Maryland Law Review

Volume 29 | Issue 3 Article 6

Exclusive Jurisdiction - The Key To Voting Rights For Residents Of Federal Enclaves - Cornman v. Dawson

Exclusive Jurisdiction — The Key To Voting Rights For Residents Of Federal Enclaves

Cornman v. Dawson[1]

INTRODUCTION

The federal government is the largest single owner of real estate in the nation, holding title to approximately one quarter of the territorial expanse of the continental United States.[2] The majority of this

1. 295 F. Supp. 654 (D. Md.), *appeal granted sub nom.* Evans v. Cornman, 38 U.S.L.W. 3114 (U.S. Oct. 14, 1969) (No. 236).

2. As of 1952 the federal government owned approximately 455 million acres or 23% of the land area of the continental United States. *See* Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy,* 101 U. PA. L. REV. 124 (1952).

land is reserved for national parks, national forests, conservation districts, and other functions which do not require permanent residents.[3] The remaining areas have been acquired for such varied uses as military bases, hospitals, public housing, atomic energy and space agency development. Such uses require the presence of many residents to maintain the federal area or enclave.[4] Because most of these enclaves are located within the territorial limits of a state, questions often arise whether enclave residents are entitled to the benefits of citizenship of the state in which the enclave is situated. One such question is whether enclave residents can be considered residents of the state for purposes of voting in state elections. The solution to this question has traditionally hinged on whether the federal government possesses exclusive jurisdiction over the enclave. Generally, where exclusive jurisdiction has existed, enclave residents have not been considered state citizens, and, in the absence of statute, have been denied the right to vote in local elections.[5] However, to the extent the state imposes substantial burdens on enclave residents normally incident to state residence or citizenship, there is recent authority for allowing the enclave resident the right to vote.[6] As will be discussed, whether these later cases are correct may depend on two considerations: first, whether the historical term "exclusive jurisdiction" is given a technical or an operative meaning, and second, whether the equal protection clause of the fourteenth amendment requires the state to accord voting rights where it imposes burdens of state citizenship.

In *Cornman v. Dawson*,[7] plaintiffs were residents of the National Institutes of Health in Montgomery County, Maryland, and had been registered voters in the state for several years.[8] Following a review of the county voters' records by the Permanent Board of Registry, they were informed that their names would be removed from the list because, as residents of federal property, they did not qualify to vote under the state constitution.[9] Plaintiffs brought suit seeking a declara-

3. The United States does not exercise any form of legislative jurisdiction over most federally owned lands. About 95% of all federal land is held as an ordinary proprietor. *See* Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 285 (1966).

4. In addition, enclave residency may stem from the obligation of the government to provide quarters for servicemen or for civilians in remote areas.

5. *See, e.g.*, Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841); Sinks v. Reese, 19 Ohio St. 306 (1869). It must be noted, however, that most enclave residents, especially servicemen, already have the right to vote in national elections via absentee ballots since they can maintain citizenship in their home state although physically absent from it. *See* Knowlton v. Knowlton, 155 Ill. 158, 39 N.E. 595 (1895); Annot., 140 A.L.R. 1100 (1942).

6. *See, e.g.*, Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952); Annot., 34 A.L.R.2d 1193 (1954).

7. 295 F. Supp. 654 (D. Md.), *appeal granted sub nom.* Evans v. Cornman, 38 U.S.L.W. 3114 (U.S. Oct. 14, 1969) (No. 236).

8. During that time, most of the plaintiffs, as enclave residents, were deemed to have fulfilled all the requirements for voting set forth in article I, section 1 of the Maryland Constitution. Additionally, two plaintiffs who had not previously registered were denied the right to register.

9. Article I, section 1 of the Maryland constitution requires that a voter be one "who has been a resident of the state for one year and of . . . the county, in which he may offer to vote, for six months, next preceding the elections." In Royer v. Board of Election Supervisors, 231 Md. 561, 191 A.2d 446, *cert. denied*, 375 U.S. 921 (1963), the Court of Appeals of Maryland held that residents of federal enclaves could not be considered state residents for voting purposes. Inhabitants of areas under exclusive

tory judgment and injunctive relief to prevent this removal. They alleged that the voting requirements as recited in the Maryland constitution denied them the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution. The court held that to deprive these enclave residents of the right to vote in local elections was a violation of their constitutional rights. The basis for the court's decision was that the federal government had ceased to exercise "exclusive jurisdiction" over the area in question and that ". . . the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed here cannot be constitutionally denied."[10] If significant portions of jurisdiction have been returned to the state so that federal jurisdiction may no longer be said to be exclusive, and if all other prerequisites of state residence have been met, then residency within a federal enclave fulfills the statutory requirements for voting in state elections.

