



To: Interested Persons  
From: ACLU –Voting Rights Project  
Date: August 12, 2019  
Re: Constitutionality of Washington, D.C. Admission Act (H.R. 51/S. 631)

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## Introduction

The Washington, D.C. Admission Act is constitutionally permissible. The Act would admit most of the District of Columbia’s currently populated areas into the Union as a new state, preserving a small area consisting of federal buildings (e.g., White House, Capitol, U.S. Supreme Court Building) as a redrawn federal district.

Still, at least four non-frivolous constitutional arguments against the Act are presently obvious. Parties challenging the law could make claims under any of three provisions: (1) the District and Federal Enclaves Clause; (2) the Admissions Clause; or (3) the Twenty-Third Amendment. This memorandum will address each. It concludes that H.R. 51/S. 631 should be considered constitutional under all three provisions. Finally, the memorandum will address a fourth argument against D.C. statehood: that the District “effectively lacks the minimum requirements to become a state.” This is a policy argument couched in constitutional terms.

First, H.R. 51/S. 631 is constitutional under the District and Federal Enclaves Clause, which provides for a federal district that “may” serve as the “Seat of Government.” H.R. 51/S. 631 reduces the size of the District but does not do away with it entirely. Thus, it does not violate the Clause. Furthermore, under the District Clause, Congress is afforded broad “plenary” powers over the District. It is within Congress’s broad authority to change the boundaries and size of the District, as the District Clause specifies only its maximum size.

Second, there is no Admission Clause problem. That Clause provides that “no new State shall be formed or erected within the Jurisdiction of any other State,” and vests Congress with the authority to admit new states to the Union. And Congress may grant D.C. statehood without first obtaining consent from the state of Maryland, because Maryland does not retain a reversionary interest in the land it ceded to the federal government for creation of the District.

Third, H.R. 51/S. 631 is not at odds with Twenty-Third Amendment, which provides the District with three electoral votes. While the Twenty-Third Amendment raises important policy considerations (e.g., the provision of three electoral votes to a small number of residents in the remaining District, including the President and their family), it does not render H.R. 51/S. 631 unconstitutional, as it prescribes neither a particular form nor population for the District.

Finally, arguments that the new State of Washington, Douglass Commonwealth fails to meet the minimum requirements of statehood fail because such requirements are policy concerns, not constitutional limitations. While the economic viability, diversity, and independence of the District are important considerations, they do not render H.R. 51/S. 631 unconstitutional.

## Discussion

H.R. 51/S. 631 would grant statehood to the District of Columbia as the State of Washington, Douglass Commonwealth. It directs that the State will include all of the current territory of the District of Columbia minus a small area consisting of a redrawn federal district, which shall remain as the District of Columbia for purposes of serving as the seat of the federal government. This Act, which would grant statehood through an act of Congress, rather than by a constitutional amendment, is a valid and defensible exercise of congressional authority.

Part I discusses the constitutionality of the Act under the District and Federal Enclaves Clause. Part II addresses its constitutionality under the Admission Clause, addressing the issue of Maryland's consent. Part III discusses the constitutionality of the Act under the Twenty-Third Amendment. Finally, Part IV concludes by examining arguments that the new State of Washington, Douglass Commonwealth does not satisfy understood minimum requirements for statehood.

### I. District and Federal Enclaves Clause

The District and Federal Enclaves Clause states:

[Congress shall have power . . .] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall for, the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.<sup>1</sup>

Courts have interpreted consistently this provision to find that Congress has broad “plenary” powers over the District and other federal enclaves.<sup>2</sup> H.R. 51/S. 631 is consistent with Congress’s broad authority because the Clause provides for a federal district that “may” serve as “the Seat of Government.”<sup>3</sup> Because the Act only reduces (instead of absorbing) the District of Columbia, it does not violate the Clause.

Critics, however, assert that the District and Federal Enclaves Clause permanently fixed the size of the District, thereby depriving Congress of the power to shrink the District from its current size.<sup>4</sup> Neither the language of the Clause nor its history supports these interpretations.

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<sup>1</sup> U.S. Const. art. I, § 8, cl. 17.

<sup>2</sup> See *O’Donoghue v. United States*, 289 U.S. 516, 539 (1933); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932); *Shoemaker v. United States*, 147 U.S. 282, 300 (1893); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 619 (1838).

<sup>3</sup> U.S. Const. art. I, § 8, cl. 17.

<sup>4</sup> See Office of Legal Policy, U.S. Dep’t. of Justice, Report to the Attorney General on the Question of Statehood for the District of Columbia iii, 18, 36 (1987) [hereinafter OLP].

