To: Interested Persons
From: ACLU-Voting Rights Project
Last Updated: March 22, 2021
Re: Constitutionality of the Washington, D.C. Admission Act (H.R. 51)

Introduction

The Washington, D.C. Admission Act is a valid and defensible exercise of congressional authority and 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. The following offers a legal analysis of the bill. It begins by summarizing the bill's relevant provisions, reviews the bill's constitutional and legal bases, and makes the following findings:

First, H.R. 51 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 reduces the size of the District but preserves a small area consisting of federal buildings as a redrawn federal district and national seat of government. Thus, it does not violate the clause. Furthermore, the District Clause affords Congress broad plenary powers over the District, including authority to change its boundaries and size so long as it is smaller than ten square miles.

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 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 by giving the residents of a smaller federal district outsized influence in presidential elections, it does not bear on the constitutionality of H.R. 51. In any event, the bill avoids these problems in two ways: (1) by repealing the statute that provides for the District's participation in federal elections—thus leaving it without appointed electors—and (2) kickstarting expedited procedures to repeal the Twenty-Third Amendment.

Fourth, 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.

I. Summary Analysis of H.R. 51

The Act 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. The bill directs the process for admission, describes with particularity the territorial bounds of the newly constituted state, regulates the transfer of real and personal property held by the former District of Columbia to the new state, establishes the jurisdiction and powers of the new state, outlines the responsibilities and legal interests of the federal government, and establishes expedited procedures for repealing the Twenty-Third Amendment, which assigns Electoral College votes to the District of Columbia.

a. Summary of Title I—Procedures for Admission

Subtitle A of Title I of the bill generally issues three directives that guide the admissions process of the State of Washington, Douglass Commonwealth. Section 101 states that upon proclamation by the President and the certification of elections for federal representation, the State of Washington, Douglass Commonwealth will be a state on equal footing with all other states. Section 102 outlines the elections process for two federal senators and one representative (until the next reapportionment) in Congress. It also directs the transfer of offices of the mayor and members and chair of the D.C. Council to the new governor, legislative assembly, and speaker of the legislative assembly, respectively, and also orders the continuation of authority and duties of judicial and executive offices to the respective executive and judicial offices of the new state. Section 103 directs the President to proclaim the election results of the first election held pursuant to this section not later than ninety days after receiving the certification of the election results, and directs that upon the President's proclamation the state will be admitted into the Union.

Subtitle B describes the new territory of the State of Washington, Douglass Commonwealth. Section 111 directs that the state will include all of the current territory of the District of Columbia minus the area of the "Capital," which would remain as the District of Columbia for purposes of serving as the seat of the federal government. The territory that remains as the Capital would be determined pursuant to the specific geographic boundaries established by the bill. It also requires the President, in consultation with the Chair of the National Capital Planning Commission and in accordance with the boundaries established by the bill, to conduct a technical survey of the metes and bounds of the District of Columbia and the new state.

Section 112 specifies the specific street boundaries of the Capital that will remain as the District of Columbia, and expressly includes the principal federal monuments, the White House, the Capitol Building, the U.S. Supreme Court building, and the federal executive, legislative, and judicial office buildings located adjacent to the National Mall and the Capitol Building. Section 113 directs the continuation by the state of title to (or jurisdiction over) all real and personal property held by the former District of Columbia for purposes of administration and maintenance. It also directs the District of Columbia, on the day before it's admitted as a state, to convey to the federal government all interest held by it in any bridge or tunnel that connects Virginia with the current District.

Subtitle C establishes the jurisdiction and powers of the new state. Section 121 establishes the legislative jurisdiction and powers of the state and extends the force and effect of federal laws to the state. Section 122 establishes parameters for the continuation and transfer of all judicial proceedings of District of Columbia courts to the appropriate newly established state courts, and the continuation of judicial proceedings of the U.S. District

Court for the District of Columbia. Section 123 prohibits the new state from imposing any taxes on federal property, except to the extent permitted by Congress. Section 124 directs that no provision of the act will confer U.S. nationality, terminate lawful U.S. nationality, or restore U.S. nationality that has been lawfully terminated.

b. Summary of Title II—Responsibilities and Interests of the Federal Government

Title II assigns responsibilities, jurisdiction, and legal interests of the federal government in relation to the grant of statehood. Subtitle A describes the treatment of federal property. Section 201 establishes exclusive congressional jurisdiction of lands within the new state that were controlled or owned by the federal government for defense or Coast Guard purposes prior to admission of the state. It also prohibits congressional jurisdiction to operate in a manner that prevent such lands from being a part of the state, and permits concurrent jurisdiction by the state in matters it would otherwise have jurisdiction over and which are consistent with federal law. Section 202 establishes that the state and its residents disclaim all right and title to any unappropriated lands or property not granted to the state or its subjurisdictions under the act, the right or title of which is held by the federal government. It also clarifies that the act does not affect any pending claims against the United States.

