

## THE CASE FOR D.C. STATEHOOD: CONGRESSIONAL INTERFERENCE WITH LOCAL PROGRESSIVE POLICIES ON GENDER AND SEXUALITY

RHEA SHINDE\*

On a sunny September morning in 2019, activists and residents of the District of Columbia (“District”) flooded the Rayburn House Office Building and spilled over into the nearby Spirit of Justice Park to witness the first congressional hearing on District statehood in over twenty-five years.<sup>1</sup> Members of the House Committee on Oversight and Reform heard testimony from District Mayor Muriel Bowser, among others, on H.R. 51, the latest legislative effort to grant the District admission into the union as a state.<sup>2</sup> The issue has directed national attention towards the Capitol as the prospect of statehood appears increasingly bright before a Democratic majority in the House of Representatives.

Common arguments against granting the District statehood posit that the population of the District is too small or that the constitution will not allow the seat of government to become a state.<sup>3</sup> These largely unfounded concerns dominate discourse and serve as a distraction mechanism from the real harms of denying statehood to District residents. The insidious effects of the current system on the local government’s ability to create progressive policy on issues pertaining to gender and sexuality cannot be understated. Over the years, members of Congress have made a concerted effort to undermine local policy initiatives on a broad spectrum of gender related issues, from LGBTQ equality to reproductive rights and sex work. These matters reside at the core of District residents’ dignity, autonomy, and basic human rights. District residents deserve the same respect afforded to other United States citizens through the instruments of state sovereignty and unabridged home rule.

The 1973 District of Columbia Home Rule Act theoretically secured the idea of self-determination for District residents.<sup>4</sup> The Act created a representative locally elected Council<sup>5</sup> and granted significant legislative and budgetary control to the Mayor<sup>6</sup> and other elected officials.<sup>7</sup> There is, however, a caveat. According to the bill, Congress retains ultimate legislative authority over the local government.<sup>8</sup> The language suggests that District sovereignty does not arise from the people themselves, but is merely a delegation of limited powers to relieve

---

\* © Rhea Shinde, 2019.

<sup>1</sup> Rachel Kurzius, *D.C. Statehood Gets First Congressional Hearing in Decades -- Race, Rights and Jack Evans All Draw Focus*, AMERICAN UNIVERSITY RADIO (Sept. 19, 2019), <https://wamu.org/story/19/09/19/d-c-statehood-gets-first-congressional-hearing-in-decades-race-rights-and-jack-evans-all-draw-focus/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Contra* Mark Joseph Stern, *The Constitution Isn’t the Obstacle to D.C. Statehood*, SLATE (Sept. 19, 2019, 6:29 PM), <https://slate.com/news-and-politics/2019/09/dc-statehood-hearing-constitution-republicans.html>. The author points out that the District has 700,000 residents, more than two other states, Wyoming and Vermont; and that the Constitution does not prescribe a minimum size for the federal seat of government, so it may be shrunk sufficiently to allow the surrounding area of the District independent statehood.

<sup>4</sup> District of Columbia Home Rule Act, D.C. CODE § 1-201.01 (1973).

<sup>5</sup> *Id.* at tit. 4, part A, subpart 1.

<sup>6</sup> *See id.* at tit 4, part B.

<sup>7</sup> *See id.* at tit. 4, part A, subpart 1.

<sup>8</sup> *Id.* at tit. 1.

Congress of the “burden” of attending to local matters.<sup>9</sup> In essence, Congress reserves the right to legislate for the District and amend or repeal any law enacted by the elected Council.<sup>10</sup>

The power of congressional interference has played a subversive role in the arena of gender and sexuality. In 2015, the House passed a resolution of disapproval regarding the District of Columbia Reproductive Health and Non-Discrimination Act (“RHNDA”).<sup>11</sup> The Act would have prohibited employers from discriminating against employees, their spouses, and dependents based on their personal reproductive health decisions.<sup>12</sup> Congresswoman Eleanor Holmes Norton supported this legislation to counteract the harmful impact of the federal Religious Freedom Restoration Act of 1993<sup>13</sup> on the residents of her district.<sup>14</sup> Two years later, the Republican controlled House passed an appropriations bill that effectively prohibited the District from spending its own local funds to enforce the RHNDA.<sup>15</sup>