## A. “Fixed Boundaries” Argument

Critics have charged that the District Clause deprives Congress of authority to dispose of lands currently part of the District of Columbia. This argument posits that, once Congress determined the amount of land required for the District and accepted those ceded lands from the states, it cannot dispose of any of it. In essence, Congress may not reduce the District’s now-“fixed” boundaries.<sup>5</sup>

This argument has drawn on analogies to Article IV, section 3—the Admission Clause—which gives Congress the power to admit new states but makes no provision for one’s expulsion or secession.<sup>6</sup> Just as the Supreme Court has held that the relationship between the Union and a State is “indissoluble,”<sup>7</sup> so too, the argument goes, Congress’s acceptance of ceded lands to create the District “contemplates a single act” and “makes no provision for revocation of the act of acceptance or for retrocession.”<sup>8</sup> In essence, Congress exhausted its authority to change the boundaries or size of the District when it accepted land to create it, and those boundaries are now fixed.

However, as noted above, it appears sufficiently well-settled that Congress’s power over the District of Columbia is sweeping or “plenary.” It “relates not only to national power but to all the powers of legislation which may be exercised by a state in dealing with its affairs.”<sup>9</sup> The District Clause, unlike the Admission Clause, grants Congress authority in the most sweeping language possible, giving it the power to exercise “exclusive Legislation in *all Cases whatsoever*.”<sup>10</sup> This sweeping and exclusive authority should include the power of Congress to contract the District to less than its current size.<sup>11</sup> Indeed, Congress’s authority to alter the boundaries and size of the District is supported by the language of the District Clause, its legislative history, and its historical application.

First, the District Clause provides no textual limitation preventing Congress from reducing the size of the District. Its only explicit limitation is that Congress shall not establish a

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<sup>5</sup> See *id.* at iii; see also Letter and Memorandum from Robert K. Kennedy, Attorney General, to Rep. Basil L. Whitener (1963), in *Home Rule, Hearings on H.R. 141 Before Subcomm. No. 6 of the H. Comm. on the District of Columbia*, 88th Cong., 1st Sess. (1964), reprinted in OLP, *supra* note 4, at 128 [hereinafter Kennedy letter]. But see Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 167-69 (1991) (rejecting argument).

<sup>6</sup> See Kennedy letter, *supra* note 5, at 128.

<sup>7</sup> See *Texas v. White*, 74 U.S. 700, 726 (1868).

<sup>8</sup> Kennedy letter, *supra* note 5, at 128; see also OLP, *supra* note 4, at 36.

<sup>9</sup> *Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108 (1953); see also *Neild v. Dist. of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress’s District Clause authority “is sweeping and inclusive in character”).

<sup>10</sup> U.S. Const. art. I, § 8, cl. 17 (emphasis added).

<sup>11</sup> See *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing on S. 132 Before the S. Comm. on Homeland Security and Governmental Affairs*, 113th Cong. 2d Sess. 82 (2014) (prepared statement of Viet D. Dinh, Professor, Georgetown University) [hereinafter Dinh] (“Just as a state may consent to the creation of a new state from within its borders, so too should Congress be permitted to carve a state from the District of Columbia, over which it enjoys sovereign control.”).

district larger than ten square miles; it says nothing about a lower limit.<sup>12</sup> Furthermore, Congress’s authority is conferred by the same operative language—“The Congress shall have Power . . . [t]o”—as all other powers listed in Article I, section 8, none of which are exhausted by exercise of that authority.<sup>13</sup> There is no reason to believe that the District Clause is somehow different.

Second, the legislative history of the Clause supports an interpretation that recognizes Congress’s power to move or change the size of the District. During the Constitutional Convention, Charles Pinckney of South Carolina urged the Committee on Detail to adopt language that would authorize Congress “to fix and *permanently* establish the seat of Government of the [United States].”<sup>14</sup> While some of Pinckney’s language was eventually incorporated into the District Clause, the adverb “permanently” was dropped.<sup>15</sup> Similarly, a proposal that Congress be granted exclusive jurisdiction over an area no less than three, nor more than six, miles square for the purpose of a permanent seat of government was abandoned in favor of the language now enshrined in the District Clause, which establishes a maximum size for the District but no minimum.<sup>16</sup> The failure of these proposals suggests that the Framers intended for Congress to have flexibility to move or change the size of the District.<sup>17</sup> Indeed, had the District Clause required a permanent and fixed capital, a constitutional amendment would be needed to move the capital even in cases of invasion, insurrection, or epidemic.<sup>18</sup>

Third, history undermines arguments that the District Clause permanently fixed the form of the District, as twice since the Constitution’s ratification Congress has changed the boundaries of the District. The first change occurred in 1791, less than one year after the cession of land from Virginia and Maryland for the District and less than four years after the Constitutional Convention, when the First Congress—including James Madison—voted to change the District’s southern boundary to include all of the area that is now known as Anacostia, Arlington, and

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<sup>12</sup> See *id.* at 83 (“[T]he presence of an upper, not lower, limit on the geographical size of the District in the Constitution at least suggests that the Framers were, if anything, more concerned with the latter.”).

<sup>13</sup> See Raven-Hansen, *supra* note 5, at 168.

<sup>14</sup> James Madison, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 420 (1920) (emphasis added).

