Liquor Regulation In Indian Country: The Modern Picture In An Antique Frame

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Commerce between the Indians and white European immigrants began almost as the latter stepped from their longboats or dismounted their horses onto North American soil. Trade in few commodities in this generally tentative, often stormy, trade relationship has been as intensely debated or as stringently regulated as the trade in alcohol.[1] Even before the American Republic was born, the colonies acted to stem the flow of intoxicants to the Indians.[2] Once established, the United States government wasted little time before exercising its commerce clause authority[3] to regulate the Indian liquor trade.[4] Stringent federal regulation of the sale and distribution of intoxicants quickly developed into total Indian prohibition.[5] Until 1953, federal law made illegal the sale or distribution of intoxicating beverages to Indians anywhere within the United States.[6]

In 1953, Congress bowed to pressure for greater Indian freedom and repealed federal Indian prohibition outside Indian country.[7] Con-

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1. Indeed, one commentator blamed the liquor trade as the direct or indirect cause of virtually every Indian war since the discovery of America. *See* R. Johnson, THE FEDERAL GOVERNMENT AND THE LIQUOR TRAFFIC 183-238 (1911).

2. *See* U.S. DEP'T OF INTERIOR FEDERAL INDIAN LAW 381 n.1 (1958) [hereinafter FEDERAL INDIAN LAW] (noting that Massachusetts, Pennsylvania, and New Jersey had enacted restrictions on liquor trade with the Indians before 1761).

3. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

4. In 1802, Congress authorized the President "to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spiritous liquors among all or any of the . . . Indian tribes . . . ." Act of March 30, 1802, § 21, 2 Stat. 139, 146 (1802); *see* FEDERAL INDIAN LAW, *supra* note 2, at 382 & n.6.

5. *See* Act of July 9, 1832, 4 Stat. 564 (1832); FEDERAL INDIAN LAW *supra* note 2, at 382; text & note 16 *infra*.

6. 18 U.S.C. § 1154 (1976); *see* United States v. Holliday, 70 U.S. (3 Wall.) 407, 415-18 (1866) (predecessor to section 1154 prohibited sales of liquor to Indians outside Indian country); United States v. Miller, 105 F. 944, 946 (D. Nev. 1901) (same); United States v. Burdick, 1 Dak. 142, 149-50, 46 N.W. 571, 573-74 (1875) (same). *See also* United States v. Mazurie, 419 U.S. 544, 547 (1975); text & notes 22-34 *infra*.

7. 18 U.S.C. § 1161 (1976); *see* FEDERAL INDIAN LAW, *supra* note 2, at 382; May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN L. REV. 217 (1977). Section 1161 renders inapplicable to any area not within Indian country the Indian prohibition provisions,

gress, in what is now title 18, section 1161 of the United States Code, rendered inapplicable federal statutes that prohibited the sale or distribution of alcohol to Indians outside Indian country.[8] Section 1161 went even further, rendering inapplicable federal laws proscribing the introduction, sale, disposition, or possession of alcohol within Indian country if such acts are "in conformity both with the laws of the State . . . and with an ordinance duly adopted by the tribe having jurisdiction . . . ."[9] Congress, by this imprecise phrase, cast the regulation of liquor transactions among and involving Indians into the murky juris-

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sections 1154 and 1156 of title 18, United States Code, and the provisions enacted by Congress to facilitate their enforcement, sections 3113, 3488, and 3618 of title 18. *See* 18 U.S.C. § 1161 (1976). "Indian country" is a term of art in the federal Indian law as it defines the territorial boundaries of state, tribal, and federal jurisdiction over Indians and their affairs, generally speaking. D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 348 (1979) [hereinafter D. GETCHES]. In 1948, Congress codified prior judicial definitions of "Indian country" in 18 U.S.C. § 1151. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507-08 (1976). Although section 1151 is a criminal statute, the Supreme Court has held that the statutory definition of "Indian country" set forth therein also applies to questions of civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Section 1151 defines "Indian country" as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", . . . , means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allottments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1976). The definition of Indian country in section 1151 does not apply, by the terms of its first sentence, to the federal statutes that prohibit dispensing and possessing alcoholic beverages within Indian country. *Id.; see* 18 U.S.C. §§ 1154(c), 1156 (1976).

Subsection 1154(c) excludes from section 1154's prohibitions fee-patented lands within non-Indian communities located within Indian reservations. *See* United States v. Mazurie, 419 U.S. 544, 549-53 (1975) (distinguishing "fee-patented lands in non-Indian communities" from those "which are not in Indian communities" in an attempt to delineate the scope of the exception); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 939-40 (D. Wyo. 1976) (non-Indian owned lodge within boundaries of reservation which had historically been subject to tribal and federal jurisdiction, even though on land patented to a non-Indian, is not within a non-Indian community and thus not within § 1154(c) exception). *But see* United States v. Morgan, 614 F.2d 166, 170 (9th Cir. 1980) (bar, owned by non-Indian on land he owns in fee within ten miles of a predominantly non-Indian South Dakota town is within this exception to "Indian country" notwithstanding the fact that both the bar and the town are surrounded by a reservation). Subsection 1154(c) also excepts from § 1154's prohibitions rights-of-way across reservations. State and county roads and interstate highways, for example, are often constructed on rights-of-way which pass through reservations. *See* 25 U.S.C. §§ 311-328 (1976).

Section 1156, title 18, prohibits the mere possession of intoxicants within Indian country, but the last paragraph of section 1156 excepts from its coverage fee-patented lands in non-Indian communities, *see* United States v. Mazurie, 419 U.S. at 549-53, and rights-of-way through reservations. 18 U.S.C. § 1156 (1976).

The Pueblos in New Mexico, which are on lands granted in fee by the Spanish to the tribes that occupy them, are nonetheless considered part of Indian country for most purposes. *See generally* United States v. Sandoval, 231 U.S. 28 (1913). The federal Indian liquor provisions apply to the Pueblos. *Id.* at 45-48; see note 27 *infra*.

