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Before the

**COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS**

of the

UNITED STATES SENATE

On the

NEW COLUMBIA ADMISSION ACT

I have been asked to advise on the constitutionality of S.132, the New Columbia Admission Act. The Act would reduce the District of Columbia to a smaller federal capital district encompassing the White House, Capitol, Supreme Court and the area containing the National Mall and Monuments. The rest of the current District of Columbia would become the state of New Columbia and be admitted as the 51st state. For the reasons amplified below, I think that courts would likely decline to adjudicate any constitutional challenge to the Act and, in all events, would likely hold that the Act is constitutional.

As an initial matter, the courts would likely avoid ruling on the merits of any constitutional challenge to the New Columbia Admission Act. In many ways, Congress' admission of new states is the paradigmatic political question. The Constitution commits the task exclusively to Congress. It is difficult to imagine judicially manageable standards for assessing the admission of New Columbia. And any decision would express disrespect for the political branches while risking the embarrassment and uncertainty of multiple branches' conflicting judgments on a state's existence. History is helpful here: When the 1846 retrocession of Arlington and Alexandria from the District to Virginia was challenged, the courts avoided ruling on the merits. It is likely that the courts would do the same if faced with a challenge to the admission of New Columbia.

In all events, courts reaching the merits would likely find the New Columbia Admission Act constitutional. Under the New States Clause, U.S. Const. art. IV, § 3, cl. 1, Congress has constitutional authority to accept new states through simple legislation. This is how states are constitutionally admitted: Aside from the original thirteen colonies, the thirty-seven remaining states were all admitted through simple legislation pursuant to Article IV. Alaska and Hawaii, most recently, were admitted through simple legislation with terms similar to those of the New Columbia Admission Act, including the provision of a republican form of government. And, quite analogous to the current situation, Congress formed Ohio with the Enabling Act of 1802 from the eastern portion of the Northwest Territory, which itself came from lands previously ceded to the federal government from other states.

Congressional authority under Article IV to admit new states is broad and subject to just three requirements within the Constitution. First, Congress must guarantee new states a republican form of government; second, new states formed from within or by combining existing states must receive state legislature approval; and third, new states must be admitted on an equal footing with existing states. The New Columbia Admission Act satisfies these three constitutional requirements. Citizens of New Columbia must adopt the 1987 constitution, which secures a republican form of government; New Columbia's territory would come entirely from the current District of Columbia, and so would not require the approval of any other state legislature; and the Act, by its terms, would admit New Columbia on an equal footing with existing states.

In addition to the constitutional requirements, Congress has traditionally imposed two additional prerequisites for statehood: First, the people of the proposed state must *want* to form a state; second, the proposed state must have sufficient population and resources to support itself and to contribute its share of the cost of maintaining the federal government. The Act meets these traditional requirements as well: The future residents of New Columbia must approve the admission of the state, and Congress' passage of the Act would signify its satisfaction that New Columbia is a viable state.

Adjudicating courts will not likely find any contravening constitutional provisions. The District Clause, U.S. Const. art. I, § 8, cl. 17, which contemplates an exclusively federal district,

is satisfied because the Act would preserve an exclusively federal district not larger than 10 miles square. The District Clause actually supports the Act because it grants Congress sweeping and exclusive authority over the federal district and thus affirms Congressional authority to alter its size or shape. In fact, history shows that Congress *can* alter the district: the First Congress altered the southern boundaries of the original District of Columbia, and in 1846 Congress retroceded Alexandria and Arlington to Virginia. Likewise, the Twenty-Third Amendment, which allows the District of Columbia to participate in the Electoral College, is not contravened just because the federal district is smaller. Although granting a shrunken federal district three electoral votes would be bad policy, the Constitution does not prohibit it. It would indeed be sound policy to repeal the Twenty-Third Amendment, concurrent with admission of New Columbia, but it is not a constitutional prerequisite.