Regarding elections, Subtitle C Section 221 outlines registration procedures and voting requirements to allow individuals residing in the revised District of Columbia to vote absentee in federal elections in the state where the voter was domiciled before residing in the District of Columbia. It gives the Attorney General authority to enforce this section. Section 223 repeals the law providing participation of the District of Columbia in the election of President and Vice President of the United States. Finally, Section 224 outlines expedited procedures for the House and Senate to consider a constitutional amendment to repeal the Twenty-Third Amendment.

c. Summary of Title III—General Provisions

Title III contains general provisions, including definitions for terms in the bill, and directs the President to certify enactment not more than sixty days after the date of enactment.

II. H.R. 51 is a Constitutional Exercise of Congressional Power

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.

a. The 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.[1]

Courts have consistently interpreted this provision to find that Congress has broad "plenary" powers over the District and other federal enclaves.[2] H.R. 51 is consistent with Congress's broad authority because the clause provides for a federal district that "may" serve as "the Seat of Government."[3] 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.[4] Neither the language of the clause nor its history supports these interpretations.

i. The "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, the argument goes, Congress may not reduce the District's now "fixed" boundaries.[5]

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.[6] Just as the Supreme Court has held that the relationship between the Union and a state is "indissoluble,"[7] 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."[8] Put another way, the argument is that 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.

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[1] U.S. Const. art. I, § 8, cl. 17.
[2] *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).
[3] U.S. Const. art. I, § 8, cl. 17.
[4] *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].
[5] *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).
[6] *See* Kennedy letter, *supra* note 5, at 128.
[7] *See Texas v. White*, 74 U.S. 700, 726 (1868).
[8] Kennedy letter, *supra* note 5, at 128; *see also* OLP, *supra* note 4, at 36.

However, as noted above, it is sufficiently well-settled that Congress's power over the District of Columbia is sweeping—or "plenary." Its authority "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."[9] The District Clause, unlike the Admission Clause, grants Congress authority in the most expansive language possible, giving it power to exercise "exclusive Legislation in *all Cases whatsoever*."[10] This sweeping and exclusive authority should include the power of Congress to contract the District to less than its current size.[11] 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 district *larger* than ten square miles; it says nothing about a lower limit.[12] 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.[13] There is no reason to believe that the District Clause is somehow different.

Second, the clause's history 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]."[14] While some of Pinckney's language was eventually incorporated into the District Clause, the adverb "permanently" was dropped.[15] Similarly, a proposal that Congress be granted exclusive jurisdiction over an area no less than three, and no 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.[16] The failure of these proposals suggests that the Framers intended for Congress to have flexibility to move or change the size of the

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[9] *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").
[10] U.S. Const. art. I, § 8, cl. 17 (emphasis added).
[11] *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.").
[12] *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.").
[13] *See* Raven-Hansen, *supra* note 5, at 168.
[14] James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 420 (1920) (emphasis added).
[15] 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)).
[16] *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).

District.[17] 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—all significant concerns at the founding.[18]

Third, history undermines arguments that the District Clause permanently fixed the District's form, as Congress changed its boundaries twice since the Constitution's ratification. The first change occurred in 1791, less than one year after Virginia and Maryland ceded land 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 Alexandria.[19] That measure significantly bolsters H.R. 51, because the Supreme Court has observed 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."[20]

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.[21] 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.[22]

The constitutionality of the 1846 retrocession did come before the Supreme Court in *Phillips v. Payne*.[23] However, the Court found that, because 30 years had passed between the retrocession and the constitutional challenge, the plaintiff was "estopped" from bringing his

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[17] *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).

[18] *See* Raven-Hansen, *supra* note 5, at 168.

[19] 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).

[20] *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.").

[21] *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.").

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

[23] 92 U.S. 130, 132 (1875).

claim.[24] 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."[25] Thus, *Phillips* should not be read to raise questions about the retrocession's constitutionality.

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 Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[26] This authority has been construed consistently to allow Congress to both acquire and convey such places.[27] 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."[28] 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.[29] 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."[30]

ii. The "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.[31] 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.[32] However, it is doubtful that a reduction in the size of the District would, in fact, impede the function of a separate federal capital.