FEDERAL JURISDICTION OVER ENCLAVES

The federal government may acquire land in any of three ways: retention of public lands not disposed of under public land laws;[11] purchase or condemnation of land under the right of eminent domain;[12] and cession by a state in accordance with article I, section 8, clause 17 of the United States Constitution.[13] The latter method, cession or purchase with state consent, was considered for many years the only manner in which the United States could gain exclusive jurisdiction. Since 1885, however, the federal government has been able to reserve exclusive jurisdiction over public lands within a state at the time

federal jurisdiction, therefore, ceased to fulfill the constitutional residency requirements and, in the opinion of the Board of Election Supervisors, could properly be removed from voters' lists.

10. 295 F. Supp. at 659. *See* text accompanying notes 66–75 *infra.*

11. Gerwig, *The Elective Franchise for Residents of Federal Areas,* 24 GEO. WASH. L. REV. 404, 405 (1956). Approximately 90% of all federal lands have been acquired (or reserved) in this manner. Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy,* 101 U. PA. L. REV. 124 (1952), *citing,* GRAPHIC NOTES ON THE PUBLIC DOMAIN 2 (Dep't of the Interior, Bureau of Land Management 1950).

12. Gerwig, *The Elective Franchise for Residents of Federal Areas,* 24 GEO. WASH. L. REV. 404, 405 (1958). "[T]he right of eminent domain [possessed by the federal government] may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." Kohl v. United States, 91 U.S. 367, 372 (1875). *See* Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy,* 101 U. PA. L. REV. 124 (1952).

13. Gerwig, *The Elective Franchise for Residents of Federal Areas,* 24 GEO. WASH. L. REV. 404, 405 (1958). U.S. CONST. art. I, § 8, cl. 17 empowers Congress:

> To exercise exclusive Legislation in all cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the 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 be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.* . . . (emphasis added).

The phrase "exclusive legislation" necessarily implies "exclusive jurisdiction." James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937); State v. Unzeuta, 281 U.S. 138 (1930); Opinion of the Justices, 42 Mass. (1 Met.) 580, 582 (1841).

that state was admitted to the Union.[14] Furthermore, it is now recognized that states may cede exclusive sovereignty over land previously held by the United States as an ordinary proprietor.[15] Prior to 1940, sole federal authority was presumed accepted as soon as the land was granted by the state,[16] with the result that in many instances exclusive jurisdiction may have arisen where it was not really desired or necessary.[17] At present, however, in addition to the state's cession, there must be a specific acceptance by the United States before exclusive federal jurisdiction arises.[18] Thus, a state may cede jurisdiction to the federal government, but unless express acceptance is forthcoming, jurisdiction over the area remains with the state.

In consenting to federal authority, the states can specifically reserve powers not inconsistent with the effective use of the land by the federal government.[19] Originally, only the right to serve civil and criminal process within the federal area could be withheld.[20] In subsequent decisions, however, the right to tax private property or corporate franchises,[21] to open roads and maintain them,[22] and to maintain railroad rights of way[23] have been held valid reservations, not interfering with federal use of the area. While the issue is not free from doubt, it would seem that states now could reserve the elective franchise for enclave residents should they desire to do so.[24] Land for the

14. *See* Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 526 (1885); Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 286 (1966); Note, *Land under Exclusive Federal Jurisdiction: An Island Within a State*, 58 YALE L.J. 1402 (1949).

15. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 286 (1966). Where land is acquired without the state's consent, as by the right of eminent domain, the United States holds as an ordinary proprietor. *See, e.g.*, Porthier v. Rodman, 291 F. 311 (1st Cir. 1923); 37 YALE L.J. 796, 797 (1928).

16. 40 U.S.C. § 255 (1964). It was held in Adams v. United States, 319 U.S. 312 (1943), that specific acceptance of the state cession is required to gain concurrent as well as exclusive jurisdiction. "The Act [40 U.S.C. § 255] created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all or partial [concurrent] jurisdiction, or exclusive jurisdiction.'" *Id.* at 314.

17. *See* Benson v. United States, 146 U.S. 325, 330 (1892); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 528 (1885).

18. *See* Benson v. United States, 146 U.S. 325 (1892); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885). Unnecessary exclusive federal jurisdiction would seem to no longer arise. *See, e.g.*, Johnson v. Morrill, 20 Cal. 2d 446, 126 P.2d 873 (1942); State v. Corcoran, 155 Kan. 714, 128 P.2d 999 (1942).

19. In Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), the Court held that where land was acquired other than by purchase with consent, the state could, in ceding jurisdiction to the United States, reserve any powers not inconsistent with federal use of the land. This was extended to include lands purchased with consent of the state pursuant to article I, section 8, clause 17 of the United States Constitution in James v. Dravo Contracting Co., 302 U.S. 134 (1937).

20. *See* Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Rogers v. Squiers, 157 F.2d 948 (9th Cir. 1946); Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841). This withholding was permitted to prevent enclaves from becoming havens for fugitives. *See* Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy*, 101 U. PA. L. REV. 124 (1952).

21. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).