Nor will courts likely require Maryland's consent, just because the land was part of Maryland before 1790. The Constitution requires a state's consent when a new state is created from within the existing state's jurisdiction. But the land that would form New Columbia is not within Maryland's jurisdiction. Maryland lost that authority as soon as the federal government accepted Maryland's absolute cession of the land. While the Act presents a handful of other concerns—e.g., New Columbia would have a uniquely federal character and influence, it would have an outsized influence in the Senate, and it would lack the sort of internal diversity of interests that most view as an ideal characteristic of statehood—those are policy issues for Congress' consideration. The mechanism is constitutional; it is for you, the people's representatives, to decide if it is wise.

I. Background on New Columbia Admission Act

The New Columbia Admission Act would admit as the 51st state most of the land area and population within the current District of Columbia. *See* Act § 111(a). New Columbia would be admitted “into the Union on an equal footing with the other States in all respects whatever.” *Id.* § 101(a). Thus, New Columbia would be entitled to at least one representative and two senators in Congress.

The Act would preserve a small enclave of federal territory as the District of Columbia. That remaining federal district would “include the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building.” *Id.* § 112(a); *see also id.* § 112(b) (setting forth metes and bounds of remaining District of Columbia); *id.* § 112(c) (setting forth exceptions to metes and bounds description, including certain military property). “After the admission of the State into the Union,” the remaining federal district will be “the seat of the Government of the United States.” *Id.* § 201.

The Act sets forth a specific process for admitting New Columbia into the Union. Following Congress' passage of the bill, the people of the District of Columbia would vote at a special election on whether to:

- (1) admit New Columbia as a state, *id.* § 102(a)(1)(A);

- (2) adopt the 1987 Constitution for the State of New Columbia approved by the Council of the District of Columbia, *id.* § 102(a)(1)(B);¹
- (3) approve the state’s boundaries, *id.* § 102(a)(1)(C); and
- (4) agree to the terms of the New Columbia Admission Act, *id.* § 102(a)(1)(D).

District of Columbia voters must approve all four items for New Columbia to be admitted as a state. *Id.* § 102(b)(1). If the provisions are approved, “the State Constitution shall be deemed ratified,” *id.* § 102(b)(1)(A), and “the President shall issue a proclamation” within 90 days that admits New Columbia into the Union, *id.* §§ 102(b)(1)(B), 104. In addition, after passage of the Act, an election would be held to elect two senators and one representative, who will be entitled to “all the rights and privileges of Senators and Representatives of other States in the Congress of the United States,” upon admission of New Columbia as a state. *Id.* § 103(c).

The New Columbia Admission Act also provides expedited procedures for repealing the Twenty-Third Amendment. “At any time after the date of the enactment of” the Act, “it shall be in order in either the House of Representatives or the Senate to offer a motion to proceed to the consideration of a joint resolution proposing an amendment ... repealing the 23rd article of amendment to the Constitution.” *Id.* § 206(b)(1).² A motion proposed under this provision would be treated as “highly privileged and...not debatable.” *Id.* § 206(b)(2)(A). The motion could not be amended; nor could the vote on the motion be reconsidered. *See id.* § 206(b)(2)(B). And any “motion to postpone shall be decided without debate.” *Id.* § 206(b)(2)(C). But neither the Act’s passage nor admission of New Columbia is conditioned on repeal of the Twenty-Third Amendment.

Finally, the New Columbia Admission Act guarantees a republican form of government and ensures continuity between the current District of Columbia and the state of New Columbia. The Act requires that the Constitution of New Columbia “shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” *Id.* § 101(b). The bill also provides that the current Mayor and Council of the District of Columbia would become the Governor and House of Delegates of New Columbia. *Id.* § 103(d). And current District executive and judicial officials would automatically become New Columbia executive and judicial officials; pending cases would be transferred to the appropriate courts. *Id.* §§ 103(e), 123(a)(2).

II. New Columbia’s Admission Would Present A Nonjusticiable Political Question.

Whatever the constitutional merits of admitting New Columbia as the 51st state, it is unlikely that the courts would decide the question. The Supreme Court has held that a case presents a nonjusticiable political question when it involves:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy

¹ District of Columbia voters approved a constitution in 1982, but the Council of the District of Columbia has since made substantive changes that would need to be ratified by voters.

