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OUTLINE

THE JURISDICTIONAL SCHEME ON THE PUBLIC LANDS

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I. Constitutionally, there are two different categories of federal property, governed by two different constitutional clauses:

A. Federal enclaves, and

B. Other federal property.

II. Federal enclaves are governed by U.S. Const., Art. I, § 8, cl. 17, here called the "enclave clause."

A. The "enclave clause" provides that Congress shall have power:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . 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 . . . ."

B. Probably contrary to the original intent, this clause was long construed to exclude all state jurisdiction over "enclaves;" it was as if the enclave were outside the boundaries of the host state, or "extraterritorial."

1. Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805).

2. United States v. Cornell, 25 F. Cas. 650, 653 (No. 14, 868) (C.C.D.R.I. 1820).

C. This principle of "extraterritoriality" and exclusive federal governmental jurisdiction even precluded Congress from voluntarily giving states jurisdiction over enclaves.

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

2. United States v. Unzeuta, 281 U.S. 138 (1930).

3. Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

D. Decisions during the Supreme Court's 1937 term confused Article I enclave principles with Article IV property clause principles and countenanced divided jurisdiction over enclaves; this change of doctrine was then implemented by statute.

1. James v. Dravo Contracting Co., 302 U.S. 134 (1937).

2. Silas Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937).

3. Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

4. Act of Oct. 9, 1940, cl. 793, § 355, ¶8, 54 Stat. 1083, 40 U.S.C. § 255.

E. Later, the traditional principle of "extraterritoriality" of enclaves was explicitly overruled.

1. Howard v. Comm'rs of Louisville, 344 U.S. 624 (1953).

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

F. More recently, the "extraterritoriality" principle has again become the rule of decision at least once.

1. United States v. State Tax Comm'n of Mississippi, 412 U.S. 363 (1973).

2. As a result, enclave doctrine is utterly confused.

3. Where there is an agreement as to divided jurisdiction over an enclave, it will probably control, subject to preemption.

III. All other federal property is governed by U.S. Const., Art. IV, § 3, cl. 2, here called the "property clause."

A. The property clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

B. Traditional case law distinguished between "territories" outside state boundaries, and "other

property" owned by the United States within the boundaries of a state.

C. As to territories, there being no other sovereign, the United States enjoyed both proprietorship and general governmental jurisdiction.

1. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

2. This rule was derived independently of the property clause, but came to be associated with that clause.

D. As to other federal property, the United States enjoyed proprietorship rights, but general governmental jurisdiction resided in the States, not in the United States.

IV. The traditional rule as to "other property" was complicated but clear.

A. Under a rule predating the Constitution and based onlanguage in the Northwest Ordinance of 1787, Congress had the exclusive right of first disposal of federal property; consequently State conveyancing laws and adverse possession laws could have no effect. E.g.,

1. Broder v. Water Co., 101 U.S. 274 (1879).

2. Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1872).

3. United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

B. Federal property could be put to use under the necessary and proper clause to effectuate some federal power independent of the property clause, in which case federal laws ordaining that federal use could preempt conflicting state laws, and state laws could not interfere with that federal use.

1. This rule was independent of the property clause itself, and rested on two distinct constitutional doctrines of general applicability:

a. The necessary and proper power; and

b. The doctrine of intergovernmental immunities.

2. Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525 (1885).

C. In ways "necessary and proper" to protect federal property, Congress could act to protect federal property as a private proprietor could not.

1. Camfield v. United States, 167 U.S. 518 (1897).

2. United States v. Alford, 274 U.S. 264 (1927).

3. Hunt v. United States, 278 U.S. 96 (1928).

D. In all other respects, the property clause was held to confer upon Congress only proprietorship powers, and no powers of general governmental jurisdiction.

1. As proprietor, the United States enjoyed a private landowner's remedies.

a. Cotton v. United States, 52 U.S. (11 How.) 229 (1851).

b. United States V. Gear, 44 U.S. (3 How.) 120 (1845).

2. Because administraton of federal property was a function of proprietorship, not of sovereignty, administrative functions could be delegated without the restraints applicable to delegation of legislative powers.

a. United States v. Grimaud, 220 U.S. 523 (1911).

b. Cf. Schechter v. Schechter Poultry Corp., 295 U.S. 495 (1935).

3. Federal policies and laws based only on the property clause were subordinate to, and could not preempt, State laws. E.g.,

a. Ward v. Race Horse, 163 U.S. 504 (1896).

b. Bacon v. Walker, 204 U.S. 311 (1907).

c. Omaechevarria v. Idaho, 246 U.S. 343 (1918).

d. Colorado v. Toll, 268 U.S. 228 (1925).

V. Aggressive federal policies and inept legal reasoning set the stage for radical and unreasoned doctrinal change.

A. The issues were seldom litigated during the formative era of federal property policy.

B. The "proprietorship" concept was confused with the unrelated concept of "proprietary" (vs. "governmental") powers.

C. A fundamental mistake in analysis of federal powers, widespread early in this century until corrected in United States v. Darby, 312 U.S. 100 (1941), infiltrated and has not yet been exorcised from property clause thinking.

D. Intellectual confusion spawned a notion of general federal legislative jurisdiction over federal property; and that notion predominated by default, without judicial endorsement.

1. Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Jurisdiction Over Federal Areas Within the States, Parts I and II (1957).

2. Public Land Law Review Commission, Report, One Third of the Nation's Land, at 278 (1970).

VI. In 1976 the Supreme Court revolutionized property clause doctrine.

A. The Court construed the property power as a power of general legislative jurisdiction, capable of preempting state law.

1. Kleppe v. New Mexico, 426 U.S. 529 (1976).

2. The Court provided no policy rationale for the change in doctrine.

3. The Kleppe briefs obscured the precedents.

4. The shock of change in the public lands States has fueled the "Sagebrush Rebellion."

B. The revolution has been expanded, still without rationale: Ventura County v. Gulf Oil Corp., _____ F. 2d _____ (9th Cir. 1979), affirmed without opinion, 48 U.S.L.W. 3625 (1980).

C. It is too early to judge whether the revolution is permanent or whether competent constitutional analysis will prevail.

FOR FURTHER STUDY see "State and Federal Power Over Federal Property," 18 Arizona Law Review 283 (1977), reprinted in 14 Public Land and Resources Law Digest 269 (1977).