<sup>15</sup> As Peter Raven-Hansen noted: “Congress itself subsequently resurrected ‘permanency’ when it accepted the cessions of Maryland and Virginia ‘for the *permanent* seat of the government,’ but it did not and could not thereby with a single statute either amend the District Clause or prevent future Congresses from enacting further legislation on the subject.” Raven-Hansen, *supra* note 5, at 168 (quoting Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 325, 29th Cong., 1st Sess. 3 (1846)).

<sup>16</sup> See H.P. Caemmerer, *Washington: The National Capital*, S. Doc. 332, 71st Cong., 2d. Sess. 5 (1932) (cited in OLP, *supra* note 4, at 54).

<sup>17</sup> See *The Federalist*, No. 43 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left to the hands of a single State, and would create . . . many obstacles to a removal of the government. . . .”) (emphasis added).

<sup>18</sup> See Raven-Hansen, *supra* note 5, at 168.

Alexandria, which had not originally been included.<sup>19</sup> That measure significantly bolsters H.R. 51, as the Supreme Court has held that “an Act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of [the Constitution’s] true meaning.’”<sup>20</sup>

Similarly, in 1846, Congress reduced the District’s area by roughly one third when it returned to Virginia the entirety of the land the State ceded to the national government in 1789—*i.e.*, what is now Arlington County and Alexandria City.<sup>21</sup> Congress only did so after specifically considering and rejecting the fixed form interpretation of the District Clause. The House Committee on the District of Columbia concluded:

The true construction of [the District Clause] would seem to be that Congress may retain and exercise exclusive jurisdiction over a district not exceeding ten miles square; and whether those limits may enlarge or diminish that district, or change the site, upon considerations relating to the seat of government, and connected with the wants for that purpose, the limitation upon their power in this respect is, that they shall not hold more than ten miles square for this purpose; and the end is, to attain what is desirable in relation to the seat of government.<sup>22</sup>

The constitutionality of the 1846 retrocession did come before the Supreme Court in *Phillips v. Payne*.<sup>23</sup> However, the Court found that, because thirty years had passed between the retrocession and the constitutional challenge, the plaintiff was “estopped” from bringing his claim.<sup>24</sup> While the Court did not reach the merits of the case, it did state in dictum that, “[i]n cases involving the action of the political departments of the government, the judiciary is bound by such action.”<sup>25</sup> Thus, there is nothing in *Phillips* that raises questions about the constitutionality of the retrocession.

Finally, returning to the language of the District Clause itself, it is worth noting that it is immediately followed in the same paragraph by a grant permitting Congress “to exercise *like Authority* over all Places purchased by the Consent of the Legislature of the State in which the

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<sup>19</sup> An Act to amend “An act for establishing the temporary and permanent seat of the Government of the United States,” ch. 17, 1 Stat. 214 (1791).

<sup>20</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); *see also* Raven-Hansen, *supra* note 5, at 170 (“Neither the ‘permanency’ of the seat of government nor the District Clause gave pause to any of the thirteen original Framers, including James Madison, who voted for the amendment.”).

<sup>21</sup> *See* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846); *see also* Dinh, *supra* note 11, at 82 (“Only half a century removed from its acceptance of lands to create the District, Congress was convinced that there was no restriction on its ability to alienate large portions of that land.”).

<sup>22</sup> Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846).

<sup>23</sup> 92 U.S. 130, 132 (1875).

<sup>24</sup> *Id.* at 134.

<sup>25</sup> *Id.* at 132.

Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”<sup>26</sup> This authority has been construed consistently to allow Congress to both acquire and convey such places.<sup>27</sup> Further, Article IV, section 3, clause 2 of the Constitution provides that Congress shall have “[p]ower to dispose of . . . Property belonging to the United States.”<sup>28</sup> Indeed, there are numerous instances where the United States has ceased to exercise ceded jurisdiction over federal enclaves, either by retrocession or transfer of lands to another state.<sup>29</sup> As George Washington University Law Professor Peter Raven-Hansen has reasoned, “Congress does not exhaust its authority by using it to acquire these places. If it can thus change the form of such federal places, then it has ‘like authority’ to do the same to the District itself.”<sup>30</sup>

## B. “Fixed Function” Argument

Second, opponents of D.C. statehood have argued that reducing the size of the District to an area comprising federal monuments and buildings only and largely devoid of people would undermine the *intent* of the District and Federal Enclaves Clause.<sup>31</sup> This argument, in effect, posits that the District Clause fixed the “function” of the whole District and no change in form or size that would impinge on that essential function is constitutional absent a constitutional amendment.<sup>32</sup> However, it is doubtful that a reduction in the size of the District would, in fact, impede the function of a separate federal capital.