² The Act also strikes provisions from the U.S. Code that implement the Twenty-Third Amendment. *See* Act § 205(a) (striking 3 U.S.C. § 21, which defines the District of Columbia as a “State” for purposes of presidential elections).

determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). A constitutional challenge to admission of New Columbia would present a number of these problems.

The Constitution textually commits the question of whether to admit a new state to Congress. *See* U.S. Const. art. IV, § 3, cl. 1. Long ago, the Supreme Court held that “it rests with Congress to decide what government is the established one in a State” and whether that government is republican in form. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). When Congress makes that decision it “is binding on every other department of the government, and could not be questioned in a judicial tribunal.” *Id.* So too it would be with the congressional decision that New Columbia is fit for admission to the Union. Though the courts will review congressional attempts to attach lasting unconstitutional conditions on newly admitted states, *see, e.g., Coyle v. Smith*, 221 U.S. 559, 567 (1911), that question is very different from whether the state is eligible for admission in the first instance. The latter is much closer to the question in *Luther*.

The constitutional debates surrounding New Columbia statehood confirm the absence of judicially manageable standards. Opponents' core arguments proceed from the Founders' intent, an implied conflict with the purpose of the Twenty-Third Amendment, and the niceties of Maryland's cession of land in the Eighteenth Century. But the constitutional provisions invoked do not expressly embody the claimed prohibitions. The courts are ill-equipped to impose free-floating notions of original intent, unrelated to the *interpretation* of any textual provisions. Even if such principles could be discovered and applied in a judicial fashion, striking down New Columbia's admission to the Union would express a grave disrespect for the political branches. This is not like reviewing run-of-the-mill legislation for adherence to the Constitution's express protections. And no doubt conflicting statements from the political and judicial branches on the validity of a state's admission would result in political embarrassment and uncertainty. Thus, the question raises the “unusual need for unquestioning adherence” to Congress' “political decision.”³

These are among the reasons why the Supreme Court previously avoided ruling on the constitutionality of Congress' retrocession of Arlington and Alexandria. In *Phillips v. Payne*, at a time before the modern political question doctrine, the Court opened its analysis by stating: “In cases involving the action of the political departments of the government, the judiciary is bound by such action.” 92 U.S. 130, 132 (1875) (citing *Luther*, among other cases). Then, after holding that “Virginia is *de facto* in possession of the territory,” the Court noted that “serious consequences

³ The Supreme Court has recently rebuffed overbroad applications of the political question doctrine. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012) (holding that the judiciary is “fully capable of determining” the constitutionality of a statute permitting Americans born in Jerusalem to list “Israel” as their place of birth on their passports); *id.* at 1427 (“In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))). But deciding the merits of whether congressional legislation infringes on the executive's foreign affairs powers is a vastly different question than whether to admit a state into the Union. Nothing in *Zivotofsky* suggests that the much more analogous decision in *Luther* was incorrect, or that the judiciary should itself wade into the business of recognizing foreign or domestic governments. *See id.* at 1428.

would follow” from a contrary holding. *Id.* at 133. Specifically, it would call into question scores of laws enacted, taxes collected, and judicial sentences and decrees entered over the decades between retrocession and the lawsuit in *Phillips*. *See id.* A constitutional challenge to New Columbia’s admission presumably would occur immediately upon the Act’s adoption and thus would not present the same retroactivity concerns. But the fear of disrupting the political organization of the Union would still probably dissuade judicial review.

III. The New Columbia Admission Act Satisfies All Constitutional Requirements And Congressional Prerequisites For New States.

The Constitution authorizes Congress to admit new states through simple legislation. The New States Clause provides: “New States may be admitted by the Congress into this Union.” U.S. Const. art. IV, § 3, cl. 1. This broad authorization “vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers appropriate as long as such means are framed within its vested powers.” Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 Case W. Res. J. Int’l L. 315, 317 (1981). The New Columbia Admission Act is a proper exercise of that broad authority, consistent with constitutional requirements and traditional legislative practice and procedures.