22. *See* United States v. Unzeuta, 281 U.S. 138 (1930); *cf. In re* Ladd, 74 F. 31 (C.C.D. Neb. 1896); Baker v. State, 47 Tex. Crim. 482, 83 S.W. 1122 (1904).

23. *See* Chicago, R.I., & Pac. R.R. v. McGlinn, 114 U.S. 542 (1885); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).

24. *See* Rothfels v. Southworth, 11 Utah 2d 169, 356 P.2d 612, 614 (1960); CAL. GOV'T CODE § 119 (West 1955); *cf.* Johnson v. Morrill, 20 Cal. 2d 446, 126 P.2d 873 (1942). *Contra*, Sinks v. Reese, 19 Ohio St. 306 (1869); State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906).

National Institutes of Health, wherein plaintiffs in *Cornman* resided, was purchased by the federal government, with state consent, in 1952.[25] Only the right to serve process within the federal enclave was reserved by Maryland,[26] and the ceded jurisdiction was expressly accepted by the United States.

RETROCESSION OF JURISDICTION

Traditionally, the resident of a federal enclave was simply not a resident of the state in which it was located, and, therefore, no constitutional right of the enclave resident was infringed by the state's refusal to grant him the right to vote.[27] So settled was the view that the federal enclave was not "within" the state, that some state courts overthrew reservations in the cession of jurisdiction to the federal government attempting to save the vote for residents of the area.[28] Courts taking such a view saw such provisions as violations of state constitutions, most of which require state residence as a qualification for voting. Similar reservations of voting power might now be allowed, however, since the Supreme Court has rejected the theory of the extra-territoriality of the federal enclave.[29]

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25. MD. ANN. CODE art. 96, §§ 31, 36, 37 (1964).

26. MD. ANN. CODE art. 96, §§ 34, 36 (1964).

27. *E.g.*, Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940); Royer v. Board of Election Supervisors, 231 Md. 561, 191 A.2d 446, *cert. denied*, 375 U.S. 921 (1963); Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841); Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948); Sinks v. Reese, 19 Ohio St. 306 (1869); Annot., 34 A.L.R.2d 1193 (1954); *see* 109 U. PA. L. REV. 1014 (1961).

28. Sinks v. Reese, 19 Ohio St. 306 (1869); State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906). *See* Comment, *Constitutional Law: Jurisdiction Over Nationally Owned Areas Within the States: Jurisdiction Over National Parks Within the States: Jurisdiction Over Yosemite National Park*, 24 CALIF. L. REV. 573, 590–91 (1936).

29. *See* Howard v. Commissioners, 334 U.S. 624, 626 (1954), where the Court stated: "The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries so long as there is no interference with the jurisdiction of the federal government." Rothfels v. Southworth, 11 Utah 169, 356 P.2d 612, 614 (1960); *cf.* Johnson v. Morrill, 20 Cal. 2d 446, 126 P.2d 873 (1942); State v. Corcoran, 155 Kan. 714, 128 P.2d 999 (1942). *But see* Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 287 (1966).

Many interesting arguments have arisen from attempts to gain voting rights for enclave residents. In Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948), residents of sections of the Los Alamos Atomic Energy Commission reservation were held to be qualified voters in New Mexico since the federal government did not exercise exclusive jurisdiction over these areas. The suit, however, concerned the legality of the votes of the enclave residents, which were cast on another part of the reservation which *was* under exclusive federal jurisdiction. The court ruled that these votes were not cast in New Mexico as required by the state constitution and were therefore invalid. This and various other attempts to persuade the courts that enclave residents are entitled to the elective franchise have failed in all but a few cases. The support for allowing residents of federal enclaves to vote in state elections consists of only three decisions: Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952); Rothfels v. Southworth, 11 Utah 2d 169, 356 P.2d 612 (1960); Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954). In addition, Kashman v. Board of Elections, 54 Misc. 2d 543, 282 N.Y.S.2d 394 (Sup. Ct. Onadaga Co. 1967), which decided that a resident of an area held by the United States as an ordinary proprietor could vote in local elections, expressed the view that residency on a federal enclave should be a neutral factor in determining whether a person had voting rights. The real question, in the court's opinion, was whether the person had the intention to establish a permanent domicile within the local subdivision.

Most courts have adhered to the traditional view that residents of enclaves over which the federal government has exclusive jurisdiction are not residents of the

In addition to the right to vote in state elections, residents of federal enclaves at one time were denied most other rights accorded state citizens.[30] The states, in turn, could not enforce any of their laws on the enclave resident since he was not "within" the state.[31] This made the federal enclave a void within the geographical boundaries of the state in which neither state law nor the rights and privileges of state citizenship applied. Both the states and the federal government have taken statutory action in an attempt to correct the situation. Shortly after the decision in *Lowe v. Lowe*,[32] which held that a resident of a federal enclave in Maryland had not acquired state residence for the purpose of filing a divorce suit, the state legislature passed a statute permitting such residents to use state courts for divorce matters.[33] This was later extended to include adoption pro-

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state in which the enclave is located. These courts reason that if a change in voting status is warranted, it should come through the state legislature or through Congress, via a retrocession of jurisdiction to the states, and not through judicial decision.