Opponents of D.C. statehood highlight the fact that the reduced District—comprising the Capitol and surrounding buildings—would be entirely within the new State of Washington, Douglass Commonwealth and, thus, would be akin to any other federal enclave, wholly

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<sup>26</sup> U.S. Const. art. I, § 8, cl. 17 (emphasis added); *see generally*, Cong. Research Serv., *Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013: Hearing on S. 132 Before the S. Comm. on Homeland Security and Gov. Affairs*, 113th Cong. 2d Sess. (2014) (Statement of Kenneth R. Thomas, Legislative Attorney, American Law Division), *available at* <https://norton.house.gov/sites/norton.house.gov/files/CRS.pdf> [hereinafter Thomas].

<sup>27</sup> *See* U.S. Interdepartmental Comm. for the Study of Jurisdiction over Federal Areas Within the States, *in* 2 JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION 273 (1957) (stating that “[b]y reason of article IV, section 3, clause 2, of the Constitution, Congress alone has the ultimate authority to determine under what terms and conditions property of the Federal Government may or shall be sold”).

<sup>28</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>29</sup> *See, e.g.*, Pub. L. 83-704, 68 Stat. 961 (1954) (retroceding jurisdiction over Atomic Energy Commission land at Sandia Base, Albuquerque to New Mexico); 81 Pub. L. 14, 63 Stat. 11 (1949) (retroceding jurisdiction over Los Alamos Energy Commission area to New Mexico); Act of Feb. 22, 1869, 44 Stat. 1176 (1921) (ceding to Virginia the authority to police land originally ceded to the United States by Maryland).

<sup>30</sup> Raven-Hansen, *supra* note 5, at 171; *see also* Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 325, 29th Cong., 1st Sess. 3 (1846) (stating that “[t]here is no more reason to believe that [Congress’s power to locate the District], when once exercised and executed, is exhausted, than in any other of [Congress’s enumerated powers]”).

<sup>31</sup> OLP, *supra* note 4, at 25, 55.

<sup>32</sup> *Id.* at 25.

dependent on the new state for essential services.<sup>33</sup> They argue that this would undermine the District’s independence and give the new state outsized benefits and outsized influence on federal policy.

One answer—most strongly advanced by George Washington University Law Professor Peter Raven-Hansen—is that the reduced District would be no more an enclave within a state than the existing District.<sup>34</sup> The current District is a contiguous federal territory surrounded on three sides by Maryland. The proposed reduced District would be a contiguous federal territory surrounded on three sides by the new State of Washington, Douglass Commonwealth. “Geographically speaking, the only difference is size; to say that one is ‘outside’ Maryland and the other ‘inside’ [the State of Washington, Douglass Commonwealth] is an exercise in semantics.”<sup>35</sup>

Furthermore, as Raven-Hansen has argued, the current District has “long since ceased to be self-sustaining in any practical sense of the word.”<sup>36</sup> The District is already inextricably connected to the surrounding metropolitan areas, including parts of Maryland and Virginia, which are home not only to many federal employees but several important federal buildings.<sup>37</sup> This level of interconnectedness has not undermined the independence and authority of the federal government within the District, nor should the proposed change in the size of the District.

Finally, Congress’s plenary authority under the District Clause has never been territorially limited to the District.<sup>38</sup> The Supreme Court has recognized that “the power in Congress, as the legislature of the United States, to legislate exclusively within [the District], carries with it, as an incident, the right to make that power effectual.”<sup>39</sup> This means that

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<sup>33</sup> *Id.* at 57-58 (“In a very real sense, the federal government would be largely dependent upon the [State of Washington, Douglass Commonwealth] for its day to day existence. . . . In short . . . the Congress would lose control over the immediate services necessary to the government’s smooth day to day operation. The national government would again be dependent upon the goodwill of another sovereign body.”).

<sup>34</sup> *See* Raven-Hansen, *supra* note 5, at 174-75.

<sup>35</sup> *Id.* at 174.

<sup>36</sup> *Id.* at 175.

<sup>37</sup> *See id.* (citing Phillip W. Buchen, *Time for the Sun to Set On Our Imperial Capital*, LEGAL TIMES 26, 27 (Feb. 18, 1991) (remarking that the placement of the Department of Defense, the Central Intelligence Agency, the National Security Agency, and the Social Security Administration in surrounding states has not undermined the independence of the federal government)).

<sup>38</sup> *See id.*

<sup>39</sup> *Cohens v. Virginia*, 19 U.S. 264, 428 (1821); *see also id.* at 429 (“The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.”). *Cohens* established the Supreme Court’s jurisdiction to review state criminal proceedings. Having established jurisdiction, the Court found that there was no conflict between Congress’s authorization of a lottery in the District of Columbia and a Virginia statute prohibiting lotteries in the state. However, it recognized that “[w]hether any particular law be designed to operate within the District or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases, the constitution and the law must be compared and construed.” *Id.*

Congress has the power to legislate against state encroachments on the independence of the District. It would retain that power even if the District were reduced in size.