In 2015, the House also passed the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act. This legislation would have permanently enjoined the District government from spending locally generated tax revenue on abortion care for its low-income residents, prohibited District government employees from providing abortions, prohibited abortions from occurring in District government facilities, and defined the local District government as a part of the federal government for any abortion related provision.<sup>16</sup> Not only was this bill an affront to the dignity and healthcare rights of District residents in need of abortion services, it was also a flagrant invasion upon the sovereignty and capability of the local government. Although the bill was never passed in the Senate, the Senate Appropriations Committee in 2018 approved a budget bill with riders, or additional provisions, attached that explicitly prohibit the District from spending its local funds on abortion services for low-income residents.<sup>17</sup>

---

<sup>9</sup> *Id.* (“ . . . [T]he intent of Congress is to delegate certain legislative powers to the government of the District of Columbia . . . and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.”).

<sup>10</sup> *Id.* at tit. 5.

<sup>11</sup> H.R.J. Res. 43, 114th Cong. (2015).

<sup>12</sup> D.C. Council 20-0790, 2014 18th Council Sess. (D.C. 2015).

<sup>13</sup> See Ian Thompson, *In an Era of Religious Refusals, the Do No Harm Act is an Essential Safeguard*, ACLU (Feb. 28, 2019), <https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/era-religious-refusals-do-no-harm-act-essential> (describing the Religious Freedom Restoration Act as congressional legislation intended to prohibit the federal government from burdening individual religious liberty; describing how the Religious Freedom Restoration Act has been abused “. . . to provide a blank check to discriminate religious or impose religious beliefs onto others.”); see generally *Burwell v. Hobby Lobby Stores*, 135 S.Ct. 2751 (2014) (holding that closely held corporations may use the Religious Freedom Restoration Act to gain exemption from a federal law that requires employers to provide employees with health insurance coverage for contraception); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019) (holding that an employer may use the Religious Freedom Restoration Act to fire a transgender employee by gaining exemption from a federal law that prohibits employment discrimination on the basis of sex).

<sup>14</sup> Press Release, Eleanor Holmes Norton, D.C. Cong. Rep., H.R. (Feb. 16, 2018), <https://norton.house.gov/media-center/press-releases/norton-to-introduce-bill-to-protect-lgbt-and-reproductive-rights-in-dc>.

<sup>15</sup> Cristina Marcos, *House Votes to Block DC Reproductive Health Law*, THE HILL (Sept. 14, 2017), <https://thehill.com/blogs/floor-action/house/350646-house-votes-to-overturn-dc-reproductive-health-law>.

<sup>16</sup> H.R. Res. 7, 114th Cong. (2015).

<sup>17</sup> Press Release, Planned Parenthood (June 22, 2018), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/senate-committee-approves-attacks-on-abortion-access>.

Other progressive policy initiatives, such as the District’s legislative efforts to promote LGBTQ rights and equality, are also beleaguered by the threat of Congressional interference. In 2014, Mayor Bowser signed the District of Columbia Human Rights Amendment Act.<sup>18</sup> The Act repeals an exemption in the District of Columbia Human Rights Act of 1977 that allowed religious schools in the District to discriminate against students on the basis of sexual orientation.<sup>19</sup> Upon the Act’s passage by the Council, Republican lawmakers in both houses of Congress introduced disapproval resolutions aimed at invalidating the District’s bill.<sup>20</sup> While their attempts were ultimately unsuccessful, and there was speculation that President Obama would not have signed the resolutions if they had passed,<sup>21</sup> the threat to the legislation was palpable. The idea that a local government’s ability to enact local policies hangs on which national political party’s ideology controls the federal executive and legislative branches is arbitrary and violative of fundamental principles of federalism and the people’s sovereignty.

Furthermore, members of Congress have attacked District protections for LGBTQ residents by attempting to incorporate the District into the federal government on this particular issue, closely paralleling their strategy with abortion specific legislation.<sup>22</sup> The First Amendment Defense Act, introduced in 2018, would have prohibited the District’s local government from denying benefits to individuals and businesses that discriminate against LGBTQ residents and those who engage in extramarital relations based on sincerely held religious beliefs or moral convictions.<sup>23</sup> The discretionary incorporation of the District into the federal government for the purpose of invalidating local protections of marginalized communities epitomizes the adverse effects of denying statehood.