The court in Royer v. Board of Election Supervisors, 231 Md. 561, 566, 191 A.2d 446, 449, *cert. denied*, 375 U.S. 921 (1963), concluded that "If a change is desirable . . . we think it should be through adjustment by the sovereign legislative bodies and not imposed by the courts." The opinions in Sinks v. Reese, 19 Ohio St. 306 (1869) and State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906) both expressed the opinion that an amendment to the state constitution would be needed to give enclave residents the right to vote. *See* Arledge v. Mabry, 52 N.M. 303, 197 P.2d 834 (1948); Comment, *Constitutional Law: Jurisdiction Over Nationally Owned Areas Within the States: Jurisdiction Over National Parks Within the States: Jurisdiction Over Yosemite National Park*, 24 CALIF. L. REV. 573, 588–91 (1936); 109 U. PA. L. REV. 1014, 1015 (1961), *citing*, INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 224–25 (1957).

30. In addition to the right of suffrage, enclave residents, since they were not considered state residents, were denied attendance at public schools, Stanford Graded Common School District v. Powell, 145 Ky. 93, 140 S.W. 67 (1911), qualification for state supported services such as welfare, People v. Lyons, 374 Ill. 557, 30 N.E.2d 46 (1940). *But see* Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967), access to civil courts in divorce, Lowe v. Lowe, 150 Md. 592, 133 A. 729 (1926), probate, McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825), or adoption proceedings, Lowe v. Lowe, 150 Md. 592, 133 A. 729 (1926), hunting and fishing licenses, *In re* Eberle, 98 F. 295 (N.D. Ill. 1899), McCready v. Virginia, 94 U.S. 391 (1876), and reduced tuition at state universities, Waugh v. University of Miss., 237 U.S. 589 (1915); Connell v. Gray, 127 P. 417 (Okla. 1912). *See* Comment, *Exclusive Federal Jurisdiction Over State-Ceded Land*, 4 ST. LOUIS L.J. 334, 337 (1957).

31. The state was deprived of taxing power within the federal enclave since state excise tax, State v. Blair, 238 Ala. 377, 191 So. 237 (1939), personal property taxes, Surplus Trading Co. v. Cook, 281 U.S. 647 (1930), and inheritance taxes, *In re* Grant's Estate, 83 Misc. 257, 144 N.Y.S. 567 (Surr. Ct. N.Y. Co. 1913), could not be collected. Also, a corporation acting solely within a federal area could not be taxed for the privilege of doing business within the state. Winston Bros. Co. v. State Tax Comm'n, 156 Ore. 505, 62 P.2d 7 (1936).

State licensing and building ordinances may be inapplicable to federal areas, Peterson v. United States, 191 F.2d 154 (9th Cir.), *cert. denied*, 342 U.S. 885 (1951); United States v. City of Chester, 144 F.2d 415 (3d Cir. 1944), and crimes committed within federal areas did not fall under state jurisdiction in some cases. Rogers v. Squier, 157 F.2d 948 (9th Cir. 1946). State industrial insurance and workmen's compensation laws also did not apply to the enclave. Martin v. Clinton Constr. Co., 41 Cal. App. 2d 35, 105 P.2d 1029 (1940); Utley v. State Indus. Comm'n, 176 Okla. 255, 55 P.2d 762 (1936); Murray v. Joe Gerrick & Co., 172 Wash. 365, 20 P.2d 591 (1933).

32. 150 Md. 592, 133 A. 729 (1926).

33. MD. ANN. CODE art. 16, § 23 (1964).

ceedings as well.[34] Other states have enacted similar laws allowing enclave residents the use of state courts.[35]

There are many state laws which may now be applied to areas of exclusive jurisdiction pursuant to federal statutes.[36] The first enactment returning portions of the federal government's exclusive jurisdiction over enclaves to the states was passed by Congress in 1928. This statute provides for state jurisdiction over wrongful deaths occurring on federal enclaves.[37] During the next twelve years, Congress authorized the states to extend to federal enclaves their workmen's compensation[38] and unemployment insurance laws,[39] and, through passage of the Lea Act,[40] permitted the levying of state fuel taxes on motor fuels sold within the enclaves.