## II. Admission Clause

The Admission Clause provides that:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>40</sup>

Congress thus is the branch of government imbued with the power to admit new states through legislation. The Supreme Court has construed this power expansively.<sup>41</sup> Indeed, aside from the Admission Clause, the Constitution imposes only one textual limitation on congressional power to admit new states. Article IV, section 4—the Guarantee Clause—of the Constitution requires that the United States must “guarantee to every State in this Union a Republican Form of Government.”<sup>42</sup> Section 101(b) of the Act meets this substantive prerequisite.<sup>43</sup>

Still, some critics of D.C. statehood argue that Congress lacks the authority to admit the new State of Washington, Douglass Commonwealth without the express consent of Maryland because, under the Admission Clause, the new State would be “formed or erected within the Jurisdiction of [an]other State.”<sup>44</sup>

The Admission Clause prohibits the creation of new states from “within the Jurisdiction of any other State” without the existing state’s consent.<sup>45</sup> Opponents of D.C. statehood argue that Maryland ceded to the federal government the lands that now make up the District of Columbia solely to create such a District.<sup>46</sup> They argue that, if the ceded land is not used for that purpose, Maryland holds a “reversionary interest” in the current District and, thus, an act like H.R. 51/S. 631 would be unconstitutional without Maryland’s permission, as triggered by the consent requirement of the Admission Clause.<sup>47</sup>

As Professor Peter Raven-Hansen explained, this argument “treats use of the ceded land for the district as a condition subsequent to the cession and assumes that the condition would be

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<sup>40</sup> U.S. Const. art. IV, § 3, cl. 1.

<sup>41</sup> See *Luther v. Borden*, 48 U.S. at 42 (“[I]t rests with Congress to decide what government is the established one in a State[.]”).

<sup>42</sup> U.S. Const. art. IV, § 4.

<sup>43</sup> See H.R. 51 § 101(b) (“The State Constitution shall always be republican in form[.]”).

<sup>44</sup> See R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, THE HERITAGE LECTURES 5 (1993). But see Raven-Hansen, *supra* note 5, at 177-83 (rejecting argument).

<sup>45</sup> U.S. Const. art. IV, § 3, cl. 1.

<sup>46</sup> See OLP, *supra* note 4, at iii.

<sup>47</sup> See Pate, *supra* note 44, at 5.



defeated by any other use of the ceded lands.”<sup>48</sup> However, for the reasons discussed below, no such reversionary interest exists.

The problem with this “reversionary interest” argument is that the asserted condition subsequent or reverter is neither express nor implied. Maryland’s legislature originally authorized its delegation to the House of Representatives “to cede to the congress of the United States any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States.”<sup>49</sup> After legislation determining where such land was to be situated passed in Maryland and Congress, Maryland passed another statute ratifying the cession of those specific lands. That cession stated:

That all that part of the said territory, called Columbia, which lies within the limits of this state, shall be and the same is hereby acknowledged to be **for ever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction**, as well of soil as of persons residing, or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.<sup>50</sup>

The language of this statute does not appear to contemplate a reversionary interest.<sup>51</sup> Indeed, its express terms—“for ever ceded and relinquished . . . in full and absolute right, and exclusive jurisdiction”—appear to signal the exact opposite: an unconditional grant of land to the United States.<sup>52</sup> This language should control and Maryland should retain no authority over the land it ceded because “the . . . cession of the District of Columbia to the Federal government relinquished the authority of the States.”<sup>53</sup> Thus, the consent provision in the Admission Clause should not apply.<sup>54</sup>

Still some may argue that, while Maryland’s statute ratifying cession did not expressly state a reverter interest, it implied one by making the transfer of land “pursuant to the tenor and effect of the eight section of the first article of the constitution of the government of the United States,” thereby suggesting that the transfer was only made for the limited purpose of creating

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<sup>48</sup> Raven-Hansen, *supra* note 5, at 178.

<sup>49</sup> 2 Laws of Maryland 1788, ch. 46 (Kilty 1800).

<sup>50</sup> 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), as quoted in *Adams v. Clinton*, 90 F. Supp. 2d 35, 58 (D.D.C. 2000) (per curiam) (emphasis added).

<sup>51</sup> See Thomas, *supra* note 26, at 3-4.

<sup>52</sup> 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800); cf. *Van Ness v. Washington*, 29 U.S. 232, 285 (1830) (construing a private land grant to the District “for use of the United States forever” as vesting “an absolute unconditional fee-simple in the United States”).

<sup>53</sup> *Downes v. Bidwell*, 182 U.S. 244, 261 (1901); see also *Reily v. Lamar*, 6 U.S. 344, 356-57 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1996); *Albaugh v. Tawes*, 233 F. Supp. 576, 578 (D. Md.), *aff’d*, 379 U.S. 27 (1964) (per curiam).