8. Pub. L. No. 83-277 § 2, 67 Stat. 586 (codified at 18 U.S.C. § 1161 (1976)); see text & notes 60-68 *infra*.

9. 18 U.S.C. § 1161 (1976). *See generally* United States v. Mazurie, 419 U.S. 544 (1975); United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934 (D. Wyo. 1976).

dictional waters which have swirled around the Indian Law since its inception.[10]

This Note will analyze the development of current federal, state, and tribal laws pertinent to the sale and disposition of alcoholic beverages within Indian country. After a brief overview of the history of the Indian liquor laws, attention will be focused upon the jurisdictional implications of the current law. Civil jurisdiction over liquor transactions on Indian lands will be analyzed first. Criminal jurisdiction over such transactions and Indians who participate in them will be briefly considered. Finally, this outsider will offer a view of the present and potential effects of the current scheme of regulation of liquor in Indian country.

A. *Thumbnail History of Liquor Regulation in Indian Country*

The federal government first acted to control the Indian liquor traffic in 1802[11] at the urging of President Thomas Jefferson.[12] There were two apparent motives underlying the President's request. The first was protection of the health and morals of the Indians.[13] The second was protection of the general peace.[14] Congress responded by authorizing Jefferson to take such measures as he felt necessary to prevent or restrain the sale or distribution of liquor among the Indian tribes.[15] The Chief Executive used his powers over treaty-making and the licensing of Indian traders to control the Indian liquor trade for thirty years before Congress enacted a law prohibiting such trade outright.[16]

The federal power to regulate the Indian liquor trade has been grounded upon several sources, including the power to make treaties

10. There have been several excellent analyses of the tripartite jurisdictional arrangements in Indian country, written in recent years. On the division of civil jurisdiction among the states, the tribes, and the federal government, *see generally* Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285-312 (1977); Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206-32; Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535-94 (1975). On criminal jurisdiction in Indian country, *see generally* Clinton, note 7 *supra*; Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387-412 (1974).

11. *See* Act of March 30, 1802, § 21, 2 Stat. 139, 146 (1802); text & note 4 *supra*.

12. *See* FEDERAL INDIAN LAW, *supra* note 2, at 381-82.

13. *See id.* "'These people [the Indians] are becoming very sensible of the baneful effects produced on their morals, their health, and existence by the abuse of ardent spirits: and some of them earnestly desire a prohibition of that article from being carried among them.'" *Id.* at 381 (quoting Jefferson from 7 AMERICAN STATE PAPERS 653 (1789-1815)).

14. *See* FEDERAL INDIAN LAW, *supra* note 2, at 382. "'It has been found, too, in experience, that the same abuse [of liquor] gives rise to incidents tending much to commit our peace with the Indians.'" *Id.* (quoting Jefferson from 7 AMERICAN STATE PAPERS 653 (1789-1815)). *See generally* R. JOHNSON, note 1 *supra*.

15. FEDERAL INDIAN LAW, *supra* note 2, at 382; see note 4 *supra*.

16. FEDERAL INDIAN LAW, *supra* note 2, at 382. Congress enacted the first Indian prohibition provision in 1832. *Id.; see* Act of July 9, 1832, 4 Stat. 564 (1832).

alluded to above.[17] Judges and commentators have described this power as derived from: the commerce clause in the United States Constitution;[18] the clause empowering Congress to manage the property of the United States;[19] and the plenary authority of Congress to exercise a guardianship role on behalf of the Indians because of their dependency upon the federal government.[20] Congress' attempts to stop the flow of intoxicants to the Indians can thus be traced to one or more constitutional foundations.[21]

Congress tinkered with its regulatory/prohibitory scheme for more than one hundred years in an effort to plug loopholes, prevent abuses and facilitate enforcement.[22] Only the highlights of Congress' activity in this regard will be set forth here. The most important of the early Congressional measures to regulate the Indian liquor trade was the Act of July 23, 1892.[23] The 1892 statute defined two distinct prohibitions.[24] First, the Act prohibited the disposition of intoxicants[25] to any Indian who was either under the guardianship of the United States[26] or held an allotment the title to which was held in trust or otherwise restricted

17. FEDERAL INDIAN LAW, *supra* note 2, at 383 & nn. 1-5; see text & note 16 *supra*.

18. U.S. CONST. art. I, § 8, cl. 3; *see* FEDERAL INDIAN LAW, *supra* note 2, at 383, *citing* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and United States Express Co. v. Friedman, 191 F. 673 (C.C.D. Ark. 1911); see note 3 *supra*.

19. U.S. CONST. art. IV, § 3, cl. 2 ("The 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."); *see* United States Express Co. v. Friedman, 191 F. 673, 674 (C.C.D. Ark. 1911). *See also* Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) (Congress' power over public lands, as both proprietor and legislature, is without limitation); *Cf.* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 373-74 (1973) (considering the extent of Congress' power over lands acquired by purchase, condemnation, or cession from the states under U.S. CONST. art. I, § 8, cl. 17).

20. FEDERAL INDIAN LAW, *supra* note 2, at 383; *see* United States v. Kagama, 118 U.S. 375, 383-84 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States Express Co. v. Friedman, 191 F. 673, 674 (C.C.D. Ark. 1911).

21. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 555-56 (1975); Perrin v. United States, 232 U.S. 478, 482 (1914); United States v. Dick, 208 U.S. 340, 353-54 (1908).

22. *See* FEDERAL INDIAN LAW, *supra* note 2, at 385-93; text & notes 23-67 *infra*.

23. FEDERAL INDIAN LAW, *supra* note 2, at 386; *see* Act of July 23, 1892, 27 Stat. 260 (1892) *as amended by* Act of June 15, 1938, 52 Stat. 696 (1938) (current version at 18 U.S.C. §§ 1154, 1156 (1976)).

24. FEDERAL INDIAN LAW, *supra* note 2, at 386.

25. The 1892 statute broadened the definition of prohibited "intoxicants" to include "ale, beer, wine, or intoxicating liquors of any kind." Some courts had held that beer was not within the earlier definitions. *See* Sarlls v. United States, 152 U.S. 570, 575-77 (1894); *In re* McDonough, 49 F. 360, 362-63 (1892); FEDERAL INDIAN LAW, *supra* note 2, at 386 n.3. *But see* Wayne v. United States, 138 F.2d 1, 2 (8th Cir. 1943).

