

**STATEMENT FOR THE RECORD
LAWRENCE H. MIREL
Wiley Rein & Fielding LLP**

For the Committee for the Capital City

***LEGISLATIVE HEARING ON H.R. 5388,
THE "DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF
2006***

SEPTEMBER 20, 2006

**SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES**

Introduction

Chairman Chabot, Ranking Member Nadler, members of the Subcommittee, I am pleased to present the following testimony on the need to restore voting to the District of Columbia and the proper and constitutionally sound way to do so. My name is Lawrence H. Mirel. I am an attorney with the Washington law firm of Wiley Rein & Fielding, and a long time citizen of the District of Columbia. Until about a year ago I served for more than six years as the Commissioner of Insurance, Securities and Banking for the District of Columbia. I am pleased to present the following testimony on behalf of the Committee for the Capital City, a non-profit citizens group dedicated to providing full voting representation in the Congress of the United States to the people of the District of Columbia.. I want to thank the Subcommittee for addressing one of the most pressing issues for residents of the District of Columbia, the need to be treated as full citizens of the United States, which necessarily includes full voting representation in Congress. This testimony explores at length the need to restore voting rights to the District, a position that has garnered almost universal agreement. It then recommends that the Subcommittee endorse H.R. 190, the “District of Columbia Voting Rights Restoration Act of 2005,” introduced by Representative Dana Rohrabacher, which we believe provides a Constitutional way of providing full voting representation to the people of the District of Columbia by treating them—for purposes of federal elections only—as citizens of Maryland

There is widespread agreement that the people of the District of Columbia should have voting representation in the Congress of the United States. After all, they are citizens of the United States, subject to the laws enacted by Congress, including federal tax laws, just like other citizens. The reason why the people of the District of Columbia are not represented in their

national legislature, uniquely among the people of capital cities throughout the democratic world, is primarily due to disagreement about how best to include them in the franchise.

The Constitution of the United States provides that the people of the several states elect representatives to the Congress. Unless the people of the District of Columbia can be considered citizens of a state—or unless the Constitution is amended to allow them to vote even though they are not citizens of a state—they will remain disenfranchised.

But the territory of the current District of Columbia was once part of the state of Maryland, and the people who lived there were citizens of Maryland. Although the Constitution gives Congress full legislative authority over the District of Columbia, it does not by its terms deprive the people living in the District of their citizenship in Maryland. H.R. 190, by declaring that the people of the District of Columbia are entitled to vote in federal elections as citizens of Maryland, restores voting rights to people who formerly had those rights as Maryland citizens, without doing violence to the Constitutional structure of a Congress comprised of representatives of states, and therefore without the need for a Constitutional amendment.

H.R. 190 is superior to other bills pending before Congress to provide voting representation to the people of the District of Columbia because it would confer *full* citizenship to District citizens, with voting representation in the House of Representatives and also in the Senate. Yet it would not increase the number of Senators, nor would it grant separate statehood to the District of Columbia. Voting representation in the House only, as would be provided by H.R. 5388, would still leave the residents of the District second class citizens, lacking representation in the upper chamber of the Congress.

For the reasons shown in the analysis below, H.R. 190 is the most rational and feasible way to provide the people of the District of Columbia of their full federal voting rights as U.S.

citizens without amending the U.S. Constitution. This bill offers the Subcommittee an opportunity to give District residents the right they deserve, while avoiding the constitutional issues presented by alternative proposals.

Analysis

When the Founders provided for an autonomous district to be the seat of the national government, their choice was colored by the reality of the times. Congress had before it two options: (1) place the seat of government in an established city; or (2) create a seat of government separate and distinct from the states as they now were. Those who argued for a unique and independent seat of government cited the value of a national capital detached from the existing political structure of the young nation.¹ The other option, a national capital in an established city, it was feared could lead to the downfall of the nation. “How could the general government be guarded from the undue influence of particular states . . . without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such state?”²

Out of this fear for the security and independence of the nation’s new national government the District of Columbia was created. The Constitution provides that the seat of government was to be no more than 10 miles square, with Congress granted “exclusive legislation in all cases whatsoever” within that territory.³ The District came into being in 1790,⁴

¹ See *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff’d*, 531 U.S. 940 (2000).

² Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 171 (1975) (quoting James Madison *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907)).

³ U.S. CONST. art. I, § 8, cl. 17.

⁴ See Act of July 16, 1790, 1 Stat. 130.

and the federal government assumed its exclusive legislation over the District 10 years later.⁵ Since 1800, the people of the District of Columbia have not had voting representation in Congress, the body that passes all its laws and its budget. It is a supreme irony that the people of the capital city of the world's greatest democracy do not vote for the people who govern them.

H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006," would allow residents of the District to be represented in the House of Representatives.⁶ The bill would make the District the equivalent of a House Congressional district, with the right to elect one Representative, but would not provide District residents with representation in the Senate.⁷ While H.R. 5388 is the subject of today's hearing, it is not the only alternative available.

Another bill pending before Congress seeks to provide full representation for the District's citizens, in both houses of Congress, without conferring full statehood on the District (with the constitutional issues that such a move would raise). H.R. 190, the "District of Columbia Voting Rights Restoration Act of 2005," recognizes that the District of Columbia is an enclave of the federal government.⁸ Therefore, Congress has the power, through its grant of exclusive legislation, to restore the national voting rights of District residents by allowing them to vote in federal elections as citizens of Maryland.⁹

Under H.R. 190, the District would be treated as a Maryland Congressional district, with its own Representative in Congress.¹⁰ District residents would be entitled to vote for the two

⁵ *See id.* § 6.