<sup>54</sup> This follows the precedent of the Enabling Act of 1802, which did not require consent from Connecticut, even though the Act formed the state of Ohio partially from territory ceded to the United States by Connecticut in 1786. See Dinh, *supra* note 11, at 75 (citing The Enabling Act of 1802, 2 Stat. 173 (1802)).

the District of Columbia under the District and Federal Enclaves Clause.<sup>55</sup> However, even if the language of Maryland’s statute ratifying cession of the District were not expressly prohibitive of a reverter interest, one cannot infer any such reverter. Reverter would presumably be determined under Maryland common law<sup>56</sup> and Maryland property law does not favor implied reversionary interests.<sup>57</sup> The Maryland Court of Appeals has gone to “great lengths in refusing to imply a condition subsequent which would result in a forfeiture,” instead insisting on “words indicating an intent that the grant is to be void if the condition is not carried out.”<sup>58</sup> Here, there are no words indicating intent that Maryland should retain any interest in the District once it ceded such land to the United States. Again, the operative language of the statute—“for ever ceded and relinquished . . . in full and absolute right, and exclusive jurisdiction”—denotes the exact opposite. The statute’s statement of purpose that the land be used to create the District of Columbia is “no more than an expression of personal trust and confidence that the grantee will use the property so far as may be reasonable and practicable to effect the purpose of the grant, and not . . . a condition subsequent or restraint upon the alienation of the property.”<sup>59</sup>

Finally, as James Madison explained in *The Federalist* No. 43, the consent provision of the Admission Clause was adopted as a “particular precaution against the erection of new States, by the partition of a State without its consent.”<sup>60</sup> As the lands comprising the District of Columbia have not been a part of Maryland since before 1790, it is hard to imagine how Congress’s exercise of its valid authority to alter the size of the District would undermine the original intent of the Admission Clause. Thus, D.C. statehood is both consistent with and constitutional under the Admission Clause and does not require Maryland’s consent for Congress to change the boundaries and size of the District.

In any event, a textual reading of the Admission Clause precludes any reverter interest, implied or otherwise. The Admission Clause requires that “no new State shall be formed or

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<sup>55</sup> See Pate, *supra* note 44, at 5. But see Thomas, *supra* note 26, at 4-5 (rejecting argument).

<sup>56</sup> This seems intuitively correct, but it is an understandably open question.

<sup>57</sup> See generally, Raven-Hansen, *supra* note 5, at 178-82; see *Gray v. Harriet Lane Home for Invalid Children*, 64 A.2d 102, 110 (Md. 1949) (“Conditions subsequent [are] not favored in the law, because the breach of such a condition causes a forfeiture and the law is averse to forfeitures.”); *Faith v. Bowles*, 37 A. 711, 712 (Md. 1897).

<sup>58</sup> *Gray*, 64 A.2d at 108; see also *Estate of Poster v. Comm’r*, 274 F.2d 358, 365 (4th Cir. 1960) (“[U]nyielding insistence upon language expressly voiding the gift in case of diversion from the declared use is an established Maryland rule in the construction of written instruments; in the absence of language expressly stating that such diversion shall effect a forfeiture, the gift is absolute and not conditional.”); *Kilpatrick v. Baltimore*, 31 A. 805, 806 (Md. 1895) (“[A] condition will not be raised by implication, from a mere declaration in the deed, that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition.”).

<sup>59</sup> *Columbia Bldg. Co. v. Cemetery of the Holy Cross*, 141 A. 525, 528 (Md. 1928); see also Raven-Hansen, *supra* note 5, at 181 n.96 (“Even when a statement of purpose was accompanied by the proviso that if the grant was used for any other purpose it ‘shall at once become void,’ the Maryland Court of Appeals refused to find a reverter because the proviso did not expressly state that the grant was effective for only ‘so long as’ it was used as provided.”) (quoting *McMahon v. Consistory of St. Paul’s Reformed Church*, 75 A.2d 122, 125 (Md. 1950)); cf. *Selectmen of Nahant v. United States*, 293 F. Supp. 1076, 1078 (D. Mass. 1968) (“The mere recital in the deed of the purpose for which the land conveyed was to be used is not in itself sufficient to impose any limitation or restriction on the estate granted.”).

<sup>60</sup> *The Federalist* No. 43, at 274 (James Madison) (1961).

erected within the Jurisdiction of any other State.”<sup>61</sup> But the District of Columbia, in its current form, is neither part of Maryland nor within its jurisdiction.<sup>62</sup> The enactment of H.R. 51/S. 631 would not change that. Once passed, the Mayor of the District of Columbia would issue a proclamation for the election of two Senators and one Representative in Congress within 30 days.<sup>63</sup> Upon certification of that election, the President would “issue a proclamation announcing the results of such elections” within 90 days,<sup>64</sup> at which point the State of Washington, Douglass Commonwealth would immediately become a separate, new State by operation of law.<sup>65</sup> At no point in this process would the new State be “within the Jurisdiction” of Maryland.

### III. Twenty-Third Amendment

The Twenty-Third Amendment was proposed by Congress in June 1960 and ratified in March 1961. It states:

**Sec. 1. 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. . . .

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.<sup>66</sup>

The purpose of the amendment was to provide all those living in the District of Columbia with the right to vote in national elections for President and Vice President. There is discernable tension between it and H.R. 51/S. 631.

