unconscious logroll that is implicit in feelings of empathy for citizens of different states and concern for their welfare even in circumstances where representatives are not directly responsible to them. This moral sense is captured by the sentiment that "we are all in the same boat," or, put more grandly, that freedom is indivisible.

Although not consciously perceived as such, this mutual identification and respect can be conceptualized as a logroll. Everyone is made better off by mutual forbearance in the assertion of political power against rival groups and factions. The logroll, however, is at once more subtle and less calculating than the kind of hyper-rational political bargaining postulated by public choice theorists. New York representatives respect the sovereignty of Oregon because of a built-in sense of restraint rather than because of fear of some direct and immediate political retribution. Representatives have internalized the anti-domination principle and, therefore, do not require either external monitoring from the judiciary or the immediate threat of retribution from their colleagues to respect it.

This global logroll ultimately accounts for our national identity and for the sense that, whatever our political differences, we are a single country with one destiny. But although this sense of identity produces strong inhibitions against domination once it is in place, putting it into place is a tricky matter. The inhibition rests on an act of imagination — a sense that we, ourselves, could easily be in the position of the target of domination. This kind of imagining is far easier if the target shares our culture and world view. If the target appears radically different, then it becomes much easier to place the disfavored group outside the scope of the logroll.

For this reason, outgroups — "discrete and insular minorities" in Justice Stone's famous phrase — have historically gained little protection from the global logroll, and the struggle for emancipation of these groups has been largely a struggle to bring them within its terms. This struggle is especially difficult for the District because many perceive the District as being dominated by outgroups. The District is black, poor, urban, and liberal. For much of America, it requires a truly heroic act of imagination to see that the welfare of each of us is tied to the welfare of the inhabitants of this city.

A court cannot order this sense of identification and empathy. Political dealmaking cannot enforce it. Yet it does not follow that litigation and politics have no role to play in establishing these essential preconditions for home rule. Although the preconditions themselves are neither legal nor political, at least in the usual sense, the struggle to establish them must be both legal and political. Indeed, the legal struggle, properly understood, is political.

The struggle consists of a persistent effort to force dominant groups to internalize the non-domination principle with respect to the District. One technique for doing so involves confronting these groups with the contradiction between their professed ideology and their treatment of District residents. Litigation is ideally suited to this task. For example, the legal claims set out earlier in the Article all exploit the gap between some noncontroversial constitutional postulates and the treatment of District residents.¹⁶⁰

Oddly, when litigation is understood in this way, it matters little whether the suit is won or lost. The point of the lawsuit is not to obtain legal protection for District residents. The point is to serve as a focus for organizing, protesting, arguing, and insisting. A loss in court that brings previously implicit contradictions to the surface and generates anger and determination can be more valuable than a win.

Litigation of this sort serves as an adjunct to political mobilization around the goal of statehood. This goal also must be properly understood. It too is no more than a technique designed to make explicit and conscious the double standard applied to the District. The end is full incorporation of the District and its residents into the national political community. The District can achieve that end only if the country as a whole begins to understand that District residents are morally entitled to self-determination. The demand for statehood is a tool for achieving that end, and the realization of statehood will signal its achievement. Yet statehood itself is not the end. Statehood will be meaningful only if the preconditions for home rule are in place. The struggle to achieve those preconditions has barely begun.

¹⁶⁰ See supra notes 125-34 and accompanying text.