⁶ *See* District of Columbia Fair and Equal House Voting Rights Act of 2006, H.R. 5388, 109th Cong. (2005).

⁷ *See id.*

⁸ *See* District of Columbia Voting Rights Restoration Act of 2005, H.R. 190, 109th Cong. (2005).

⁹ *See id.* § 3.

¹⁰ *See id.* § 6.

Senators from Maryland and would be allowed to run for either the House or Senate in Maryland.¹¹ The District would be entitled to a new Representative upon enactment, so the bill provides that two Representatives would be added to the current Congress. One would be from the District, and the other would be from whichever state, according to the 2000 census, would be next eligible for an additional Representative.¹² After the 2010 census, the current number of members of the House of Representatives would be restored, with Congressional districts reapportioned accordingly.¹³

H.R. 190 is the most appropriate and constitutionally sound approach to restoring the federal franchise to those persons living in the District. The bill recognizes the right of persons living in the District to vote for Congressional representation as Maryland citizens, which they arguably have been throughout the District's existence. This right to participate in federal elections is already available to persons living in other federal enclaves over which Congress has "exclusive legislation." Finally, the bill avoids many thorny constitutional issues that plague other pending proposals.

I. Congressional Power Over the District of Columbia Includes the Power to Grant Citizens of the District Federal Voting Rights

There is general recognition that the power of "exclusive legislation" granted to Congress by the District Clause is a broad grant of power.¹⁴ Courts have held that power to contain within it "full and unlimited jurisdiction to provide for the general welfare of the citizens within the

¹¹ *See id.* § 3.

¹² *See id.* § 6. Note that H.R. 190 does not provide for an at-large representative, but rather utilizes the district map that would have been used had the state in question received an additional representative after the 2000 census.

¹³ *See id.*

¹⁴ *See, e.g., Simms v. Rives*, 84 F.2d 871, 877 (D.C. App. 1936).

District of Columbia by any and every act of legislation which it may deem conducive to that end.”¹⁵ Congress has the power, as a result, to restore to District residents rights that they ought to have as U.S. citizens. Congress has already recognized that the residents of the District hold residual rights stemming from their status as Maryland citizens before the territory that makes up the District was ceded to the national government. H.R. 190 reaffirms that one of those basic rights was to vote in Maryland elections for Congressional representatives, a statutory recognition well within the power of the federal government.

A. Congressional Power Over the District

The power Congress holds over the District is nearly absolute.¹⁶ Congress has been granted “complete legislative control [over the District] as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which congress exercises within the boundaries of the states, on the other.”¹⁷ The grant of power contained in

¹⁵ *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. App. 1940); *see also Nat’l Mut. Ins. Co. of the Dist. of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

¹⁶ Nearly is the operative term. *See infra* Part I.B. for a discussion of the residual rights of residents of the District, voting being one. It is important to remember that the District was not created by the Constitution as an independent entity. It is made up of territory that was once part of two sovereign states of the nation. The current District contains land that was once part of the State of Maryland and was subject to the dominion and control of that State.

The principles of sovereignty hold that an entity with jurisdiction over certain territory has the power to rule that territory as it wishes, subject to any applicable constraints. The entity has the power to exercise dominion over its territory, passing rules and regulations necessary for expedient control. Thus, prior to the District’s creation, the land, then part of Maryland, was subject to the laws of Maryland, including laws governing voting rights and procedures.

Transfer of control, or in the case of the District a grant to Congress of “exclusive legislation,” grants the new sovereign the power to change any laws then applicable to the relevant territory. A transfer of legislative authority over a parcel of land does not negate the laws of the previous sovereign. Rather, those laws continue to apply until changed, an expedient adopted to preserve the legal rights and entitlements of the persons living in the territory that has changed hands. *See, for instance*, 11 D.C. Code Ann. 75 (2001) for a list of the laws of England and Maryland that are still applicable to the District based on the control that England and Maryland exercised over the land that today makes up the District.

¹⁷ *Neild*, 110 F.2d at 250.

the District Clause has been interpreted to give Congress “extraordinary and plenary power”¹⁸ to pass laws covering “every proper purpose of government.”¹⁹

Under the District Clause, then, Congress can exercise any and all affirmative powers that are necessary for the operation of the District. That power, for instance, included the power to grant the District a home rule charter for self governance.²⁰ But does that same power include the right to declare that persons living in the District are Maryland citizens for federal voting purposes? Congress surely had the constitutional power to declare that the part of the original District, which came from the state of Virginia, could be returned to that state, which restored the right of persons living in that territory to vote in Virginia elections.²¹ And at least one federal court has indicated that Congress may elect to return some rights it holds over the District to the states that ceded the land covering the District.²²

It is true that the Supreme Court in 1964 summarily affirmed a federal district court opinion that held, among other things, that residents of the District are not citizens of Maryland and have no inherent right to vote in Maryland.²³ But that opinion does not mean that Congress lacks the legislative authority to restore the right to vote to the people of the District. Congress was permitted to constitutionally revoke its power over the part of the District that lay in

¹⁸ *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

¹⁹ *Nield*, 110 F.2d at 249.

²⁰ See The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. Code Ann. 173 (2001).

²¹ See Act of Retrocession of the County of Alexandria, 9 Stat. 35 (1846), *reprinted in* 1 D.C. Code Ann. 72 (2001).