Probably the most significant of the retrocession statutes was the Buck Act of 1940.[41] This enactment gives the states authority to levy and collect sales, use, and income taxes within federal enclaves. The constitutionality of the right to levy income taxes on residents or those employed on federal enclaves was tested in *Kiker v. City of Philadelphia.*[42] The court found that an employee of the Philadelphia Navy Yard was not deprived of property "without due process of law" by having to pay a Philadelphia earnings tax. Since all the benefits of the city were legally available to him, he received something in return for his taxes.[43]

Congress at an early date enacted legislation to deal with criminal offenses applicable to federal territory. The first Assimilative Crimes Act,[44] enacted in 1825, provided that the criminal laws of the state are applicable to federal enclaves in the absence of congressional statute. The earlier statute required periodic re-enactments to keep current with changes in state penal law since only the state law in effect at the time of enactment could be applied to the enclave.[45] The Assimilative Crimes Act,[46] however, now provides that the state law in force at

34. MD. ANN. CODE art. 16, § 69 (1964).

35. *E.g.,* KAN. STAT. ANN. § 60-1603(b) (1964).

36. *See* Sewell, *The Federal Enclave,* 33 TENN. L. REV. 283, 306-11 (1966); Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy,* 101 U. PA. L. REV. 124 (1952); Note, *State Control Over Federal Areas,* 12 GEO. WASH. L. REV. 80 (1943).

37. 16 U.S.C. § 457 (1964).

38. 40 U.S.C. § 290 (1964).

39. 26 U.S.C. § 3305(d) (1964).

40. 4 U.S.C. § 104 (1964).

41. 4 U.S.C. §§ 105-10 (1964).

42. 346 Pa. 624, 31 A.2d 289, *cert. denied,* 320 U.S. 741 (1943). *Cf.* James v. Dravo Contracting Co., 302 U.S. 134 (1937) (where the right to tax enclave residents was reserved in the grant of cession by the state).

43. State taxing power was further increased in 1947, when an enactment permitted the states to tax a lessee's interest in real estate leased by the federal government from within an enclave. 10 U.S.C. § 2667(e) (1964).

44. 4 Stat. 115 (now 18 U.S.C. § 13 (1964)).

45. *See* Cornman v. Dawson, 295 F. Supp. 654, 657 (D. Md.), *appeal granted sub nom.* Evans v. Cornman, 38 U.S.L.W. 3114 (U.S. Oct. 14, 1969) (No. 236), *citing,* INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 126-31 (1957).

46. 18 U.S.C. § 13 (1964).

the time of the offense governs if there is no pertinent federal law, thereby eliminating the re-enactment requirement. To a great extent then, state penal codes now apply to federal enclaves.

Where the United States alone once exercised sovereignty, the many retrocessive statutes have resulted in a situation where the state and federal governments exercise almost concurrent jurisdiction. The court in *Cornman* based its decision on the present relationship between state authority and residents of federal enclaves. The court recognized that the state was imposing significant burdens of state citizenship on the plaintiffs without extending to them the counterbalancing right to vote in state elections. *Cornman* noted the existence of the traditional view that the franchise cannot be extended to residents of areas under exclusive federal jurisdiction,[47] and in fact, reaffirmed this view.[48] The court went on, however, to distinguish the line of precedents denying the right to vote from the situation where the federal government has retroceded to a state[49] all or substantially all of the incidents of jurisdiction, in which latter case the state could not constitutionally deny the right to vote. The factual situation in *Cornman* was somewhere between these two extremes, and the court, balancing the amount of jurisdiction exercised by the two sovereigns in light of the nature of the right being asserted, concluded that it violated the equal protection guaranteed by the fourteenth amendment for the state to deny plaintiffs the right to vote.

A CHANGING VIEW

The clear weight of authority,[50] viewed narrowly, supports the view taken by the Court of Appeals of Maryland in *Royer v. Board of Election Supervisors,*[51] that where the federal government possesses *exclusive* jurisdiction over territory, residents of the federal area are not residents of the state for purposes of voting in state elections. In *Royer,* the residents of an area under exclusive federal jurisdiction argued that since they were forced to pay state taxes, but could not vote in state elections, they were victims of "taxation without representation." In denying the enclave residents voting rights, the court expressed the opinion that this "colonial slogan" was not without exceptions and cited Washington, D.C., as an example.[52]

47. *E.g.,* Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940); Royer v. Board of Election Supervisors, 231 Md. 561, 191 A.2d 446, *cert. denied,* 375 U.S. 921 (1963); Sinks v. Reese, 19 Ohio St. 306 (1869); *see* Gerwig, *The Elective Franchise for Residents of Federal Enclaves,* 24 GEO. WASH. L. REV. 404 (1956); 109 U. PA. L. REV. 1014 (1961).

48. Where the federal government has exclusive jurisdiction over land located within the geographical boundaries of a state, it can hardly be doubted that no constitutional right of a resident of the enclave is infringed by the state's refusal to grant such resident the right to vote.
295 F. Supp. at 656.

49. Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952); Rothfels v. Southworth, 11 Utah 2d 169, 356 P.2d 612 (1960); Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954).

50. *See* note 27 *supra.*

51. 231 Md. 561, 191 A.2d 446, *cert. denied,* 375 U.S. 921 (1963).