The Constitution contains only two textual limits and one structural limit on the admission of new states. First, Congress must guarantee that the new state will provide a republican form of government. *See* U.S. Const. art. IV, § 4. Second, no new state may be formed “within the Jurisdiction of any other State” or by combining two or more existing states, or parts of states, “without the Consent of the Legislatures of the States concerned.” U.S. Const. art. IV, § 3, cl. 1. The Supreme Court has also interpreted the constitutional structure to require that new states be “admitted on an equal footing with the original states.” *Coyle*, 221 U.S. at 567 (quotation marks omitted). Though Congress can condition admittance on a state satisfying certain requirements, Congress cannot place lasting limitations on a state’s sovereignty—e.g., it cannot require that the state keep its capital in a specified city after admission. *See id.* at 567-68; *see also Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) (“[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.”).

Traditionally, Congress has also imposed two other prerequisites for statehood. First, Congress has required proof that the residents of the proposed state actually *want* to form a new state. *See* J. Otis Cochran, *District of Columbia Statehood*, 32 How. L.J. 413, 418 (1989). This requirement reflects the fundamental principle of self-governance that “[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the *consent of the governed*.” *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868) (emphasis added). Second, Congress has considered whether “the proposed new state has sufficient population and resources to support state government and at the same time carry its share of the cost of the federal government.” Cochran, 32 How. L.J. at 418. This prerequisite is a core exercise of Congress’ plenary authority over the admission of new states. It is a means for the current states—through their representatives in Congress—to preserve the integrity and well-functioning of the Union by ensuring that new states will carry their load.

Congress has typically exercised its power to admit new states through a three-step process. First, Congress usually “passes an enabling act prescribing the process by which the people of a United States territory may draft and adopt a state constitution” and express their desire to form a new state. David F. Forte, *New States Clause*, *The Heritage Guide to the Constitution*.⁴ Second, the proposed state “then submits its proposed constitution to Congress, which either accepts it or requires changes.” *Id.* Third, “[u]pon approval of the new state constitution, Congress may direct the President to issue a proclamation certifying the entry of the new state into the United States.” *Id.*⁵

The New Columbia Admission Act satisfies these requirements and procedures. New Columbia’s admission to the Union satisfies the Constitution’s requirements. The Act expressly requires that the “State Constitution shall always be republican in form,” Act § 101(b), and admission is conditioned on ratification of the 1987 Constitution adopted by the D.C. Council, *id.* §§ 102(a)(1)(B), 102(b), which is in fact republican in form. Moreover, the Supreme Court long ago held that “it rests with Congress to decide” whether a state provides a “republican form of government.” *Luther*, at 48 U.S. at 42. Thus, so long as Congress assures itself that the 1987 Constitution secures to New Columbia a proper form of government, the courts will not second-guess that judgment. Part IV of this memorandum explains why Maryland’s consent is not required for the creation of New Columbia. In short, the new state is not “within the Jurisdiction” of Maryland because Maryland divested itself of authority over the land when it ceded the territory to the United States in 1791. New Columbia would not be created by combining existing states. And the Act provides that the new state will be “admitted into the Union on an equal footing with the other States in all respects whatever.” Act § 101(a).

Congress’ traditional prerequisites are present here as well. The Act ensures that New Columbia’s residents want to create the new state. Section 102 requires that the question be put to vote in a special election and provides that the Act’s provisions “shall cease to be effective” if the voters reject statehood. *See* Act § 102(b)(2).

Congress alone decides whether New Columbia can support itself and the Union as a new state. This is a practical analysis that the existing states’ representatives must undertake according to the political and economic concerns of their constituents. Thus, there is not much room for constitutional analysis on this point—other than to say that Congress’ judgment will likely not be questioned by the courts. To be sure, there has been considerable debate over whether New Columbia would be a viable state. *See, e.g.*, U.S. Dep’t of Justice, Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* 59-68 (1987) (“OLP Report”) (“[T]he District of Columbia simply lacks the resources both to support a state government and to provide its fair share of the cost of the federal government.”). This is a concern that warrants Congress’ careful consideration. But if Congress is satisfied that it poses no political problem to the Union, then that conclusion is controlling.