²² *Adams v. Clinton*, 90 F. Supp. 2d 35, 44 n.46 (D.D.C.), *aff'd*, 531 U.S. 940 (2000) (“It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, *or had it subsequently ceded partial authority back to the state.*” (emphasis added)). *Adams* determined that district court lacked the authority to restore voting rights to people living in the District. See *id.* at 50 n.25. This determination has no effect on the authority of Congress to act in this sphere.

²³ See *Albaugh v. Tawes*, 233 F. Supp. 576, 578 (D. Md.), *aff'd*, 379 U.S. 27 (1964).

Virginia, and it could constitutionally choose to use its exclusive legislation to restore the right of District residents to vote in federal elections by recognizing that District residents are citizens of Maryland for voting purposes. Moreover, that Supreme Court ruling provides dubious authority for denying the people of the District their right to vote in national elections as citizens of Maryland.²⁴ History suggests that the persons on the Maryland land that was ceded to the “exclusive legislation” of Congress to become the District of Columbia could have been able to vote as citizens of Maryland all along.

B. The Remnants of a Right All But Discarded

Although the grant of power to the Congress in the District Clause is broad, it is important to note that it is not total. Merely because Congress was granted the power of “exclusive legislation” over the District, that power does not automatically take away rights that residents of the District formerly had under Maryland law.²⁵ It is true that Congress enacted a law that accepted cession of the right to legislate for the territory ceded by Maryland and

²⁴ See *infra* Part I.B for a discussion of the history of the federal franchise for persons living in the District. The facts of *Albaugh* also raise questions as to the validity of the holding in the case. William Albaugh was a resident of Maryland who brought a challenge to the Republican primary election for U.S. Senator in Maryland that he lost to a challenger. See *Albaugh*, 233 F. Supp. at 576. He brought a *pro se* complaint in federal court alleging that the results of the election should be nullified because residents of the District had not voted in the election. See *id.* at 576-77. He was not a resident of the District and in all likelihood lacked standing to challenge the election. See *id.* Thus, the facts of the case argue against an expansive interpretation of the holding that District residents were stripped of all vestiges of their rights as Maryland residents. District residents were not even parties in the case.

²⁵ There is nothing contained in the Constitutional grant of power to Congress over the District that would lead one to conclude that the Framers intended the District to be a fiefdom of Congress negating its former identity as part of Maryland and Virginia. Instead, one must believe that the choice to create a seat for the national government out of voluntary cessions from a state or states was an attempt to create an independent seat of government that preserved some vestiges of its former state identity.

Viewed in this light, the provision in the Constitution granting Congress control over the District is oriented toward administrative or functional control over the seat of government. To avoid the security issues at the forefront of the minds of the Framers, it was important that the administrative control of the District be separate from any single individual state. But the grant of power in the Constitution does not, by its own language, mean that the territory used for the District was to be stripped of its historical and jurisdictional ties to Maryland or Virginia.

Virginia that became the District.²⁶ But Congress explicitly recognized, in its assumption of legislative authority over the District, that “the laws of the state within [the District] shall not be affected by acceptance . . . until the Congress shall otherwise by law provide.”²⁷ Presumably, those laws “not affected by acceptance” include laws related to voting, as the residents of the District, in their capacity as Maryland citizens and domiciliaries, were entitled to vote in Maryland elections and did so before the District was formed.²⁸

The documents that consummated the cession of territory from Virginia and Maryland to the federal government for the establishment of a national capital make it clear that the cession was not meant to strip persons living in those areas of their rights. The framers believed that it was well within the power of Virginia and Maryland to guarantee the rights of those people who would be living in the District.²⁹ Each state expressly preserved the power and operation of its laws until such time as the Congress provided otherwise.³⁰ In fact, the Maryland act ratifying the cession of territory expressly reserved the individual rights of the Maryland residents who would

²⁶ See An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, § 1, 1 Stat. 139, ch. 28 (1790).

²⁷ *Id.* This proposition was reaffirmed by the Act of Congress establishing the government of the District. “[T]he laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States” Act of February 27, 1801, §1, 2 Stat. 103, *reprinted in* 1 D.C. Code Ann. 46 (2001).

²⁸ “It is important to bear constantly in mind that the District was made up of portions of two original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all rights, guarantees, and immunities of the Constitution.” *O’Donoghue v. United States*, 289 U.S. 516, 540 (1933).

²⁹ See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907) (“[T]here must be a cession, by particular states, of the district to Congress, and . . . the states may settle the terms of the cession. The states may make what stipulation they please in it.”); see also The Federalist No. 43 (James Madison) (“[T]he state will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it”).

³⁰ See An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts. Ch. 45, *reprinted in* 1 D.C. Code Ann. 35 (2001); An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 33 (2001).

live in the new territory. “[N]othing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.”³¹ There is little doubt that the right to vote is a right close to the hearts of all Americans. No affirmative action or statement by the persons living in the District has ever ceded to the federal government the right to remove their ability to vote. Nor has the Congress ever enacted a law stripping them of that right.³²

Thus, for Congress to recognize that the people of the District still have rights they had as Maryland citizens—rights that were never taken from them by law—is not a radical step. The Constitution and the cession statutes alike presume that residents of the District are permitted to have and hold the rights of citizens of the nation. Before the District was formed, Maryland residents had the right to vote for members of Congress representing that state and exercised that right frequently. The acts that assumed federal jurisdiction over the District preserved that right, unless altered or removed by the Congress of the United States. Adoption of H.R. 190 merely restores a right and status that District residents once had.