26. 18 U.S.C. § 1154 (1976); *see, e.g.*, United States v. Sandoval, 231 U.S. 28, 48 (1913); United States v. Miller, 105 F. 944, 946 (D. Nev. 1901); United States v. Earl, 17 F. 75, 77 (C.C.D. Or. 1883).

The guardian-ward relationship between the United States and the Indians was first expressed in principle by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1832). The relationship was explicitly recognized as the basis of Congress' authority to invest in federal courts exclusive jurisdiction to try Indians accused of major crimes in Indian country. *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886). The Court held, in *Sandoval*, that the United States' responsibility as guardian of the pueblo tribes made the federal liquor prohibitions applicable within the pueblos. United States v. Sandoval, 231 U.S. 28, 48 (1913).

by the United States.[27] The second prohibition was directed to the introduction or attempt to introduce intoxicants into Indian country.[28] The first prohibition focused upon the protected status of the purchaser or recipient of liquor[29] and applied both within and outside Indian country.[30] The second prohibition, however, focused upon the site of the illegal transaction.[31] A transaction that occured within the limits of Indian country would thus trigger the enforcement provisions of the Act regardless of the status of the actors.[32]

The 1892 act was difficult to enforce.[33] Courts repeatedly held, for example, that possession of liquor within Indian country was not alone sufficient to show that it had been illegally introduced.[34] Congress closed this loophole in 1916 by expressly providing that possession of intoxicants within Indian country is prima facie evidence of unlawful introduction.[35] To facilitate enforcement of Indian prohibition laws like the 1892 act, Congress made possession an independent offense in 1918.[36]

The 1892 act was amended in 1938, but most provisions of the earlier act survived.[37] The amended version expanded the definition of intoxicants expressly included under the 1892 act[38] to include bever-

27. 18 U.S.C. § 1154 (1976); *see* FEDERAL INDIAN LAW, *supra* note 2, at 386. For a comprehensive study of the allottment era in federal Indian policy, *see History of the Allottment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 428-89 (1934) (D.S. Otis). To Indians, the allottment policy was a disaster, diminishing Indian land holdings from 138 million acres to 48 million with a parallel decline in material wealth, thereby causing decay in tribal organization. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE TWO: FINAL REPORT ON TRIBAL GOVERNMENT 144 (Comm. Print 1976) [hereinafter REPORT ON TRIBAL GOV'T].

28. *See* 18 U.S.C. § 1154 (1976); FEDERAL INDIAN LAW, *supra* note 2, at 387. See note 7 *supra*, for a definition of Indian country for purposes of the federal Indian prohibition statutes.

29. *See* United States v. Sutton, 215 U.S. 291, 295 (1909). *See also* Perrin v. United States, 232 U.S. 478, 484 (1914); State v. Rorvick, 76 Idaho 58, 62, 277 P.2d 566, 568 (1954).

30. *See* Perrin v. United States, 232 U.S. 478, 482-85 (1914); United States v. Nice, 241 U.S. 591, 600-01 (1916); United States v. Twelve Bottles of Whiskey, 201 F. 191, 192 (D. Mont. 1912).

31. *See* United States v. Mazurie, 419 U.S. 544, 554-56 (1975); United States v. Morgan, 614 F.2d 166, 170-71 (9th Cir. 1980); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 940 (D. Wyo. 1976). *See also* United States v. Sutton, 215 U.S. 291, 294 (1909); United States Express Co. v. Friedman, 191 F. 673, 680-81 (C.C.D. Ark. 1911).

32. *See* United States v. Mazurie, 419 U.S. 544, 554-56 (1975).

33. *See* May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN L. REV. 217 (1977) (suggesting that bootlegging and other illegal practices were common in Indian country). *See also* FEDERAL INDIAN LAW, *supra* note 2, at 386-88 (discussing weak spots in the federal prohibitory provisions and Congress' attempts to fill loopholes).

34. 5 FEDERAL INDIAN LAW, *supra* note 2, at 387; *see, e.g.*, Parks v. United States, 225 F. 369, 370 (8th Cir. 1915); Collier v. United States, 221 F. 64, 65 (8th Cir. 1915); Chambliss v. United States, 218 F. 154, 157-58 (8th Cir. 1914).

35. Act of May 18, 1916, 39 Stat. 123, 124 (1916) (codified at 18 U.S.C. § 3488 (1976)); *see* Brown v. United States, 265 F. 623, 624 (8th Cir. 1920); FEDERAL INDIAN LAW, *supra* note 2, at 387.

36. FEDERAL INDIAN LAW, *supra* note 2, at 387; *see* 18 U.S.C. § 1156 (1976).

37. *Compare* Act of June 15, 1938, 52 Stat. 696 (1938) *with* Act of July 23, 1892, 27 Stat. 260 (1892). The surviving provisions of the 1892 and 1938 statutes may be found in 18 U.S.C. §§ 1154, 1156 (1976).

38. *See* note 25 *supra*.

ages that had been subsequently included by judicial interpretation.[39] The 1938 act also authorized prosecution by information for a first offense and added specific penalty provisions.[40]

Congress has adopted other provisions to facilitate enforcement as conditions have warranted.[41] For example, various Indian affairs officers are expressly authorized by federal statute to search persons suspected of smuggling alcohol into Indian country,[42] to conduct warrantless searches of houses, stores, vehicles and boats,[43] and to seize and subject to forfeiture goods and vehicles involved in the illegal alcohol traffic.[44] Federal officials may not, however, use these permissive provisions as a basis for a search, seizure, or forfeiture unconnected with enforcement of the Indian liquor laws.[45]

In addition to the federal statutory prohibitions and enforcement provisions, treaties between several tribes and the United States expressly prohibited the sale or introduction of intoxicants within the limits of the reservations established by those treaties.[46] Furthermore, after the policy of dealing with Indian tribes by treaty was abandoned, Congress adopted several "agreements" between the United States and

39. *See* FEDERAL INDIAN LAW, *supra* note 2, at 386 & n. 3.