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[24] *Id.* at 134.
[25] *Id.* at 132.
[26] 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].
[27] *See* U.S. Interdepartmental Comm. for the Study of Jurisdiction over Federal Areas Within the Sates, *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").
[28] U.S. Const. art. IV, § 3, cl. 2.
[29] *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).
[30] 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 "[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]").
[31] OLP, *supra* note 4, at 25, 55.
[32] *Id.* at 25.

D.C. statehood detractors 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 so would be akin to any other federal enclave, wholly dependent on the new state for essential services.[33] 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 Professor Raven-Hansen—is that the reduced District would be no more an enclave within a state than the existing District.[34] 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."[35]

Furthermore, as Professor Raven-Hansen has argued, the current District has "long since ceased to be self-sustaining in any practical sense of the word."[36] The District is already inextricably connected to the surrounding metropolitan areas, including parts of Maryland and Virginia, which are home to many federal employees and several important federal buildings.[37] 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. 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."[38] This means that Congress has the power to legislate against state encroachments on the independence of the District. It would surely retain that power even if the District were reduced in size.

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[33] *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.").

[34] *See* Raven-Hansen, *supra* note 5, at 174-75.

[35] *Id.* at 174.

[36] *Id.* at 175.

[37] *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)).

[38] *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.*

b. Admission Clause

The Admission Clause provides:

> 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.[39]

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.[40] 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."[41] Section 101(b) of the bill meets this substantive prerequisite.[42]

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 the new state would be "formed or erected within the Jurisdiction of [an]other State."[43]

The Admission Clause prohibits the creation of new states from "within the Jurisdiction of any other State" without the existing state's consent.[44] 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.[45] 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 would be unconstitutional without Maryland's permission, as triggered by the consent requirement of the Admission Clause.[46]

But 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 defeated by any other use of the ceded lands."[47] For the reasons discussed below, no such reversionary interest exists.

The principal problem with the Maryland "reversionary interest" argument is that an asserted condition subsequent or reverter has been neither expressly made nor implied.

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[39] U.S. Const. art. IV, § 3, cl. 1.
[40] *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[.]").
[41] U.S. Const. art. IV, § 4.
[42] *See* H.R. 51 § 101(b) ("The State Constitution shall always be republican in form[.]").
[43] *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).
[44] U.S. Const. art. IV, § 3, cl. 1.
[45] *See* OLP, *supra* note 4, at iii.
[46] *See* Pate, *supra* note 43, at 5.
[47] Raven-Hansen, *supra* note 5, at 178.

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."[48] 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.[49]

The language of this statute does not appear to contemplate a reversionary interest.[50] 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.[51] 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."[52] Thus, the consent provision in the Admission Clause should not apply.[53]

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 the District of Columbia under the District and Federal Enclaves Clause.[54] 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[55] and Maryland property law does not favor implied reversionary interests.[56] The Maryland Court of Appeals has

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[48] 2 Laws of Maryland 1788, ch. 46 (Kilty 1800).
[49] 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).
[50] *See* Thomas, *supra* note 26, at 3-4.
[51] 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800) (emphasis added); *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").
[52] *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).
[53] 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)).
[54] *See* Pate, *supra* note 43, at 5. *But see* Thomas, *supra* note 26, at 4-5 (rejecting argument).
[55] This seems intuitively correct, but it is an understandably open question.
[56] *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).

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."[57] 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."[58]

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."[59] 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 forbids the "form[ing] or erect[ing]" of a "new State . . . within the Jurisdiction of any other state."[60] But the District of Columbia, in its current form, is neither part of Maryland nor within its jurisdiction.[61] The enactment of H.R. 51 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 thirty days.[62] Upon certification of that election, the President would "issue a proclamation announcing the results of such elections" within ninety days,[63] at which point

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[57] *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.").

[58] *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.").

[59] The Federalist No. 43, at 274 (James Madison) (1961).

[60] U.S. Const. art. IV, § 3, cl. 1.

[61] *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).

[62] H.R. 51 § 102(a).

[63] *Id.* 103(a).

the State of Washington, Douglass Commonwealth would immediately become a separate, new state by operation of law.[64] At no point in this process would the new state be "within the Jurisdiction" of Maryland.

c. 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.[65]

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.

The Twenty-Third Amendment practically means that residents of the District of Columbia hold three votes in the Electoral College. Under H.R. 51, the few residents who live in the reduced District—*including the President and their family*—would therefore 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 District.[66] 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.[67]

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."[68] 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

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[64] *Id.* 103(b).
[65] U.S. Const. amend. XXIII (emphasis added).
[66] *See* Kennedy letter, *supra* note 5, at 132.
[67] *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. . . .").
[68] *See* Dinh, *supra* note 11, at 84 (citing *Adams*, 90 F. Supp. 2d. at 50).

district.