C. Federal Legislation is the Most Appropriate Means to Resurrect These Voting Rights

H.R. 190 does not operate in a vacuum. It is not creating a right that residents of the District are not already entitled to. As revealed in the history of the creation of the District, residents of the land that was ceded to the federal government were entitled to maintain their

³¹ An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts. Ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 35 (2001).

³² In fact, it can be logically argued that residents of the District lost their status as voters due to nothing more than a quirk of fate that led to an act of omission. Voting registration in Maryland occurs on a county-by-county basis. When the District of Columbia was created, the counties from which it was carved could no longer register voters as county residents for voting purposes. District residents were now Maryland itinerant residents for voting purposes, lacking a tie to a county government empowered to complete the procedural requirements necessary to qualify to vote in Maryland.

Maryland or Virginia citizenship, respectively, for voting purposes until Congress stated otherwise. No action has been taken by Congress to date to remove that right. H.R. 190 merely restores what already exists.

The power of Congress to act to remedy the wrongs done to the residents of the District is also affirmed by the power Congress has exercised over voting rights for persons not mentioned in the Constitution. The Constitution limits the voting franchise for Representatives and Senators to those persons who are citizens of a state.³³ It might be argued that this “citizenship” required by the Constitution means that a state must exercise dominion and control over persons who vote in federal elections in that state. Congress, however, has determined the contours of this citizenship requirement, and Congress has determined that a state need not have control over a voter for that person to be entitled to vote for Congressional representatives.

By statute, Congress granted Indians the status as full citizens of the United States.³⁴ That citizenship carried with it the right to vote in federal elections, although Indian reservations, in their status as sovereign lands, are not subject to state power or control.³⁵ The status of Indian reservations as sovereign land, however, left the newly-minted American citizens without a jurisdiction to vote in. Congress resolved that dilemma by declaring Indians citizens of the state in which the reservation resides.³⁶ Congress has also extended by statute the federal franchise to

³³ See U.S. CONST. art. I, § 2 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. Const. amend. XVII (“The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”).

³⁴ See 8 U.S.C. § 1401.

³⁵ See, e.g., U.S. CONST. art. I, § 8, cl. 3 (granting Congress the exclusive power to regulate commerce with Indian tribes, thereby recognizing their sovereign status).

³⁶ See 8 U.S.C. § 1401(a)(2). Note that Congressional power to pass such a statute would extend from the control given to Congress over Indian reservations in Article I, section 8, clause 3 of the Constitution, the same section addressing federal power over the District and enclaves. See U.S. CONST. art I, § 8. Note also that this right was given in express disregard to the fact that Indians cannot be taxed by state governments and are not subject to

persons in the military or living overseas, even though they may have no American residence.³⁷

The statute grants these individual the right to vote even though they may not be subject to any state power of any kind and may have no desire to ever return to the United States. It does so by declaring them “citizens” of the state where they were domiciled before leaving the country, allowing military and overseas voters to vote for Representatives and Senators from that state.

It is true that Maryland has no power over the persons who now reside in the District. It gave up that power when it ceded to Congress the land for the District, making it subject to the “exclusive legislation” of Congress. But state power over certain territory has nothing to do with the right of the persons in that territory to exercise their federal franchise. The Supreme Court has reiterated that “it is not reasonable to assume that the cession stripped [persons living in that territory] of [their] rights.”³⁸ Passage of H.R. 190 follows in the steps of the acts granting voting rights to Indians and overseas Americans. It reaffirms that the District never lost its status as Maryland territory and implements a process for restoration of the federal franchise for District residents, a right that has lain dormant for too long.³⁹

legislative apportionment according to the 14th Amendment. *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975), *aff’d*, 429 U.S. 876 (1976).

³⁷ See Uniformed and Overseas Citizen Absentee Voting Act, Pub. L. No. 99-4100, 100 Stat. 924 (1986) (codified at 42 U.S.C. §§ 1973ff et seq.).

³⁸ *O’Donoghue v. United States*, 289 U.S. 516, 540 (1933).

³⁹ Mere lapse of time does not lessen the force of this argument. A right duly granted cannot be removed by time alone. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 & n.16 (1984) (allowing an Indian land claim to proceed more than 200 years after the suit ripened, even though the suit might upset the property rights of current New York residents). As eloquently stated by the Supreme Court:

[The District] had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution.

The core to a democracy is the right of the citizens of the nation to make their voices heard and participate in electing those whose decisions affect their lives. The right to vote “is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”⁴⁰ The Supreme Court has long recognized that the right to vote is inherent in the relationship between a citizen and the national government. The federal franchise “do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.”⁴¹ “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”⁴²

H.R. 190 restores the right of persons living in the District to be participating members of our federal democracy. It does this through a means that recognizes that persons living in the District never abandoned their status as residents of Maryland. Maryland residents, at the time of cession, held the power to elect persons to the federal government. They held that power by virtue of their status as members of the American democracy under the auspices of the

O’Donoghue, 289 U.S. at 541 (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

It is important, once again, to reiterate that the creation of the District did not cut off the ties the territory used for the District had with Maryland. As explained in this memorandum, Maryland did not fully cede the territory for the District of Columbia, electing instead to reserve some minor level of jurisdiction over that land. *See, supra*, footnote 32. It is true that this reserved jurisdiction merely ensured that the residents of the District did not lose any rights formerly provided unless and until the Congress provided otherwise. *See id.* But that small reservation indicates that Maryland believed that it was ceding administrative and functional control over the District. The purpose of the cession, therefore, was to ensure that a single state, or coalition of states, could not usurp the federal government’s control of the seat of power. The purpose of the cession was not to strip residents of the land of every vestige of their former Maryland selves. H.R. 190 recognizes the historical anomaly caused by the cession and restores the federal franchise to District residents in a constitutional and logical manner.