52. *Id.* at 566, 191 A.2d at 449. The court in its opinion stated:
Moreover, we need only look to the District of Columbia, once a part of Maryland before exclusive jurisdiction was ceded to the Federal Government, to see

The *Royer* court, however, relied on precedent which arguably dealt with a different factual situation. In the older cases, there existed "exclusive jurisdiction." In *Royer,* however, while there may have existed "exclusive jurisdiction" in a technical sense, there was in fact no operative exclusive jurisdiction. This lack of operative exclusive jurisdiction was recognized in *Arapajolu v. McMenamin,*[53] *Adams v. Londeree,*[54] and *Rothfels v. Southworth.*[55] *Cornman* relied on these three cases for its holding that enclave residents cannot be denied the right to vote where substantial incidents of jurisdiction have been returned to the states, while *Royer* distinguished these cases and instead applied the prevailing view.

In *Arapajolu,* residents of military reservations in Monterey County, California were denied the right to register as voters. Since all of the plaintiffs had resided on reservations for the length of time required to gain voting rights, the only question presented was whether the reservations, which had theretofore been under exclusive federal jurisdiction, were "within" Monterey County. The court first reaffirmed the principle that where Congress exercised exclusive jurisdiction over a territory, the area was no longer a part of the state. The court found, however, that exclusive federal authority within such areas no longer existed since jurisdiction over various matters had been receded to the states. In reaching its decision the court distinguished earlier election cases on the ground that they were decided prior to congressional retrocession of jurisdiction to the states.[56] The *Royer* court attempted to distinguish *Arapajolu* by reasoning that the case was decided by an intermediate court, and that the outcome turned on the court's construction of a local statute. This reasoning is at best doubtful. While it is correct that the case was decided by an intermediate court, the rationale of the decision in no way depended upon a local statute. Plaintiffs were denied the right to vote in state elections because the state had ceded exclusive jurisdiction to the United States. The court upheld the right to vote because it found retrocessions of numerous incidents of jurisdiction to the states —

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that the right to tax is not inseparable from the right to vote, for the residents of that area are taxed although they have no right to vote for the persons who impose the taxes. . . .

Id. In Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940), the dissent took the position that the act which admitted Kansas to the Union allowed state residency for inmates of a federal veteran's home. The statute provided that the state should consist of all territory within certain boundaries. Since the home was located within these boundaries, it was effectively within the state. The inmates, therefore, were state residents and should, according to the rationale of the dissent, be entitled to vote. The twenty-third amendment to the United States Constitution gives the right to vote in national elections to residents of the District of Columbia. They still have no legislative representation, however, and hence they continue to be subjected to "taxation without representation."

53. 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952).

54. 139 W. Va. 748, 83 S.E.2d 127 (1954).

55. 11 Utah 2d 169, 356 P.2d 612 (1960).

56. The court distinguished Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948), which was decided after the stated recessions of jurisdiction, on the ground that the *Arledge* court considered these new enactments, but assumed that the United States still retained jurisdiction. *See* Annot., 34 A.L.R.2d 1193, 1197 (1954).

that is, because "[t]he jurisdiction over these lands is no longer full or complete or exclusive."[57]

Adams and *Rothfels* were also distinguished in *Royer*.[58] In *Adams,* a writ of mandamus was brought to strike the name of defendant, a candidate for mayor of South Charleston, from the ballot and from the voter's registration records. Defendant was a resident of the United States Naval Reservation located within the bounds of the city of South Charleston. The issue before the court was stated thusly: "Obviously, the question reduces itself to whether Londeree was a citizen and resident of the State, within the meaning of the State constitutional provision, while residing on the reservation."[59] The United States acquired the land about 1917, and the only reservation of jurisdiction by the state was for the purpose of serving civil and criminal process.[60] In 1931 the legislature amended the Code and provided that all cessions to the United States should be in the nature of *concurrent* jurisdiction. While the court discussed the statute consenting to the cession of jurisdiction to the United States, the decision did not turn on this statute, but rather, the outcome of the case depended on the court's view that the state, in ceding the territory, had retained sovereignty over the area to the extent that such sovereignty does not conflict with the sovereignty ceded to the United States.

In *Rothfels,* plaintiff, a civilian employee residing on a military reservation, sought to compel defendant to register him as a qualified voter. Plaintiff was denied registration on the ground that he was not a resident of the state. The Utah Supreme Court held that a civilian residing on a military reservation within the state had the right to vote in state elections. A Utah statute, providing that a person living on a military reservation is not to be considered a resident, was repealed by the legislature.[61] There was some question in the case as to the nature of the sovereignty exercised by the United States over the reservation in question. It does not appear, however, as was stated in *Royer,* that "the state had reserved concurrent jurisdiction."[62] In discussing the sovereignty exercised by the United States, the court spoke of various incidents of jurisdiction exercised by the state over the area, but these were mainly incidents of jurisdiction which had been retroceded to the state.[63] While a local statute played a key role in the court's decision, the reliance by the court on the decisions in *Arapajolu* and *Adams* makes it probable that the same result would have been reached in the absence of such a statute.