⁴ Available at: <http://www.heritage.org/constitution#!/articles/4/essays/125/new-states-clause>.

⁵ Some states have pursued an alternative path, known as the “Tennessee Plan,” by which they adopted a state constitution then petitioned Congress for admission. *See* R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, *The Heritage Lectures* 3 (1993), http://thf_media.s3.amazonaws.com/1993/pdf/hl461.pdf. D.C. Statehood proponents initially pursued this route, but the most recent New Columbia constitution has not yet been ratified. Thus, the New Columbia Admission Act is best viewed as a traditional enabling act that requires adoption of a pre-existing, un-ratified state constitution.

The New Columbia Admission Act follows the typical procedure for admission of new states. The Act functions like “enabling legislation” that provides for admission so long as certain criteria are met. Key among those criteria is that New Columbia’s residents ratify an acceptable constitution, and the Act specifies that the 1987 Constitution is acceptable. Thus, once New Columbia’s residents approve admission, ratify the 1987 Constitution, and accept the boundaries and other provisions set forth in the Act, the President will issue a proclamation accepting New Columbia as the 51st state. *See* Act §§ 102(b)(1), 104.

The Act thus complies with all constitutional and congressional requirements. If New Columbia were being created out of any other territory, its admission likely would face little or no constitutional attack. But the unique nature of the District of Columbia raises some unique constitutional concerns. This memorandum will next address those concerns.

IV. The New Columbia Admission Act Does Not Violate Any Other Constitutional Provisions.

Three core concerns have been raised with the constitutionality of admitting New Columbia as a state. First, the Constitution’s District Clause contemplates a federal city like the current District of Columbia and thus shrinking the District to a small federal enclave violates the Founders’ intent. Second, the Twenty-Third Amendment prohibits the creation of New Columbia because it contemplates the continued existence of the current federal district. Third, admittance of New Columbia requires Maryland’s consent because its land originally belonged to Maryland and was ceded to the federal government solely to create the District of Columbia. I address each in turn.

A. The Act does not violate the District Clause.

The broadest challenge to admitting New Columbia as a state is rooted in the Constitution’s District Clause. This clause grants Congress power to “exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.” U.S. Const. art. I, § 8, cl. 17. This provision, so goes the objection, requires the District of Columbia to remain fixed in size and character: “a federal enclave was created to ensure the independence of the new government, to avoid, in George Mason’s words, ‘a provincial tincture to ye Natl. deliberations.’” OLP Report 55 (quoting James Madison, *Notes of Debates in the Federal Convention of 1787* 378 (A. Koch ed., 1966)). The concerns are that the federal government “cannot be dependent upon any one of the states to ensure its smooth operation,” nor is any state “entitled to a greater voice in the national councils than any other.” *See id.*

Instead of imposing constitutional limits, the District Clause grants Congress authority over the federal district that “may” be created as the federal seat of government. Though it contemplates that a federal district will exist, the District Clause does not mandate that the district be any minimum size or specific shape. In fact, it conspicuously avoids placing a lower limit on the district’s geographic area, while placing an absolute *upper* limit on its size. Had the Framers wished to mandate a lower bound for the size of the federal district, they knew how. But they did not. Thus, the text of the Constitution does not prohibit Congress from reducing the size of the District of Columbia, as contemplated in the New Columbia Admission Act. *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 *Geo. Wash. L. Rev.* 160, 166-77 (1991) (refuting the “fixed form” argument).

If anything, the District Clause affirmatively supports the constitutionality of the New Columbia Admission Act. The District Clause grants Congress plenary and exclusive power over the District of Columbia, and the courts have granted Congress wide latitude in its exercise of that authority. In *District of Columbia v. John R. Thompson Co.*, the Supreme Court explained that “[t]he power of Congress over the District of Columbia 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.” 346 U.S. 100, 108 (1953) (quotation marks omitted); *see also Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (Congress’ District Clause authority “is sweeping and inclusive in character”). 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. *See Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2007) (statement of Viet D. Dinh) (“D.C. Voting Rights Testimony”) (“In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.”).