⁴⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁴¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

⁴² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Constitution.⁴³ The residents of the District were never stripped of that right by the cession of land to make the District or by an act of Congress to affirmatively deny them the right to vote. H.R. 190 recognizes what should be the state of affairs now by declaring that persons living in the District are Maryland residents for federal voting purposes. And the Supreme Court has already held, in an analogous situation, that an extension of rights in this manner is appropriate under the Constitution.⁴⁴

II. The Congressional Power Over Federal Enclaves Reaffirms the Right of District Citizens to be Treated as Maryland Citizens for Purposes of Federal Voting

Article I, § 8, clause 17 of the Constitution contains not only the grant of federal legislative authority over the District of Columbia, but also a grant of federal power over federal enclaves. Congress is empowered “to exercise *like authority*⁴⁵ 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, dockyards, and other needful buildings.”⁴⁶ Federal enclaves are lands controlled by the statutes and regulations of the Congress. And yet persons living on those

⁴³ See, e.g., *O’Donoghue v. United States*, 289 U.S. 516, 541 (1933) (“This District has been a part of the States of Maryland and Virginia. . . . The Constitution has attached to it irrevocably.” (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)); *id.* at 540 (“It is important to bear constantly in mind that the District was made up of portions of two original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all rights, guarantees, and immunities of the Constitution.”).

⁴⁴ See *Evans v. Cornman*, 398 U.S. 419 (1970), explained in detail *infra* Part II.

⁴⁵ That is, exactly the same authority that it exercises over the District of Columbia. The clause in its entirety reads:

The Congress shall have the Power . . .

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, 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;”

U.S. CONST. art. I, § 8, cl. 17.

⁴⁶ U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

enclaves have been granted the right to vote in state elections through a recognition that persons living in an enclave effectively reside in the state from which the federal enclave was carved.

The seminal case addressing the state voting rights of those living on federal enclaves is *Evans v. Cornman*.⁴⁷ There, the Supreme Court determined that residents of the campus of the National Institutes of Health (NIH), located in Bethesda, Maryland, were entitled to vote in Maryland state elections.⁴⁸ As recognized by the Court, the NIH campus was, and continues to be, a federal enclave subject to the “exclusive legislation” of the Congress of the United States.⁴⁹ But in so exercising its “exclusive legislation,” Congress had permitted the State of Maryland to regulate many facets of life on the NIH campus, including criminal laws, taxes, spending decisions, unemployment laws, and workers compensation laws.⁵⁰ Because the interests of NIH’s residents were so bound up in the actions of Maryland, the Court held that it violated the 14th Amendment to deny those persons living at NIH to vote in Maryland state elections.⁵¹

It is true that the situation of District residents does not precisely mirror that of the persons living on the NIH campus. Maryland does not exercise authority over the people living in the District. But H.R. 190 seeks to restore *federal* voting rights to the persons living in the District, not state voting rights. Thus, under the analysis in *Evans*, the question is whether the interests of those living in the District are affected by a government that regulates their lives. In *Evans*, it was the conclusion of the Court that residents of the NIH campus “have a stake [in

⁴⁷ *Evans v. Cornman*, 398 U.S. 419 (1970).

⁴⁸ *Id.* at 426.

⁴⁹ *See id.* at 419.

⁵⁰ *Id.* at 424.

⁵¹ *Id.* at 425-26.

actions taken by the State of Maryland] equal to that of other Maryland residents.”⁵² That stake, according to the court, entitled the NIH residents to vote for those who had direct control over their lives. Residents of the District are affected by every decision made by the Congress, which holds final authority over the District’s budget and legislation.⁵³ They have a stake in actions taken by federal elected officials, and they should therefore have the right to vote for persons who make decisions that affect their lives, under the reasoning of *Evans*.

H.R. 190 simply seeks to restore to those persons living in the District the same right to vote in federal elections that they held when the District was a part of Maryland. The Court, in *Evans*, determined that even without affirmative Congressional action, it was a denial of federal constitutional rights to deny persons living on the NIH campus the right to vote in state elections, when the state held sway over their lives.⁵⁴ Thus, the principle underlying *Evans* is one that recognizes that people should have the right to elect those who have control over them. District residents deserve no less when it comes to federal elections. Permitting them to vote in Maryland, by recognizing that they never lost certain rights of their Maryland citizenship when the District was formed, is the most appropriate way to ensure that District residents participate in choosing those who shape the policies guiding life in the District.

III. Nothing in Article I, Section II & Section III Regarding Qualifications and Inhabitation Requirements Affect the Constitutionality of H.R. 190

The proposed legislation also fits squarely under the election and eligibility of Representatives and Senators clauses of the Constitution. Congress clearly has the ability, and

⁵² *Id.* at 426.

⁵³ See, e.g., *O’Donoghue v. United States*, 289 U.S. 516, 539 (1933) (“Over this District Congress possesses ‘the combined powers of a general and of a state government in all cases where legislation is possible.’” (quoting *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889))); see also Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U.L. REV. 311 (1990).

⁵⁴ *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970).

has used that power, to adjust the residency and inhabitation requirements set forth in the Constitution.

The first clause of Article I, Section 2 (for election of Representatives) and Section 3 (for election of Senators), requires that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” US. Const., Art I, § 2. Despite the explicit tie to those qualified to vote in state legislative elections, Congress has, on numerous occasions, provided people who are not allowed to vote in state elections the opportunity to vote in federal elections.