The Twenty-Third Amendment practically means that residents of the District of Columbia hold three votes in the Electoral College. Under H.R. 51/S. 631, the few residents who live in the reduced District—including the President and their family—would have outsized influence in presidential elections. Critics have argued that this anomaly would violate the Twenty-Third Amendment’s intent, thus foreclosing a statutory reduction in the size of the

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<sup>61</sup> U.S. Const. art. IV, § 3, cl. 1.

<sup>62</sup> See *Downes*, 182 U.S. at 261 (“[T]he . . . cession of the District of Columbia to the Federal government relinquished the authority of the States . . .”); see also *Hobson*, 255 F. Supp. at 297 (“[T]he effect of cession upon individuals was to terminate their state citizenship and the jurisdiction of the state governments over them.”); cf. *Brennan v. S & M Enters.*, 362 F. Supp. 595, 599 (D.D.C. 1973) (noting “unique geographic status of Washington, D. C.”), *aff’d*, 505 F.2d 475 (D.C. Cir. 1974).

<sup>63</sup> H.R. 51 § 102(a).

<sup>64</sup> *Id.* 103(a).

<sup>65</sup> *Id.* 103(b).

<sup>66</sup> U.S. Const. amend. XXIII (emphasis added).

District.<sup>67</sup> Critics have also argued that the Twenty-Third Amendment, by giving the District three electoral votes, contemplates the continued existence of a large populated federal district.<sup>68</sup>

However, these arguments are not supported by the text of the Amendment or any other part of the Constitution. The Twenty-Third Amendment, like the District Clause, makes no mention of a minimum geographic size or population in the federal district and it applies regardless of changes in the District’s population. “[I]n general, the Constitution is not violated anytime the factual assumptions underlying a provision change.”<sup>69</sup> Thus, changing the factual premise underlying the Twenty-Third Amendment—that there will be a large populated district—does not violate its terms granting electoral rights to residents of that district.

Indeed, there is no inherent *conflict* between H.R. 51/S. 631 and the text of the Twenty-Third Amendment. Although peculiar, this result does not pose a constitutional obstacle to H.R. 51/S. 631. The concerns raised by the interaction of H.R. 51/S. 631 with the Twenty-Third Amendment are policy considerations, not constitutional limits.

The most significant concern is with the allocation of three electoral votes to residents of the reduced District, including the President and their family. This may be bad policy, but not unconstitutional. Moreover, H.R. 51/S. 631 tries to avoid the problem in two ways: (1) by repealing 3 U.S.C. § 21,<sup>70</sup> which presently provides for the District’s participation in federal elections—thus leaving it without appointed electors—and (2) by kickstarting “Expedited Procedures for Consideration of Constitutional Amendment Repealing 23rd Amendment.”<sup>71</sup>

While these measures do not likely end-run or nullify the Amendment’s mandatory language (i.e., “The District . . . *shall* appoint” electors), neither does the Amendment foreclose the Act from a constitutional standpoint.<sup>72</sup> As a separate practical matter, it is worth noting that repealing the Twenty-Third Amendment will itself require a constitutional amendment. Thus, despite the appeal of H.R. 51/S. 631 as a legislative resolution to D.C. statehood, the Act would not foreclose the need to engage in the amendment process.

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<sup>67</sup> See Kennedy letter, *supra* note 5, at 132.

<sup>68</sup> See *id.* at 134 (“[A] persuasive argument can be made that the adoption of the 23d Amendment has given permanent constitutional status to the existence of a federally owned ‘District constituting the seat of government of the United States,’ having a substantial area and population.”). *But see id.* (“This is not to imply that the existing boundaries of the District of Columbia are immutable or that Congress could not move the seat of government to a different location. . .”).

<sup>69</sup> See Dinh, *supra* note 11, at 84 (citing *Adams*, 90 F. Supp. 2d. at 50).

<sup>70</sup> See H.R. 51 § 205.

<sup>71</sup> *Id.* § 206.

<sup>72</sup> See Kennedy letter, *supra* note 5, at 132 (“[The Twenty-Third] amendment does not leave it up to Congress to determine whether or not the District of Columbia shall cast three electoral votes in a particular presidential election. It contains a clear direction that the District ‘shall appoint’ the appropriate number of electors, and gives Congress discretion only as to the mechanics by which the appointment is made.”). *But see* Phillip G. Shrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 348-49 (1990) (arguing Twenty-Third Amendment is not self-executing, so Congress can simply decline to provide electors for the District); *see also* Raven-Hansen, *supra* note 5, at 187-88.