Indeed, there is no inherent *conflict* between H.R. 51 and the text of the Twenty-Third Amendment. Although peculiar, this result does not pose a constitutional obstacle to H.R. 51. The concerns raised by the interaction of H.R. 51 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 seeks to avoid the problem in two ways: (1) by repealing 3 U.S.C. § 21,[69] 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."[70] While these measures do not likely escape the Amendment's mandatory language (i.e., "The District . . . ***shall*** appoint" electors), neither does the Amendment foreclose the Act from a constitutional standpoint.[71]

Other policy solutions include proposals that there be no voting residents in the reduced District. H.R. 51 already provides for Capital residents to be allowed to vote in federal elections in their last state of residence.[72] The President and their family could vote in their home state, as they do customarily already.[73] The few other residents of the reduced District could vote in Washington, Douglass Commonwealth. Professor Raven-Hansen has argued that Congress has the authority to enact legislation entitling residents of the reduced District to vote in the new state for elections to federal office, much as citizens living overseas may vote in federal elections in their previous state of residence even if they do not have a current home there or intend to return.[74] These solutions would render the Twenty-Third Amendment inoperative. "The result is untidy—an obsolete yet unrepealed constitutional provision—but it is neither unprecedented nor unconstitutional."[75]

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

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[69] *See* H.R. 51 § 223.
[70] *Id.* § 224.
[71] *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.
[72] *See* H.R. 51 § 221.
[73] Brian Pamer, *Why Are the Obamas Still Eligible To Vote in Illinois?*, Slate (Nov. 6, 2012), https://slate.com/news-and-politics/2012/11/where-does-obama-vote-shouldnt-the-president-vote-in-washington-rather-than-illinois.html.
[74] *See* Raven-Hansen, *supra* note 5, at 185-6.
[75] *Id.* at 186 (referencing "U.S. Const. art. II, § I (procedures for selection of President by electors), impliedly superseded by amendment XII (providing new procedures for selection of President by electors), itself impliedly superseded by amendment XX, § 3; article IV, § 2, clause 3 (Fugitive Slave Clause), impliedly repealed by amendment XIII (outlawing slavery and involuntary servitude); cf. U.S. Const. art. I, § 2 (describing initial entitlements of original states to representatives); U.S. Const. art. 1. § 9 ($10 limitation of tax or duty on imported slaves); U.S. Const. art. V (limitation on certain amendments prior to 1808).")

H.R. 51 as a legislative resolution to D.C. statehood, the Act would not foreclose the need to engage in the amendment process. However, given the interest in ensuring fairly appointed electors, Congress should have a strong incentive to begin the expedited procedures for repealing the Twenty-Third Amendment.

d. 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."[76] 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."[77] 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.[78] Second, critics argue that any new state must have sufficiently diverse interests to function as "a proper Madisonian society."[79] Only then, in this view, could the state serve as an appropriate counterweight to federal authority.[80]

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.[81] 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-Hansen to characterize the argument as "strictly a political one, dressed up in constitutional garb."[82]

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.[83] That report describes these requirements as "historical standards" and "traditionally accepted requirements for statehood."[84] However, they are not implicit constitutional requirements. They have not even been strictly applied as historical standards.[85]

Second, Congress has not articulated a "multiplicity of interests"[86] 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

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[76] OLP, *supra* note 4, at 59. *But see* Raven-Hansen, *supra* note 5, at 191-92 (rejecting argument).
[77] OLP, *supra* note 4, at 59.
[78] *See id.* at vi, 59-62.
[79] *See id.* at v, 62-63; *see also* The Federalist No. 51 (James Madison) (Clinton Rossiter, ed., 1961).
[80] *See* OLP, *supra* note 4, at 63-67; *see also* The Federalist No. 51, at 323 (James Madison).
[81] Raven-Hansen, *supra* note 5, at 166.
[82] *Id.* at 189.
[83] *See* H.R. Rep. No. 624, 85th Cong., 1st Sess. 11 (1957).
[84] *Id.*
[85] *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.
[86] The Federalist No. 51 (James Madison) (1961).

state."[87] Had 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.[88] Regardless, these considerations are nothing more than policy considerations—for Congress to decide—not constitutional limits on D.C. statehood.[89]

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 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 should be appropriately addressed, but they are not constitutional limitations on Congress's authority to pass H.R. 51.

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[87] Raven-Hansen, *supra* note 5, at 191.

[88] *See id.* at 192.

[89] 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).