The most explicit example of this is the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).⁵⁵ This law requires that each state allow military and overseas voters who do not reside in the state for purposes of state elections vote via absentee ballot for all federal elections.⁵⁶ Therefore, while Maryland requires residency to register to vote in state,⁵⁷ UOCAVA overrides that qualification for federal elections.⁵⁸

Another example is found in *Oregon v. Mitchell*, where the Supreme Court upheld Title II of the Voting Rights Act, which barred durational residence requirements for presidential and

⁵⁵ 42 U.S.C. 1973ff.

⁵⁶ 42 U.S.C. 1973ff-1(a) (2005).

⁵⁷ MD. CODE ANN., ELECT. LAW § 3-102(a)(3).

⁵⁸ The question of the constitutionality of UOCAVA in allowing non-residents to vote in federal elections has never been reached by the Supreme Court. In *Romeu v. Cohen*, the Second Circuit held that UOCAVA was not unconstitutional even though it failed to provide the same absentee voting rights to citizens who had moved to Puerto Rico as it did to military and overseas voters who had moved to other countries. 265 F.3d 118 (2nd Cir. 2001). While Judge Walker, in a footnote to his concurrence, questioned the Constitutionality of UOCAVA as it related to overseas voters as overreaching Spending Clause and Necessary and Proper Clause authority, *id.* at 137 n.7, the author of the majority opinion, Judge Leval, in dicta, cited *Oregon v. Mitchell* for support, just as is done *infra*, for the proposition that UOCAVA clearly falls under Congress’s power to require that states accept the votes of certain non-resident voters. *Id.* at 130 n.9 (citing *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970)). In *De La Rosa v. United States*, a federal district judge reviewed UOCAVA under rational basis review and determined that the statute had a legitimate governmental purpose, “namely “to facilitate absentee voting by United States citizens, both military and civilian, who are overseas.” 842 F. Supp. 607, 611 (D. P.R. 1994) (citing H.R. Rep. No. 99-765, 1986 U.S.C.C.A.N. at 2009).

vice-presidential elections.⁵⁹ The Court also partially upheld Title III, which had lowered the national voting age to eighteen, holding that Congress could set a national voting age for federal elections, but could not for state elections.⁶⁰ While the 26th Amendment rendered the later ruling moot for purposes of the specific issue that had been before the Court, *Oregon v. Mitchell* does provide generally that the constitutional ability of Congress to “make or alter” the “time, place, and manner” regulations set forth by the states⁶¹ can be extended to allow Congress to set different qualifications for federal voters than exist in a particular state for that state’s local elections.⁶² Therefore, since Congress has the power to override residency qualifications for overseas voters in federal elections through UOCAVA and override durational residency requirements and age restrictions in federal elections through the Voting Rights Act, Congress must have the power to extend the privilege of voting in federal elections to people in the District as citizens of Maryland.

Likewise, Congress’s ability to adjust residency requirements plays a large role in the requirements for those elected to serve as a representative or Senator. Each person who serves as a Representative or a Senator must be, among other things, “an Inhabitant of that State in which he shall be chosen” US. Const., Art. I, § 2, & § 3. The clear purpose of this phrase was to

⁵⁹ 400 U.S. 112, 134 (1970).

⁶⁰ *Id.* at 119.

⁶¹ The U.S. Constitution provides that

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Art. I, § 4.

⁶² *Mitchell*, 400 U.S. at 124-25.

ensure that the representative live among the people he represents.⁶³ Nothing in H.R. 190 frustrates that purpose. Further, nothing in the Constitution would frustrate the ability of Congress to determine who is and who is not an inhabitant of a particular state.⁶⁴

In fact, Congress, on numerous occasions, has determined who is and who is not an inhabitant of a particular area for federal elections.⁶⁵ For example, as noted above, UOCAVA specifically grants residency, for the purpose of elections, to overseas citizens.⁶⁶ In addition, the creation of new states out of old ones, like Kentucky in 1792, Maine in 1820, and West Virginia in 1863, necessarily moved the inhabitancy of former Massachusetts and Virginia residents to their new states without the need for any person to physically move.⁶⁷ Inhabitancy ran with Congress's classification. Clearly those "new" inhabitants of Maine and West Virginia could

⁶³ See *Adams v. Clinton*, 90 F. Supp. 2d 35, 90 (D. D.C. 1998), (Oberdorfer, dissenting). The Constitutional Convention spent part of one day debating over the language of this Section, resulting in the change from "resident" to "inhabitant," which, according to James Madison, "would not exclude persons absent occasionally for considerable time on public or private business." George Mason specifically feared that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State. This is the practice in the boroughs of England." James Madison, August 8 Notes From the Constitutional Convention, *reprinted in* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 216 (Yale University Press, 1937).

⁶⁴ As noted in Section II *infra*, the courts have determined that residents of federal enclaves can also be considered residents of a state for state voting purposes. Congress has also extended voting rights to persons overseas and living on Indian reservations, clothing them with "residency" for voting purposes. Congress would be well within its rights to declare, as provided in H.R. 190, that residents of the District could be considered residents of Maryland for federal voting purposes. Therefore, the inhabitants of the District may properly vote in Maryland. The situation here is slightly different – a determination whether such inhabitants may serve as representatives for Maryland, as occurred prior to 1800.