History, too, supports this view. The original District of Columbia was much larger than the current District because it included land in Virginia that is now Arlington County and Alexandria City. In 1846, Congress retroceded that land to Virginia, thus reducing the District’s area by one third. *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* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169. Faced with similar arguments that the District Clause prohibited Congress from reducing the boundaries of the once-set federal district, the House Committee on the District of Columbia at that time 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.

Retrocession of Alexandria to Virginia, House Comm. on the District of Columbia, H.R. Rep. No. 29-325, at 3-4 (1846). 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.⁶ Even earlier, in 1791, the First Congress altered the southern boundaries of the District to capture portions of what are now Alexandria and Anacostia. *See* Raven-Hansen, 60 Geo. Wash. L. Rev. at 169-70. Thirteen of the Constitution’s Framers, including James Madison, voted in favor of this amendment, *see id.*, which ““is contemporaneous and weighty evidence”” that the District Clause does not prevent Congress from altering the District’s boundaries, *Marsh*

⁶ The Virginia retrocession was challenged decades later by citizen attempting to avoid taxation by Virginia, but the Supreme Court declined to rule on the question, holding that “[i]n cases involving the action of the political departments of the government, the judiciary is bound by such action,” and “[t]he State of Virginia is *de facto* in possession of the territory in question.” *Phillips v. Payne*, 92 U.S. 130, 132-33 (1875). As explained above, the Court’s avoidance of the question in *Payne* is strong evidence that courts likely would not rule on admittance of New Columbia.

v. Chambers, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

Contrary historical arguments, which focus on the Founders' statements regarding the need for a federal district, do not prove otherwise. For instance, James Madison wrote that "a dependence of the members of the general government on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy." *The Federalist* No. 43 (James Madison). A large federal city like the current District of Columbia, so goes the argument, is necessary so that Congress can "ultimately control the basic services needed by the national government." OLP Report at 57. Indeed, "[e]very Justice Department that has addressed the question, from the Kennedy Administration to the Bush Administration, has concluded that the Constitution does not allow for legislative alteration of the District's status." R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, *The Heritage Lectures* 6 (1993).

The need for independence from state control or dependence undoubtedly influenced the Constitution's provision for a federal district, and it should inform Congress' policy judgment on the admission of New Columbia. But it is just that: a policy concern. The Act preserves a federal district that is outside the control of any state and is less than ten miles square. That is all the Constitution requires. The statements of individual Framers cannot convert a constitutional clause that *grants* Congress broad authority into a clause strictly *limiting* Congress' authority.

At bottom, neither the District Clause nor the policy concerns that led to its enactment present a constitutional obstacle to the New Columbia Admission Act. The Act preserves a federal district to serve as the "Seat of the Government of the United States." Congress has plenary power over the District, and it has previously exercised that power by reducing the District's size. Arguments concerning the independence and vitality of a shrunken District are serious and should be seriously considered. But they pose no *constitutional* limit. They are within Congress' sound discretion to legislate on this sensitive political matter.

In this regard, it is worth noting that the concerns that motivated the Framers may be attenuated when the surrounding state (New Columbia) is relatively small and poses no particular risk of usurpation, especially when the federal enclave has been independent and autonomous for over two centuries. And any rational policy debate would weigh the benefit (protecting the federal seat from state usurpation) against the cost (disenfranchisement of residents who pose no threat and have no particular connection to the federal seat). It strikes me that it is harder to justify why someone living far from the federal seat—say, in Anacostia or upper Northwest—should be disenfranchised than it is to explain how having those neighborhoods under direct federal control is necessary to protect the federal government. Again, these are policy questions and not matters of constitutional law, but the 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.