57. 249 P.2d at 323.

58. In both the *Rothfels* and *Adams* cases there were powerful dissents, and the decisions were rested on the local statutes and the fact that the state had reserved concurrent jurisdiction. We think these cases are readily distinguishable and not persuasive.

231 Md. at 566, 191 A.2d at 449.

59. 83 S.E.2d at 132.

60. *Id.*

61. UTAH LAWS 1896 c. 126 § 11(11), *repealed by* UTAH LAWS 1957 c. 38 § 1.

62. 231 Md. at 566, 191 A.2d at 449.

63. *See* notes 44–54 *supra* and accompanying text.

The *Royer* court, relying on dictum in its earlier opinion in *Lowe v. Lowe*,[64] and pointing to the failure of a bill in the Maryland legislature the previous year which would have conferred voting rights on enclave residents, rejected the later cases, reasoning that the retrocession of certain aspects of jurisdiction neither amounted to a general grant of concurrent jurisdiction nor compelled the states to afford voting privileges, since ". . . the matter has traditionally been left to adjustment between Federal and State legislative bodies."[65] Thus, the court concluded, plaintiff's rights under the equal protection clause of the fourteenth amendment had not been violated. This result is in direct conflict with that of *Cornman*. The easiest explanation for the divergent outcomes in *Royer* and *Cornman* is that the court in *Royer* felt compelled to follow the weight of precedent, while *Cornman*, noting the changed circumstances occurring since many of the decisions relied upon by *Royer*, enunciated a modern approach which upholds the spirit of the equal protection clause of the fourteenth amendment. The court's holding that the right to vote could not be denied plaintiffs was based on the equal protection clause of the fourteenth amendment. In effect, the court was stating that it was discriminatory for Maryland to treat plaintiffs differently from other citizens for purposes of voting in state elections. The equal protection clause of the fourteenth amendment ". . . has long been treated by the Court as a dubious weapon in the armory of judicial review. But after eighty years of relative desuetude, the equal protection clause is now coming into its own."[66] It was early stated by the Supreme Court that the privilege to vote in a state is within the jurisdiction of the state itself and is not incident to United States citizenship,[67] and the only check on the state's power was that it could not be exercised so as to discriminate in violation of the Federal Constitution.[68] The equal protection clause, however, was not thought to be applicable to such cases of discrimination.[69] Indeed, full recognition of the availability of protection of the right to vote through use of the equal protection clause was not established until the decision in *Reynolds v. Sims*.[70] The equal protection clause operates both as a limitation on permissible classification and as a ban on discriminatory legislation.[71] One commentator[72] has stated that there are two types of limitations on the right to vote which are constitutionally permissible: those which promote intelligent or responsible voting and those which have as their purpose the separation of those with

64. 150 Md. 592, 133 A. 729 (1926).
65. 231 Md. at 565, 191 A.2d at 449.
66. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *Compare* Breedlove v. Suttles, 302 U.S. 277 (1937), *with* Harper v. State Bd. of Elections, 383 U.S. 663 (1966).
67. Pope v. Williams, 193 U.S. 621 (1904).
68. *Id.* at 632.
69. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting opinion of Harlan, J.).
70. 377 U.S. 533 (1964). *See* 16 AM. U.L. REV. 128 (1966).
71. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).
72. 67 MICH. L. REV. 1260 (1969).

a substantial interest in the outcome of an election from others with little or no such interest.[73] In *Cornman,* the treatment accorded plaintiffs could only be defended on the ground that they had no substantial interest in the outcome of the elections. Under the rationale of the older line of cases,[74] this might have been a valid reason for denying residents of federal enclaves the right to vote in state elections. Since plaintiffs in most respects were subject to the same burdens as any other "citizen" of Maryland, it is no longer accurate to say that they were not substantially interested in the outcome of state elections.[75]

The *Cornman* decision is of significantly greater impact than the decisions in *Adams, Rothfels,* and *Arapajolu.* The earlier cases involved state courts applying state law to determine if the particular individuals fell within the ambit of state residence requirements. That these cases were of little significance in contrast with the earlier authorities is evidenced by their rejection by the Maryland Court of Appeals six years ago in *Royer. Cornman,* however, leaves no doubt that the question is not one to be "left to adjustment between the Federal and State legislative bodies."[76] The court was clear that when a state subjects an individual to substantial burdens of state citizenship, it cannot deny that individual the right to vote without violating the fourteenth amendment. In so ruling, not only did the court bring about a reversal of *Royer,* but it has, in effect, given the right to vote in local elections to all qualified residents of federal enclaves over which a state exercises any significant jurisdiction. This result, although seemingly a reversal of the traditional view, is more properly characterized as a proper application of the substantive basis of the old rule. The rationale for denying the resident of a federal enclave the right to vote was articulated in *Commonwealth v. Clary:*[77] ". . . no hardship is thereby imposed on those [enclave] inhabitants; because they are not interested in any elections made within the state, or held to pay any taxes imposed by its authority, nor bound by any of its laws."[78] Since residents of enclaves are now in fact subject to numerous incidents of state sovereignty, the factual basis for the traditional rule no longer prevails, and it is proper that the rule no longer be applied.