⁶⁵ It also has given itself the power to determine who is and who is not an inhabitant as defined by other clauses of the Constitution. The Twelfth Amendment includes the prohibition against an elector voting for a President and a Vice President who are both "inhabitants" of the same state as the elector. U.S. Const. Amend. XII. Congress, via 3 U.S.C. § 15, has the power to determine the validity of objections to the electoral college, including the inhabitants prohibition. See Christopher Maravilla, *That Dog Don't Hunt: The Twelfth Amendment After Jones v. Bush*, 23 PACE L.REV 213, 257-58 (2002).

⁶⁶ 42 U.S.C. 1973ff-1(a) (2005).

⁶⁷ While arguments that the creation of these states could have been unconstitutional have been made, they are not taken seriously today and the "inhabitancy" of these citizens has never been questioned. See Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 CAL. L.REV. 291 (2002). "[R]ealistically, West Virginia is not, regardless of anyone's constitutional argument, going to be absorbed back into old Virginia." *Id.* at 395.

serve in Congress, for by writ of Congress, their inhabitancy had transferred to their new state home.

In general, the power to alter congressional district lines, removing from the states the ability to create “rotten boroughs,” a fear of the Founders,⁶⁸ or to provide for the election of Congressmen at large,⁶⁹ always has existed in the Constitution. The Federal government has used such a power through Section Five of the Voting Rights Act, granting administrative and judicial review over any voting changes within certain states, counties, even townships.

Therefore, “moving” the inhabitancy of DC residents to Maryland, for the purposes of federal elections, surely is possible, just as the “movement” of inhabitancy is possible for oversees voters, or voters in newly created states, or even through new congressional districts arising from the decennial census and redistribution of Congressional seats that are under Federal review.

IV. The 23rd Amendment Does Not Stand As An Impediment to H.R. 190; To Hold Otherwise Would Undermine the Spirit of Representation for District Citizens Embodied Within The Amendment

The final hurdle that H.R. 190 must overcome is that of the 23rd Amendment. Section 4 of the proposed law directs first that the “people of the District of Columbia” are hereby eligible to participate in the election of electors from the state of Maryland, and, therefore, that Congress appoint no presidential electors for the District of Columbia. On its face, this presents a problem that is inherent in the structure of the Constitution itself – namely, can a Constitutional amendment be “repealed” as a matter of fact, rather than by law?

This situation is different from that of the 19th Amendment, which outlawed the sale of alcohol and was repealed by the 21st Amendment. While the text of the 19th Amendment still is

⁶⁸ *Mitchell*, 400 U.S. at 122 (citing *Wesberry v. Sanders*, 376 U.S. 1, 14-16 (1964)).

⁶⁹ *Id.* (citing Act of Aug. 8, 1911, 37 Stat. 13).

printed as part of the Constitution, it no longer has any force. This impotence results from Congress and the states taking away a power in exactly the same manner that it had previously provided it. To let Congress, by a simple majority, and the President, by mere signature, take away a power granted by the Constitution, on the other hand, would, on its face, seem to undermine the whole American Constitutional experiment.

What H.R. 190 proposes, however, does not strike at the heart of the federal structure. Rather, it merely exercises the powers that the Amendment grants to Congress in a way that eliminates the absurd result of three “extra” electors following the residents of the District where ever they go, potentially giving them two bites at the presidential apple, while providing those residents more representation than they receive under the current regime. The objective of Section 4 of H.R. 190, therefore, is not to grant the 23rd Amendment power through Maryland, but simply to decline to use the congressional power to appoint electors for the District, so that those residents can receive the full breadth of representation they can receive under the rubric of H.R. 190’s statutory scheme.

The 23rd Amendment provides that

Section 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; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Note, first, that the Amendment does not require that these electors be elected.⁷⁰ Merely because Congress chose election as the means by which appointment would occur does not mandate that election is the course that was required. The language of the 23rd Amendment, therefore, parallels that of Article II, Section 1: "Each state shall appoint, in such manner as the Legislature thereof may direct. . . ." This, in effect, places Congress in the role of state legislature for the District's electors. Within the Congressional records of the debates regarding passage of the 23rd Amendment, legislators believed that Congress's power under this Amendment would mirror that of a state legislature over the direction of appointment of presidential electors.⁷¹

In this context, it is constitutionally permissible for a state to refrain from appointing presidential electors.⁷² In the presidential election of 1789, for example, New York did not produce any such electors.⁷³ While such an action is by no means a regular occurrence, neither

⁷⁰ A Congressional committee rejected an earlier draft of the amendment, which provided election of those electors by the people of the District of Columbia, in the manner provided later by Congress. See Philip Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 349 n.186 (1990). In fact, throughout the first years of the Union, it was the practice that state legislatures appointed electors, rather than direct election of presidential electors.

⁷¹ See, e.g., 106 Cong. Rec. 12,560 (1960) ("CONGRESSMAN MEADER: . . . I am assuming, however, that this resolution will give Congress the same authority with respect to the appointment of electors that the State legislatures have under article II, section I."); H.R. Rep. No. 1698, 86th Cong. 2d Sess. (1960), reprinted in 1960 U.S.C.C.A.N. 1462 ("It should be noted that this language follows closely, insofar as it is applicable, the language of article II of the Constitution.").