40. Act of June 15, 1938, 52 Stat. 696 (1938); *see* FEDERAL INDIAN LAW, *supra* note 2, at 386 n. 3. The various Indian prohibition acts, now codified at 18 U.S.C. §§ 1154, 1156 (1976), made each sale a separate offense. *See* Wayne v. United States, 138 F.2d 1, 2-3 (8th Cir. 1943), *cert. denied*, 320 U.S. 800 (1944). The fact that the person accused of illegally selling or dispensing liquor to an Indian was ignorant of the Indian's status as ward or allottee of the United States, see text & notes 27-28 *supra*, was no defense. Hayes v. United States, 112 F.2d 676, 677 (10th Cir. 1940); Scheff v. United States, 33 F.2d 263, 265 (8th Cir. 1929).

41. *See* FEDERAL INDIAN LAW, *supra* note 2, at 388-90.

42. 18 U.S.C. § 3113 (1976).

43. *Id.; see* FEDERAL INDIAN LAW, *supra* note 2, at 388. *See also* Gilbert v. United States, 144 F.2d 568, 570 (10th Cir. 1944) (liquor seized by Indian police officer in violation of defendant's fourth amendment rights held inadmissible in trial for illegal introduction of liquor into Indian country).

44. 18 U.S.C. § 3618 (1976). *See generally* United States v. One Chevrolet Coupe Automobile, 58 F.2d 235 (9th Cir. 1932); United States v. One 1941 4-Door Buick Sedan, 64 F. Supp. 905 (D. Minn. 1946); United States v. One Buick Roadster Automobile, 244 F. 961 (D. Okla. 1917).

45. FEDERAL INDIAN LAW, *supra* note 2, at 389; *see* United States v. One Cadillac Eight Automobile, 255 F. 173, 177 (M.D. Tenn. 1918) (provisions to facilitate enforcement of Indian liquor laws may not be used as a basis for search, seizure, or forfeiture of vehicles used in any other illicit commerce); United States v. One Buick Roadster Automobile, 244 F. 961, 966 (E.D. Okla. 1917) (predecessor to 18 U.S.C. § 3618 did not enlarge authority of federal officers to conduct warrantless searches for liquor outside Indian country); Palcher v. United States, 11 F. 47, 50-51 (C.C.D. Minn. 1882) (search for and seizure of liquor under Indian liquor laws unauthorized outside Indian country).

46. *See, e.g.*, Treaty with the Mimbres Bands of the Gila Apaches, Fort Thorn, New Mexico, June 9, 1855, art. 7, *reprinted in* TREATIES & AGREEMENTS OF THE INDIAN TRIBES OF THE SOUTHWEST 137, 139 [hereinafter SOUTHWEST TREATIES]; Treaty with the Mescalero Apaches, Fort Thorn, New Mexico, June 14, 1855, art. 7, *reprinted in* SOUTHWEST TREATIES, *supra*, at 144; Treaty with the Navajos, Laguna Negra, New Mexico, June 18, 1855, art. 7, *reprinted in* SOUTHWEST TREATIES, *supra*, at 148; Treaty with the Arickaree, Fort Berthold, Dakota Territory, July 27, 1886, art. 6, *reprinted in* TREATIES & AGREEMENTS OF THE INDIAN TRIBES OF THE NORTHERN PLAINS 78, 79. *See also* FEDERAL INDIAN LAW, *supra* note 2, at 383-84.

various tribes which contained prohibition clauses.[47] Finally, Congress imposed liquor restrictions on lands ceded to the United States by the Indians when these lands adjoined Indian country.[48]

During, and even before, the period of total Indian prohibition under the federal law, the states were also active in the regulation of alcohol on Indian lands and of sales to Indians.[49] Several states enacted statutes that prohibited liquor trade with Indians,[50] and at least two states—Arizona and New Mexico—had such prohibitions written into their constitutions.[51] At least one state continued to enforce its Indian prohibition law even outside Indian country after Congress legalized off-reservation sales to Indians in 1953.[52] Nevertheless, the last of the state prohibition statutes directed solely at Indians were repealed in 1955.[53]

America's sobering experience with nationwide prohibition under the eighteenth amendment and its repeal by the twenty-first amendment had little practical effect upon Indians and did not affect the Indian liquor laws.[54] The twenty-first amendment, and the amendments to title 27 of the United States Code that followed in its wake,[55] recognized in the states almost plenary control over alcohol within their borders.[56] Again, the Indians were unaffected.[57] The federal laws that anchored Indian prohibition, and similar state laws that were not inconsistent,[58] remained in full force and effect until 1953.[59]

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47. FEDERAL INDIAN LAW, *supra* note 2, at 384 (citing agreements with the Nez Perce and the Yankton Sioux).

48. *Id.* at 385 n. 16; *see* Perrin v. United States, 232 U.S. 478, 485-86 (1914); United States v. Dick, 208 U.S. 340, 359 (1908); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883).

49. See text & notes 2-7 *supra*.

50. *See* People v. Bray, 105 Cal. 344, 349-50, 38 P. 731, 733 (1894) (California statute that prohibited dispensing liquor to Indians valid exercise of state's police powers); State v. Wise, 70 Minn. 99, 101, 72 N.W. 843, 844 (1897) (finding racial distinction between whites and Indians sufficient basis for classification in statutes prohibiting sale of intoxicants to Indians); State v. Kenney, 83 Wash. 441, 444, 145 P. 450, 451 (1915) (defendant convicted of giving liquor to an Indian in violation of Washington law despite acquittal on similar charge in federal court); State v. Mamlock, 58 Wash. 631, 633, 109 P. 47, 48 (1910) (defendant convicted of selling liquor to an Indian in violation of Washington statute, fourteenth amendment due process claim rejected).