B. The Act does not violate the Twenty-Third Amendment.

It is urged that admitting New Columbia would be inconsistent with the voting rights provided to District residents in the Twenty-Third Amendment. Because the Twenty-Third Amendment provides District residents with three votes in the Electoral College, the few remaining residents of the Act's shrunken federal district could claim an outsized influence on

presidential elections. Opponents argue that this electoral anomaly would violate the Twenty-Third Amendment's intent. *See generally* Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 Geo. Wash. L. Rev. 475 (1992). Moreover, they argue, the amendment is premised on the existence of a large populated District, which confirms that the Constitution prohibits Congress from reducing the District's size. *See, e.g.*, OLP Report at 21-23. But these arguments are policy inferences not mandated by the constitutional text. A constitutional provision is not violated anytime the factual premise behind its enactment changes. While the Twenty-Third Amendment will pose grave policy concerns if the New Columbia Admission Act is adopted, the amendment does not *prohibit* the Act.

Section 1 of the Twenty-Third Amendment 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.

U.S. Const. amend. XXIII, § 1. As a practical matter, the amendment enables District of Columbia residents to cast three electoral votes in presidential elections because the smallest state will virtually always have one representative and two senators in Congress.

Nothing in the Twenty-Third Amendment prohibits the admission of New Columbia. Because the New Columbia Admission Act will preserve a federal "District constituting the seat of Government of the United States," the Twenty-Third Amendment plainly can still operate according to its terms. The amendment, like the District Clause, says nothing about minimal geographic or population limits on the federal district. Nor does it matter if the population within the federal district changes. That was always going to be true to some extent: The District of Columbia's population is ever increasing or decreasing; yet the Twenty-Third Amendment's provision of electoral votes does not shift with those population fluctuations. Similarly, it would not violate the Constitution if the least populous state in the Union divided itself in two states, one of which contained very few residents, and Congress admitted the new state into the Union. This might be bad policy, but it would be constitutional.

That is because, in general, the Constitution is not violated anytime the factual assumptions underlying a provision change. For example, the increased number and economic influence of District residents does not mean that the Constitution changes to mandate their enfranchisement. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000) (per curiam). Thus, changing a factual premise of the Twenty-Third Amendment does not violate its prior grant of electoral rights. The full electoral rights of New Columbia residents could logically and practically co-exist with the Twenty-Third Amendment rights for the shrunken district's residents. There is no inherent conflict and thus no constitutional problem.

Objections to New Columbia based on the Twenty-Third Amendment ignore the difference between a statute that alters the premise for a constitutional amendment and legislation that violates a constitutional prohibition included in an amendment. By way of analogy, a statute repealing the income tax is not unconstitutional because it renders superfluous the Sixteenth

Amendment, which authorizes a federal income tax. Of course, the Twenty-Third Amendment was passed against the factual backdrop of a District that included a substantial number of residents disenfranchised from presidential elections. But that does not mean that Congress lacks the power to alter that factual premise through legislation rather than constitutional amendment. Consider, as illustration, whether Congress had authority to adopt the New Columbia Admission Act before the Twenty-Third Amendment. Absolutely nothing in the Twenty-Third Amendment purports to limit congressional power, so if Congress had the power to admit New Columbia prior to the Twenty-Third Amendment, the amendment did not take that power away. All of this is to say that the Twenty-Third Amendment by itself adds little to the analysis of congressional power to admit New Columbia.

To be sure, it makes little policy sense to grant the smaller district's residents outsized influence on the presidential election. (Given that the President and First Family will be among those few residents, it would pose a particularly pernicious advantage to presidential incumbents.) Thus, if New Columbia is admitted, I think the Twenty-Third Amendment *should* be repealed. The Act provides for expedited consideration of a constitutional amendment for repeal, and one would expect Congress and the states to quickly ratify the repeal amendment to protect their electoral votes from dilution. In fact, the better policy would be to make repeal of the Twenty-Third Amendment a prerequisite to New Columbia's admittance. But that is a political judgment for Congress to make, not a constitutional limit on New Columbia's admittance to the Union.