CONCLUSION

Since *Arapajolu v. McMenamin,*[79] there has been strong criticism of the view that the federal government has receded parts of its ex-

73. *E.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

74. *See* note 77 *infra* and accompanying text.

75. It should also be noted that decisions which have rejected the theory of the extraterritorality of the federal enclave support the view that residents of federal enclaves are "within" the state which encompasses the enclave. *E.g.,* Howard v. Commissioners, 334 U.S. 624 (1954).

76. Royer v. Board of Election Supervisors, 231 Md. 561, 565, 191 A.2d 446, 449, *cert. denied,* 375 U.S. 921 (1963).

77. 8 Mass. 72 (1811).

78. *Id.* at 77.

79. 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952).

clusive jurisdiction over federal enclaves to the states.[80] Logically it would seem that once the United States has acquired exclusive authority over an area, it can be returned to the state only through positive congressional recession.[81] An examination of the statutes which appear to recede jurisdiction over enclaves to the states reveals an intent by Congress to avoid any change in the sovereign control possessed by the federal government.[82] These statutes, it is argued, merely *permit* the state to exercise a right — they do not confer any sovereignty upon the state.[83] Congress may repeal such retrocessive laws at any time, thus removing exclusive federal areas from the jurisdiction of state laws.[84] Had there been an actual retrocession of jurisdiction, this would not be the case. Jurisdiction having once been returned to the state, it would require the consent of the state to cede such jurisdiction back to the federal government.[85]

Such criticism is fairly persuasive and has probably accounted for the heretofore minimal acceptance of *Arapajolu*. The fact remains, however, that whether states are *permitted* or *empowered* to impose obligations on enclave residents, the residents are nonetheless very much under state jurisdiction. They are forced to abide by state laws, pay state taxes, and generally act as state citizens. They are even considered state residents for certain purposes.[86] Even if the state has enacted no applicable legislation, the mere fact that it is empowered to do so should be sufficient reason for extending the franchise. Regardless of the type of sovereignty exercised over them or their places of residence, it would seem that enclave inhabitants should be able to vote for the legislators who make the laws by which they must abide.

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80. *See* Gerwig, *The Elective Franchise for Residents of Federal Areas*, 24 GEO. WASH. L. REV. 404, 418–20 (1956); Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 306–09 (1966).

81. 109 U. PA. L. REV. 1014, 1016 (1964), *citing*, INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. I, at 72–73 (1956). *But see* S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) (which held that if the area ceased to be used for a federal purpose, the exclusive jurisdiction automatically terminates); La Duke v. Melin, 45 N.D. 349, 177 N.W. 673 (1920) (which implied that it was possible for the United States to lose jurisdiction by abandonment, as where military reservations are opened to homesteaders, and no retrocession of jurisdiction is necessary).

82. Gerwig, *The Elective Franchise for Residents of Federal Areas*, 24 GEO. WASH. L. REV. 404, 418–19 (1956). *See, e.g.*, 4 U.S.C. § 108 (1964), which states:

> The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of the law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

83. *See* Gerwig, *The Elective Franchise for Residents of Federal Areas*, 24 GEO. WASH. L. REV. 404, 418–20 (1956); Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 306–09 (1966).

84. Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 302 (1966).

85. *See* notes 13–17 *supra* and accompanying text.

86. MD. ANN. CODE art. 16, § 23 (1966) states that enclave residents are considered residents of the state for divorce and adoption proceedings in state courts. They are also considered state residents in apportioning Maryland's seats in the United States House of Representatives. Cornman v. Dawson, 295 F. Supp. 654, 657 n.7, *appeal granted sub nom.* Evans v. Cornman, 38 U.S.L.W. 3114 (U.S. Oct. 14, 1969) (No. 236). *See* 109 U.PA. L. REV. 1014, 1017 (1961).

It may be that the right of access to state courts or the right to have the state provide equal educational opportunities requires a different balancing of the elements of jurisdiction being exercised by the state and federal governments. But the elective franchise is the most important privilege of a democratic society,[87] and it must be considered apart from the ordinary rights of citizenship. As the Supreme Court stated in *Williams v. Rhodes*,[88] "other rights, even the most basic, are illusory if the right to vote is undermined."[89]

87. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968); Carrington v. Rash, 380 U.S. 89, 96 (1965).
88. 393 U.S. 23 (1968).
89. *Id.* at 31.