51. ARIZ. CONST. art. 20, § 3 (amended Nov. 2, 1954); N.M. CONST. art. 21, § 1 (amended Nov. 2, 1954). Congress expressly authorized Arizona and New Mexico to amend these constitutional prohibition provisions in Pub. L. No. 83-277, § 3, 67 Stat. 586 (1953). *See* United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978).

52. *See* State v. Rorvick, 76 Idaho 58, 67-68, 277 P.2d 566, 571-72 (1954) (defendant convicted of violating IDAHO CODE § 18-4201).

53. *See* 1955 Cal. Stats. ch. 48, § 1 (repealing CAL. PENAL CODE § 397 (Deering 1948)); 1955 Idaho Sess. Laws ch. 262, § 1 (repealing IDAHO CODE § 18-4201 (1953)).

54. FEDERAL INDIAN LAW, *supra* note 2, at 390; *see* Kennedy v. United States, 265 U.S. 344, 345-46 (1924); Elam v. United States, 7 F.2d 887, 887 (8th Cir. 1925); Browning v. United States, 6 F.2d 801, 809 (8th Cir.), *cert. denied*, 269 U.S. 568 (1925).

55. *E.g.*, 27 U.S.C. §§ 121, 122, 201-12, 221 (Supp. 1980).

56. *See* U.S. CONST. amend. XXI, § 2; 27 U.S.C. §§ 121, 122 (Supp. 1980); 18 U.S.C. § 1262 (1976).

57. See text & note 54 *supra*. *See also* United States v. McGowan, 302 U.S. 535, 539 (1938).

58. *See* United States v. McGowan, 302 U.S. 535, 539 (1938) (considering the authority of

During the late 1940's and early 1950's, protective and remedial legislation curtailing liquor trade with Indians came to be viewed as inconsistent with their status as United States citizens.[60] Congress, therefore, recognized in 1953 that Indians were entitled to the privileges and immunities that accompany citizenship,[61] and, in effect, repealed federal Indian prohibition outside Indian country.[62] Most of the states with Indian prohibition laws soon followed suit.[63] For the first time in generations, Indians could drink legally outside their reservations,[64] and those who had made clandestine sales of liquor to the Indians could legally do so over the table.[65] Public law 83-277 did not, however, completely repeal the federal Indian prohibition laws.[66] These federal provisions still apply, by negative implication,[67] to liquor

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the states to regulate or prohibit the introduction of liquor into Indian country, the Court said, "Enactments of the federal Government passed to protect and guard its Indian wards only affect the operation, within [Indian lands], of such state laws as conflict with the Federal enactments.").

59. See text & notes 6-9 *supra*; text & notes 60-67 *infra*.

60. *See* FEDERAL INDIAN LAW, *supra* note 2, at 382; May, *supra* note 7, at 217.

61. *See* FEDERAL INDIAN LAW, *supra* note 2, at 382. Congress expressly recognized Indians as citizens of the United States in the Indian Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C. § 1401(a)(2) (1976), although many Indians had already been made citizens by prior statutes or by treaty. D. GETCHES, *supra* note 7, at 495. The United States Supreme Court, prior to the citizenship act, recognized that the Indians' United States citizenship was "not incompatible with tribal existence or continued guardianship" and thus Congress could continue to adopt and enforce regulations for their protection. United States v. Nice, 241 U.S. 591, 600-01 (1916). The Court held in *Nice* that Congress, acting in its guardian capacity to protect the Indians, has the authority to prohibit the sale of alcoholic beverages to Indians who are dependent upon the United States, notwithstanding the fact that they are U.S. citizens. *Id.* at 601. Thus, it seems that the Indians' citizenship, standing alone, was not considered a sufficient reason to alleviate federal prohibition until 1953.

62. *See* Act of Aug. 15, 1953, Pub. L. No. 83-277, § 2, 67 Stat. 588 (codified at 18 U.S.C. § 1161 (1976)). The language of the Act did not repeal Indian prohibition outright, nor did it repeal any of the federal statutes aimed at enforcing Indian prohibition. *See* text & notes 6-9 *supra*; text & notes 64-68 *infra*.

The reasons for Congress' about-face on Indian prohibition outside Indian country appear numerous. May, *supra* note 7, at 217. The civil rights movement had begun to appear in the early 1950's and made Indian prohibition appear discriminatory. *Id.* In addition, several Indian groups had requested repeal of the prohibition. *See id.*; 99 CONG. REC. 1388-89 (1953). Finally, Congress may have realized that prohibition was expensive to enforce and had been ineffective in stopping the flow of liquor into Indian country and into Indian hands outside Indian country. *See* May, *supra* note 7, at 217.

63. *See* text & notes 54-56 *supra*. It should be noted that Congress authorized Arizona and New Mexico to repeal the prohibition provisions in their constitutions in the same act which created 18 U.S.C. § 1161. Act of Aug. 15, 1953, Pub. L. No. 83-277, § 3, 67 Stat. 588; *see* FEDERAL INDIAN LAW, *supra* note 2, at 382; text & note 51 *supra*.

64. 18 U.S.C. § 1161 (1976); *see* May, *supra* note 7, at 217-18.

65. *See* cases cited in note 29 *supra*.

66. *See* United States v. Mazurie, 419 U.S. 544, 545-47 (1975); May, *supra* note 7, at 218; note 62 *supra*.

67. Under the terms of 18 U.S.C. § 1161, an act or transaction involving liquor that has not been affirmatively legalized by the tribe within whose reservation such act or transaction occurs is in violation of federal law, and the violator will be subject to federal prosecution under the terms of either 18 U.S.C. § 1154 or § 1156. *See* United States v. Mazurie, 419 U.S. 544, 545-48 (1975); FEDERAL INDIAN LAW, *supra* note 2, at 382-83; text & notes 90-102 *infra*. Whether a person who violates a state law in the course of a liquor transaction within Indian country will also be subject to federal prosecution is currently uncertain. See text & notes 215-34 *infra*. *See also* United States v. Mazurie, 419 U.S. at 558 n.12 (reserving the question of whether differing treatment of non-Indians and Indians with respect to liquor transactions within Indian country by either the tribes

transactions within Indian country that are not "in conformity both with the laws of the state in which such act[s] or transaction[s] [occur] and with an ordinance duly adopted by the tribe having jurisdiction over such area[s] of Indian country . . . ."[68] The meaning of the quoted language, its effect upon the laws currently recognized or arguably applicable to liquor transactions by or among Indians within Indian country, and its jurisdictional implications will be analyzed in the following sections.