#### IV. Minimum Requirements of Statehood

One final argument has been made against D.C. statehood, namely that the new state “effectively lacks the minimum requirements to become a state.”<sup>73</sup> This argument takes the premise that “[t]here are . . . certain effective minimum requirements defining a ‘state eligible for admission to the Union, which are not found in the Constitution.’”<sup>74</sup> For example, statehood detractors argue that a state must have a large enough population and enough resources to support a state government and uphold its share of the cost of the federal government.<sup>75</sup> Second, critics argue that any new state must have sufficiently diverse interests to function as “a proper Madisonian society.”<sup>76</sup> Only then, in this view, could the state serve as an appropriate counterweight to federal authority.<sup>77</sup>

In essence, opponents of D.C. statehood argue that it is “too small, too poor, and too identified with the federal government” to satisfy these requirements.<sup>78</sup> However, as explained, there are no *explicit* requirements for statehood other than states should not be formed from within or by joining lands of states without those states’ consent and must have “a republican form of government.” This has led Professor Raven-Hasen to characterize the argument as “strictly a political one, dressed up in constitutional garb.”<sup>79</sup>

To the extent there is any authority requiring sufficient population and financial viability for statehood, it can only be found in a House Committee report on Alaskan statehood prepared in 1957.<sup>80</sup> That report describes these requirements as “historical standards” and “traditionally accepted requirements for statehood.”<sup>81</sup> However, they are not implicit constitutional requirements. They have not even been strictly applied as historical standards.<sup>82</sup>

Second, Congress has not articulated a “multiplicity of interests”<sup>83</sup> standard. Indeed, according to Professor Raven-Hansen, “[t]he ideal Madisonian society was actually a construct which Madison directed toward American society as a whole, not each component state.”<sup>84</sup> Had

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<sup>73</sup> OLP, *supra* note 4, at 59. *But see* Raven-Hansen, *supra* note 5, at 191-92 (rejecting argument).

<sup>74</sup> OLP, *supra* note 4, at 59.

<sup>75</sup> *See id.* at vi, 59-62.

<sup>76</sup> *See id.* at v, 62-63; *see also* The Federalist No. 51 (James Madison) (Clinton Rossiter, ed., 1961).

<sup>77</sup> *See* OLP, *supra* note 4, at 63-67; *see also* The Federalist No. 51, at 323 (James Madison).

<sup>78</sup> Raven-Hansen, *supra* note 5, at 166.

<sup>79</sup> *Id.* at 189.

<sup>80</sup> *See* H.R. Rep. No. 624, 85th Cong., 1st Sess. 11 (1957).

<sup>81</sup> *Id.*

<sup>82</sup> *See* Northwest Ordinance of 1787, *reprinted in* Act of Aug. 7, 1787, 1 Stat. 50, 53 n.(a) (1789) (setting the first population standard for statehood at 60,000 people; however, that standard was subsequently disregarded on five occasions); General Accounting Office, EXPERIENCES OF PAST TERRITORIES CAN ASSIST PUERTO RICO STATUS DELIBERATIONS 12 (1980) (listing states with “dubious economic potential” at the time of their admission); *see generally* Raven-Hansen, *supra* note 5, at 191.

<sup>83</sup> The Federalist No. 51 (James Madison) (1961).

<sup>84</sup> Raven-Hansen, *supra* note 5, at 191.

that concept been applied to the original thirteen colonies—or Utah for that matter, with an overwhelmingly Mormon population now and at the time it was admitted to the Union—they might have failed to gain statehood.

Furthermore, it is not even clear that a new State of Washington, Douglass Commonwealth would lack this “multiplicity of interests.” While the federal government is undeniably the primary economic driver in the District, it is simply “untrue and patronizing” to assert that there are no competing interests in the District or that its identity is wholly wrapped up with the national government.<sup>85</sup> Regardless, these considerations are nothing more than policy considerations—for Congress to decide—not constitutional limits on D.C. statehood.<sup>86</sup>

### Conclusion

Critics—including the Department of Justice under several presidential administrations—have raised concerns about the constitutionality of admitting the District of Columbia as a state through an act of Congress, rather than by a constitutional amendment. However, H.R. 51/S. 631 is a valid and defensible exercise of congressional authority. It complies with the District and Federal Enclaves Clause, the Admission Clause, and the Twenty-Third Amendment. Concerns about D.C.’s viability as a state are policy considerations that must be taken seriously, but they are not constitutional limitations on Congress’s authority to pass H.R. 51/S. 631.

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<sup>85</sup> See *id.* at 192.

<sup>86</sup> Indeed, though multiple Departments of Justice have raised these concerns, even they have recognized that these are political, not constitutional concerns. See OLP, *supra* note 4, at v (“The District of Columbia lacks this essential *political* requisite for statehood.”) (emphasis added); see also *District of Columbia Representation in Congress: Hearing on S.J. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong., 2d Sess. 17-18 (1978) (testimony of Assistant Attorney General John M. Harmon), reprinted in OLP, *supra* note 4, at 92, 94 (“At this point, a *practical* problem is presented.”) (emphasis added); *Representation for the District of Columbia: Hearings on Proposed Constitutional Amendment to Provide for Full Congressional Representation for the District of Columbia Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong., 1st Sess. 126 (1977) (testimony of Assistant Attorney General Patricia M. Wald), reprinted in OLP, *supra* note 4, at 98, 100 (“This presents *practical and even theoretical* problems.”) (emphasis added).