This history of congressional interference with the District’s gender and sexuality related policy matters culminates in this most recent threat to local legislation: The Community Safety and Health Amendment Act of 2019.<sup>24</sup> If passed, this Act would decriminalize sex work in the District by removing all criminal penalties for commercial sexual exchanges between consenting adults.<sup>25</sup> The decriminalization of sex work is a deeply divisive<sup>26</sup> and location specific issue. According to data from the Metropolitan Police Department, sex work-related charges in the District more than doubled from 2017 to 2018.<sup>27</sup> In the District, a variety of factors influence sex workers’ access to police protection, including the federal crackdown on sex work websites and widespread gentrification in certain areas.<sup>28</sup> Local elected officials are in the best position to

---

<sup>18</sup> D.C. Council 20-266, 2014 18th Council Sess. (D.C. 2015).

<sup>19</sup> *Id.*

<sup>20</sup> S.J. Res. 11, 114th Cong. (2015); H.R.J. Res. 44, 114th Cong. (2015).

<sup>21</sup> Bridget Bowman, *Congress Looks to Act on Blocking D.C. Bills*, ROLL CALL (Apr. 14, 2015), <https://www.rollcall.com/news/congress-looks-to-act-on-blocking-d-c-bills>.

<sup>22</sup> *See* S. Res. 2525, 115th Cong. (2018).

<sup>23</sup> *Id.* at § 3.

<sup>24</sup> D.C. Council 23-0318, 2019 23rd Council Sess. (D.C.).

<sup>25</sup> *Id.*

<sup>26</sup> *See* Steve Warren, *DC City Council to Hold Public Hearing Thursday on Bill to Fully Decriminalize Sex Trade*, CBN NEWS (Oct. 15, 2019), <https://www1.cbn.com/cbnnews/us/2019/october/dc-city-council-to-hold-public-hearing-thursday-on-bill-to-fully-decriminalize-sex-trade>.

<sup>27</sup> Rachel Chason, ‘A Mecca for Prostitution’? A New Bill Proposes Decriminalizing Sex Work in D.C., THE WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9\\_story.html](https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9_story.html).

<sup>28</sup> *See id.*

evaluate these factors and respond to the concerns of District residents advocating for and against decriminalization.

Consistent with past interference, congressional Republicans have already attempted to stall the bill's progress, despite the fact that the legislation has not yet reached a vote in the Council. In June of 2019, Republican representatives sought to prohibit the District from spending its local funds on enacting any decriminalization bill by proposing additional language to the federal budget.<sup>29</sup> While this attempt was ultimately unsuccessful, the Community Safety and Health Amendment Act has a long road ahead shadowed by the enduring threat of congressional interference. Without recognition of unabridged District home rule and serious consideration of statehood, the democratic process of determining how to address sex work in the District is entirely undermined.

Issues of gender and sexuality are at the core of how people work and live in any locality. Under longstanding principles of federalism and democracy in this nation, these issues should be decided by locally elected representatives who reflect the values of their constituents. The case for District statehood appears particularly salient when the composition of Congress is unrepresentative of the political affiliations and values held by the majority of District residents. Yet the case is no less powerful when the federal and local governments are more closely aligned. Although local legislative efforts may not face severe existential threats, the efficiency of local democratic processes, faith in the integrity of local democratic institutions, and the basic principle of popular sovereignty are at stake. Statehood would enable the District to safeguard its values and provide for the most marginalized members of the community in matters of gender, sexuality, and beyond.

---

<sup>29</sup> Fenit Nirappil, *Congressional Republicans Target Efforts to Decriminalize Sex Work in the District*, THE WASH. POST (June 12, 2019), [https://www.washingtonpost.com/local/dc-politics/congressional-republicans-target-efforts-to-decriminalize-sex-work-in-the-district/2019/06/12/fb6a39e0-8d11-11e9-b08e-cfd89bd36d4e\\_story.html](https://www.washingtonpost.com/local/dc-politics/congressional-republicans-target-efforts-to-decriminalize-sex-work-in-the-district/2019/06/12/fb6a39e0-8d11-11e9-b08e-cfd89bd36d4e_story.html).