Tribal Regulation of Alcohol Under 18 U.S.C. § 1161

After experiencing enforced prohibition for more than 150 years, the Indian tribes were faced in 1953 with the difficult decision of either repealing or maintaining tribal prohibition provisions in response to section 1161.[69] In making their determinations, the tribes weighed considerations for the health and morals of their members along with concerns for law enforcement within their reservations.[70] Some tribes quickly passed alcohol legislation.[71] By 1955, twenty-two tribes had enacted ordinances legalizing the introduction or possession of alcoholic beverages within their reservations.[72] The pace of tribal passage of legalization ordinances slowed until the mid-1960's, then picked up to an average of twelve new ordinances per year.[73] By 1978, 126 tribal laws dealing with alcohol had been enacted, affecting 100 reservations.[74] Two tribes have repealed legalization ordinances.[75]

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or the federal government raises equal protection or due process concerns); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 940-44 (D. Wyo. 1976) (rejecting due process and equal protection challenges to 18 U.S.C. 1161 under the Indian Civil Rights Act, 25 U.S.C. § 1302).

68. 18 U.S.C. § 1161 (1976). *See generally* United States v. Mazurie, 419 U.S. 544 (1975); United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934 (D. Wyo. 1976).

69. *See* May, *supra* note 7, at 218.

70. *See id.* at 218 n.8.

71. *Id.* at 218.

72. *Id.* at 224. By 1956, five tribes required vendors to secure tribal licenses to sell liquor. *See id.* These five tribal licensing provisions were enacted by the Cheyenne River Sioux, the Blackfoot Tribe, the Red Cliff Chippewa Band, and the Lower Brule Sioux. *Id.* The Blackfeet passed two such ordinances in 1954. *Id.*

73. *Id.* at 218.

74. *See* Petitioner's Brief for Certiorari, Appendix H. at 28a-32a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 444 U.S. 832 (1979). Appendix H of the petition is an updated version of a chart that appeared in May, *supra* note 7, at 224-27.

Two of the largest and most populous reservations, those occupied by the Crow and Navajo tribes, remain under tribal prohibition. *See* CROW TRIBAL CODE § 8-5-572 (1972) (providing that possession or introduction of alcoholic beverages into the Crow Reservation shall be in violation of the ordinance); 17 NAVAJO TRIBAL CODE § 561 (1970) (forbidding the possession, sale, transportation or manufacture of liquor within the reservation and penalizing violations with a sentence of labor not to exceed 60 days). 17 NAVAJO TRIBAL CODE § 562 (1970) prohibits the use of roads or rights-of-way within the reservation for the transportation of liquor for sale or barter within the reservation, except for scientific or religious purposes.

75. May, *supra* note 7, at 221 & n.13. In 1970, the Ogallala Sioux Tribal Council repealed two ordinances: a 1969 ordinance permitting the introduction and possession of alcoholic beverages within the Pine Ridge Reservation; and a 1970 ordinance permitting the sale of such bever-

The tribal liquor ordinances vary widely in content,[76] from simple legalization of introduction and possession to complex provisions regulating hours of sale, licenses per district, conditions of sale, sales by the drink, and package sales.[77] Seven of these ordinances impose tribal taxes of up to fifteen percent on retail sales,[78] and six ordinances authorize the tribes to sell liquor.[79] Thus, it appears that some tribes have used alcohol legalization as a revenue source and a commercial enterprise.[80]

Tribal legalization ordinances must be approved by the Secretary of the Interior,[81] and they typically make lawful the introduction, sale, and possession of intoxicants if "in accordance with" the law of the state in which the reservation is located.[82] Thus, many tribes have explicitly referred to state law as the benchmark against which the legality of a liquor-related transaction within their reservations is to be measured.[83]

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ages. *See* 35 FED. REG. 14004 (1970). The effect of this repeal was to reintroduce prohibition on the reservation. May, *supra* note 7, at 221. The strong objection of three of the conservative district councils on the reservation and problems associated with making liquor so readily available to tribal members have been cited as the reasons behind repeal of the Sioux ordinances. *Id.* at 220-21.

In 1964, the Walker River Paiute Tribe (Nevada) stopped all liquor sales within the reservation which had previously been permitted under a 1963 ordinance. *See* 29 Fed. Reg. 6656 (1964). Introduction and possession of alcohol had been legalized on the Walker River Reservation in 1955 and remained legal. May, *supra* note 7, at 221-24. The tribe cited problems associated with liquor sales and with the immediate availability of liquor to tribal members as reasons for the repeal. *Id.* at 222. The tribe enacted an ordinance reinstituting sales within the Walker River Reservation in 1966. *Id.* at 225.

76. May, *supra* note 7, at 219.

77. *See id.* at 219, 224-27; Petitioner's Brief for Certiorari, Appendix H, at 28a-32a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978).

78. *See* Petitioner's Brief for Certiorari, Appendix H, at 28a-32a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978). The tribes occupying the following reservations have enacted provisions to tax liquor sales: Minnesota Chippewa; Ft. Yuma; Ft. McDowell Mohave-Apache; Rosebud Sioux; Yavapai-Prescott Indian Community; Tulalip; and Muckleshoot. *See id.*

79. *See id.* Tribes occupying the following reservations have authorized themselves to sell alcoholic beverages under tribal statutes approved by the Secretary of the Interior: Hualapai (Cal.); Rocky Boy (Mont.); Chippewa Cree (Wis.); Chemehuevi (Cal.); Fort Belknap (Mont.); Sokaogon Chippewa Community (Wis.); and Muckleshoot (Wash.). *Id.* at 28a-32a. The Ogallala Sioux tribe repealed an ordinance authorizing the tribe to sell liquor within the Pine Ridge Reservation. See text & note 75 *supra*.