⁷² Professor Adam Kirkland states that "[U]nder no circumstances, however, can a state or Congress deny electoral votes all together." *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation.*, 60 GEO. WASH. L. REV. 475, 495 (1991). He, however, cites to neither case nor Constitutional treatise to support such a blanket statement; rather he cites to an Attorney General's statement, provided by Robert Kennedy soon after ratification of the 23rd Amendment. One must not overlook the self-serving nature of Kennedy's comments. Not only was this amendment passed during his watch, his own brother was elected President by a very slim margin in 1960. The legal opinion of his Attorney General and brother regarding three electoral votes and the ability of Congress to refrain from appointing electors that most assuredly would have voted for President Kennedy in 1964 must be viewed quite critically and certainly cannot be the only brick on which to build a case that the denial of electoral votes is forbidden.

⁷³ Professor Kirkland dismisses this election for a number of reasons. See *id* at 495-96. None of those reasons, however, determine whether or not New York's action (or inaction) were unconstitutional. He does go on to argue

is it necessarily constitutionally impermissible. Article II, Section 1 is clear in allowing appointment of electors in the manner that the state’s legislature sees fit. One can easily argue, and the Constitution does not prohibit such an argument, that the power to appoint also includes the power to refrain from appointing. Since the language of the 23rd Amendment tracks that of Article II, Section 1, Congress, then, would, in theory, have the power to refrain from appointing electors by either failing to enact or repealing a previous enactment of the power granted to Congress by the 23rd Amendment.⁷⁴

To try to determine whether the 23rd Amendment is self-executing⁷⁵ or can be “repealed” legislatively, then, misses the point, since Congress, under this amendment, merely is acting via the same powers that a state legislature already possesses. Further, the language providing that Congress *may* direct is not an absolute requirement. Other Amendments also provide Congress with the power to do something without requiring it be done.⁷⁶ Finally, this amendment is

that “modern notions of equal protection and the privileges and immunities of U.S. citizenship; the guarantee of a republican form of government; and the structure of federalism implicit in the constitutional order” mandate that such an action would be unconstitutional today. *Id.* at 496. Whether or not Professor Kirkland is correct, though, is ultimately irrelevant, since, as noted *supra*, H.R. 190 merely shifts the District’s presidential electorate into Maryland. Therefore, none of his “modern notions” would be altered.

⁷⁴ As Professor Peter Raven-Hansen noted, this power is stated expressly within the language of the Amendment and the legislative history, for Congress changed the original language of the Amendment from “in such manner and under such regulations as the Congress *shall* provide” to “as the Congress *may* direct,” tracking the language, as noted above, from Article II, section 1. *See The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187-88 (1991).

⁷⁵ Note that Congress did take six months to enact the enabling legislation once the Amendment was passed. *See id.* at 188. The Supreme Court has held that the Fifteenth Amendment is “self-executing” despite having language identical to Section II of the 23rd Amendment. *See Guinn v. U.S.*, 238 U.S. 347, 363 (1915). In no way, however, does that case automatically confer self-execution to all similar language. Rather, *Guinn* focused on the prohibitive nature of the Fifteenth Amendment – no additional legislation was necessary to void state law that was contrary to the language of the Amendment. The 23rd Amendment, on the other hand, grants solely a positive power; it prohibits nothing. Such a power cannot, by nature of the grant, be self-executing because of its positive nature. Unlike a prohibition, a grant of power requires language stating exactly the limits of the power and the means by which the power will be imposed.

⁷⁶ The Twentieth Amendment provides some examples of this – Congress “may provide by law for the case wherein neither a President elect nor a Vice President elect shall have qualified,” and “may provide for the case of the death of any of the person from whom the House of Representatives may choose a President” In contrast, it also

unique in that Congress specifically chose to mirror the language used within Article I that provided the powers in question to the states. Given the analogous relationship between the District and Congress, this situation surely is different from that which exists behind other constitutional amendments.

Most importantly, though, the people of the District, unlike the citizens of 1789 New York, will be represented in the electoral college, and the aims of the 23rd Amendment will be reached; in fact, they will be exceeded. H.R.190 expressly provides that District residents will have a say in the election of Maryland's electoral votes by voting as those equivalent to Maryland residents, just as those persons covered by UOCAVA. Therefore, no Fourteenth Amendment concerns exist since no rights that the people possess would be abrogated.⁷⁷ In fact, HR 190 increases those rights from only allowing District citizens to vote in Presidential elections, as the 23rd Amendment provides, to granting them full federal voting powers as part of Maryland.⁷⁸

The overriding concern of those who advocated for, and ultimately passed, the 23rd amendment was to provide the people of the District of Columbia some semblance of representation in the election of those with power over the District. Nothing in H.R. 190 is contrary to that concern. Truly it would be ironic in the darkest sense of the term for the desire

provides that Congress "shall assemble at least once in every year ..." Drafters of amendment language clearly have the ability to impose requirements or provide flexibility, which ever is desired.

⁷⁷ See Hansen, *supra* note 75 at 188.

⁷⁸ Note that every single person within the District would have the right to vote for Maryland electors. No separate voting enclave is created. This is completely different from attempts made in the 1990's to provide statehood for the District by reducing the size of the federal enclave such that, for all intents and purposes, all or virtually all (other than the President's family and any homeless persons) residents of the District would be citizens of the "new" state without repealing the 23rd Amendment by a subsequent constitutional amendment. Therefore, arguments against H.R. 190 that flow from disagreements related to statehood plans have no bearing on this analysis. The spirit of the 23rd Amendment would still exist – rather the manner by which electoral college representation for the District is legislatively determined such that representation exists as part of Maryland. As noted above, H.R. 190 does not abrogate any person's substantive right to representation in the electoral college.

of the 89th Congress to provide a small amount of representation to the people of the District ultimately to thwart the ability of the 109th Congress to provide a much larger voice in federal elections to those same disenfranchised people.