In all events, the New Columbia Admission Act seeks to avoid the problem of granting three electoral votes to the reduced federal district. The Act repeals 3 U.S.C. § 21, which currently provides for the District of Columbia's participation as a state in presidential elections, thus leaving the District without any legislatively-provided presidential electors. *See* Act § 205. This provision builds on Professor Schrag's theory that the Twenty-Third Amendment is not self-executing and thus Congress can simply decline to provide electors for the federal district. *See* Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 *Cath. U. L. Rev.* 311, 348-49 (1990). Congress is granted some authority to control the appointment of the District's electors: The District "shall appoint" those electors "in such manner as the Congress may direct," and the Amendment grants Congress the "power to enforce this article by appropriate legislation." U.S. Const. amend. XXIII. But it is unlikely that the "power to *enforce*" the Twenty-Third Amendment includes the power to nullify it. And the Twenty-Third Amendment speaks in mandatory terms: "The District constituting the seat of Government of the United States *shall* appoint" electors for President and Vice President. *Id.* (emphasis added). But the constitutionality of New Columbia's admittance does not rise or fall with this provision. Whatever the legality and effect of Section 205, it is severable from the rest of the Act, and the admission of New Columbia remains constitutional.

C. Admission of New Columbia does not require Maryland's consent.

Some also argue that the Constitution requires Maryland's consent before New Columbia can be carved out of the existing District of Columbia. The New States Clause prohibits the creation of any new state from "within the Jurisdiction of any other State" without the existing state's consent. U.S. Const. art. IV, § 3, cl. 1. Statehood opponents argue that Maryland ceded its land to the federal government solely for use as the federal capital district and thus Maryland retains an interest in the land that would trigger the New States Clause's consent requirement if Congress attempts to alienate the land. *See, e.g.,* OLP Report at 58; *see also generally* Raven-Hansen, 60 *Geo. Wash. L. Rev.* at 177-83.

The premise of this argument is false. The land that would create New Columbia is not “within the Jurisdiction” of Maryland, and Maryland has no residual authority over the land. On the contrary, Maryland relinquished all sovereign authority over the land when it ceded the territory and the federal government accepted it. The express terms of the cession state that the land is “*for ever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction . . .*” 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), *quoted in* Raven-Hansen, 60 Geo. Wash. L. Rev. at 179 (emphasis added). The terms could not be more clear. Maryland retained no authority over the land because, “the cession had ended residents’] political link with” Maryland. D.C. Voting Rights Testimony (citing *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901); *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966)). Thus, by its terms, the consent provision in the New States Clause does not apply. In this vein, the New Columbia Admission Act follows the precedent of the Enabling Act of 1802, which did not require consent from Connecticut even though the Act formed Ohio partially from territory Connecticut ceded to the United States in 1786. The Enabling Act of 1802, 2 Stat. 173 (1802); 5 *The Territorial Papers of the United States* 22-24 (Clarence Edwin Carter ed., 1934).

D. Other policy concerns do not raise constitutional problems.

Statehood opponents also raise a number of other practical concerns that do not raise any constitutional problems. For instance, even setting the Twenty-Third Amendment aside, the state of New Columbia would have an outsized influence in the Senate, given its exceptionally small geographic size and relatively low population. New Columbia would also undoubtedly retain the culture of a “national city” and would likely enjoy the advantages of geographic proximity to the federal government. And New Columbia would hardly present the sort of economic, cultural, and geographic diversity of the traditional Madisonian democracy. It would add a diverse counterweight to large, sparsely populated states, but New Columbia would consist *entirely* of one city, whose existence and prosperity are tied to the federal government. These are all significant concerns that counsel against admitting New Columbia as a state. But the Constitution does not speak directly to any of these problems and thus they are for Congress to resolve in its political judgment.

* * *

At its core, the admission of New Columbia is a political decision for Congress. The New Columbia Admission Act satisfies the minimal constitutional requirements and traditional prerequisites for the admission of new states, and courts will likely find other constitutional attacks to be meritless. Virtually all of the objections actually amount to disputes over political policy—that is, whether New Columbia would structurally fit within the existing Union. But the Constitution commits that judgment to Congress, which has the power to admit new states and possesses plenary power over the District of Columbia. There is little cause for the courts to second-guess that decision.