80. The Mescalero Apache Tribe has owned and operated a bar in the community of Mescalero, New Mexico for ten years without a state license. Petitioner's Brief for Certiorari, Appendix B, at 4a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978). The tribe operates a bar at Apache Summit, New Mexico, within the Mescalero Reservation, which is licensed by the State. *Id.* at 4a-5a. The Mescalero Tribe also sells liquor without a state license at the Inn of the Mountain Gods, a multi-million dollar tribally-owned resort complex within the reservation. *Id.* at 4a.

81. *See* 18 U.S.C. § 1161 (1976).

82. May, *supra* note 7, at 219-220. *See also* United States v. Mazurie, 419 U.S. 544, 547 (1975).

83. These references to state law seem to be facile attempts by the tribes to write simple ordinances which will nonetheless provide tribal and federal authorities with provisions, adopted by reference to the states' liquor codes, to control hours of sale, conditions of sale, refilling bottles, and other contingencies likely to arise in the course of on-reservation liquor trade. These ambiguous references to state law also seem calculated to win the approval of the Secretary of the Inte-

Tribal authority to enforce regulations relating to the introduction, ppossession, and sale of liquor within their reservations has been the subject of some debate.[84] The power of the tribes to regulate the activities of their own members within their reservation boundaries seems too well established to question here.[85] The more difficult issue is tribal power to regulate the liquor-related activities of non-Indians within Indian country. The question is compounded by the fact that the tribes' civil and criminal jurisdiction over non-Indians within Indian country are not coextensive.[86] Thus, tribal civil jurisdiction over non-Indians will be considered separately from tribal criminal jurisdiction and enforcement authority.

Tribal Civil Jurisdiction Over Non-Indians

Tribal attempts to assert civil jurisdiction over non-Indians doing business within Indian country have taken two forms. The tribes have asserted their authority to require non-Indians both to secure tribal licenses[87] and to pay taxes levied by the tribes upon their business activities and property within reservation boundaries.[88] Both assertions of tribal jurisdiction have met with strident non-Indian opposition.[89]

The United States Supreme Court, in *United States v. Mazurie*, clearly established tribal authority to license non-Indian liquor retailers

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rior, necessary under section 1161 before a tribal legalization ordinance may become effective. 18 U.S.C. § 1161 (1976); *see* United States v. Mazurie, 419 U.S. 544, 557 n. 12 (1975) (noting that such approval may provide some protection against arbitrary tribal action in liquor regulation); Petitioner's Brief for Certiorari, at 5, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978) (noting that the Mescalero Apache ordinance legalizes the introduction, possession, or sale of liquor within the Mescalero Reservation if in conformity with New Mexico law).

84. *See generally* United States v. Mazurie, 419 U.S. 544 (1975); United States v. Morgan, 614 F.2d 166 (9th Cir. 1980); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934 (D. Wyo. 1976).

85. *See* Fisher v. District Court, 424 U.S. 382, 387-89 (1976) (recognizing exclusive tribal jurisdiction over proceedings for the adoption of an Indian child domiciled on the reservation); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (recognizing that tribes retain their inherent sovereign power to regulate their members, make their own law with regard to internal tribal affairs, and enforce their own laws in their courts); United States v. Wheeler, 435 U.S. 313, 322 (1978) (the tribal self-government authority includes the power to prescribe laws applicable to the tribe's membership and enforce them with criminal sanctions, subject, however, to complete or partial defeasance by Congress).

86. Indian tribes do not have criminal jurisdiction over non-Indians, even for crimes committed within the limits of their reservations. Oliphant v. Suquamish Tribe, 435 U.S. 191, 209-11 (1978). The tribes may, however, have civil jurisdiction to tax non-Indian businesses within reservation boundaries. *See* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 544 (10th Cir. 1980), *cert. granted*, 101 S.Ct. 71 (1981). The tribes also have the power, delegated by Congress, to license non-Indians who wish to sell liquor within the exterior boundaries of their reservations. United States v. Mazurie, 419 U.S. 544, 557-58 (1975).

87. *See* United States v. Mazurie, 419 U.S. 544, 546-47 (1975); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 936-37 (D. Wyo. 1976).

88. Morris v. Hitchcock, 194 U.S. 384, 389-93 (1904); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 543 (10th Cir. 1980), *cert. granted*, 101 S.Ct. 71 (1981); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 557 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959).

89. See text & notes 90-102, 112-16 *infra*.

within Indian country.[90] The petitioners, owners and operators of a bar located on land owned by them in fee within the external boundaries of the Wind River Reservation in central Wyoming,[91] were convicted by a Wyoming district court of introducing liquor into Indian country in violation of federal law.[92] They appealed their convictions to the United States Court of Appeals for the Tenth Circuit,[93] alleging that the statute under which they were convicted was unconstitutionally vague as applied to them,[94] and alleging further that 18 U.S.C. § 1161 was an invalid attempt by Congress to delegate its authority to control non-Indian introduction of alcoholic beverages onto non-Indian land to "private voluntary organizations."[95] The Tenth Circuit reversed the petitioners' convictions on these bases.[96]

The United States Supreme Court reversed the Tenth Circuit and affirmed the petitioners' convictions.[97] The Court first held that the statute under which the Mazuries were convicted was not unconstitutionally vague.[98] The Court then rejected petitioners' characterization of Indian tribes as private voluntary organizations[99] and held that Congress' delegation to the tribes of its power to regulate non-Indian liquor transactions on non-Indian land within Indian country was valid.[100] The Court reasoned that Indian tribes possess enough independent authority over matters that affect tribal life to "protect Congress' decision to vest in tribal councils" part of its own authority to regulate non-Indian liquor transactions under the commerce clause.[101] After *Mazurie*, a non-Indian who either refuses or simply fails to secure a tribal liquor license where the tribe requires one will be subject to federal prosecution.[102] Thus, a tribe may assert civil jurisdiction over non-

90. 419 U.S. 544, 557-59 (1975).

91. *Id.* at 546-47. The Court noted that a substantial part of the Wind River Reservation in Wyoming, the home of the Arapahoe and Shoshone Tribes and the Mazuries, had been patented to non-Indians. *Id.* at 546.

92. *Id.* at 545.

93. *Id.; see* United States v. Mazurie, 487 F.2d 14, 15 (10th Cir. 1973).

94. 419 U.S. at 549-53.

95. *Id.* at 556.

96. *Id.* at 546.

97. *Id.* at 546, 559.

98. *Id.* at 553.

99. *Id.* at 557 (The relevant cases "surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations,' and they thus undermine the rationale of the Court of Appeals decision.").

100. *Id.* at 557-58.

101. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1934)).

102. *See* FEDERAL INDIAN LAW, *supra* note 2, at 382-83. It should be noted that the assertion of civil jurisdiction by the Arapahoe and Shoshone tribes in both United States v. Mazurie, 419 U.S. 544, and Berry v. United States, 420 F. Supp. 934 (D. Wyo. 1976), was accomplished indirectly. The tribes have no criminal jurisdiction over non-Indians, Oliphant v. Suquamish Tribe, 435 U.S. 191, 209-11 (1978), and thus could not fine or otherwise penalize the non-Indian bar owners for failure to secure a tribal license. Furthermore, the fact that both the non-Indian establishment involved in *Mazurie* and the one involved in *Berry* were located on land patented in fee to the non-Indian owner/defendants probably prohibits the tribes from excluding them from the

Indian liquor retailers to the extent that it may require them to secure a tribal license.

The United States Supreme Court has not yet clearly determined whether Indian tribes may impose taxes on non-Indian liquor sales within reservation boundaries. Several tribes have already passed ordinances that purport to levy taxes of up to fifteen percent on liquor sold within their reservations.[103] These tribal ordinances do not exclude non-Indians from taxation, whether their liquor sales are on Indian or non-Indian land within the reservation boundaries. The issues, then, are whether Indian tribes may tax non-Indian liquor sales within reservation boundaries, whether the fact that such sales are on land owned by non-Indians significantly affects this tribal taxing authority, and under what theories tribal taxes on liquor sales by non-Indians may be sustained.

Federal courts have acknowledged the authority of Indian tribes to tax non-Indians doing business within Indian reservations in several cases.[104] Some of these decisions have rested upon the theory that the tribes have the power to exclude nonmembers from their reservations and to set the terms under which nonmembers may do business on Indian lands.[105] The remainder of these decisions have held that the tribes have the inherent power to tax the activities of nonmembers within their reservations.[106]

The Supreme Court addressed the tribal taxing authority issue in *Washington v. Confederated Colville Tribes*.[107] The Court acknowledged in *Colville* that Indian tribes have retained the power to tax

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reservation. *See* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980) (holding that United States district court has jurisdiction to hear claim by non-Indians that Indian blockade of their access road, at suggestion of tribal council, violated their constitutional rights). Therefore, the only route via which the tribe can subject nonmembers to tribal civil jurisdiction is to expose them to federal prosecution under a statute like 18 U.S.C. § 1154 or § 1156 if they refuse to recognize the tribes' jurisdiction. *See* 18 U.S.C. § 1161 (1976); text & notes 67-72 *supra*. *But see* Kerr-McGee Corp. v. Navajo Tribe, Civ. No. 79-383M (D. Ariz., filed May 15, 1979) (challenging the authority of the Navajo tribe to enforce its business use and possessory interest taxes on nonmember mineral development companies, which do business on tribal lands leased from the federal government, by unilaterally suspending such leases or seizing the plaintiffs' assets within the Navajo Reservation).

103. *See* text & note 78 *supra*.

104. *See* Washington v. Confederated Colville Tribes, 447 U.S. 134, 152-53 (1980); Morris v. Hitchcock, 194 U.S. 384, 392 (1904); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 544 (10th Cir. 1980), *cert. granted*, 101 S.Ct. 71 (1981); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 98-99 (8th Cir. 1956); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

105. Buster v. Wright, 135 F. 947, 950 (7th Cir. 1905); *see* Morris v. Hitchcock, 194 U.S. 384, 389-93 (1904); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 548 (10th Cir. 1980), *cert. granted*, 101 S. Ct. 71 (1981).

106. Washington v. Confederated Colville Tribes, 447 U.S 134, 152-53 (1980); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 544 (10th Cir. 1980), *cert. granted*, 101 S. Ct. 71 (1981); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956).

107. 447 U.S. 134 (1980).

transactions upon Indian trust lands as a "fundamental attribute" of tribal sovereignty unless divested of this authority explicitly by Congress or implicitly as a result of their dependent status.[108] The *Colville* Court ultimately held that the tribes may levy a tax, the incidence of which falls on the purchaser, on cigarette sales within the reservations.[109] The Court reasoned that the tribes have not been divested of the power to tax by Congress,[110] nor is tribal exercise of taxing authority inconsistent with the tribes' dependent relationship to the United States.[111] The Court noted that the inherent authority of Indian tribes to tax transactions involving nonmembers doing business within their reservations is subordinate only to the power of the federal government.[112] In summary, the *Colville* Court recognized that Indian tribes retain the sovereign authority to tax transactions that significantly involve the tribe or its members when such transactions occur on tribal trust lands.[113]

The Court recently granted a petition for certiorari in *Merrion v. Jicarilla Apache Tribes*,[114] another case involving a challenge to tribal authority to tax the on-reservation business activities of nonmembers. In *Merrion*, several non-Indian mineral development companies have challenged the authority of the Jicarilla tribe to levy severance taxes on the production of oil and gas on leased lands within the Jicarilla Reservation.[115] The Tenth Circuit, finding persuasive decisions of the Supreme Court indicating that retained tribal authority has "at least

108. *Id.* at 152.
109. *Id.*
110. *Id.* at 153.
111. *Id.* at 153-54.
112. Id. at 154.
113. *See id.* at 152-54. In the words of Justice White, writing for the majority, "The power to tax transactions *occurring on tribal trust lands and significantly involving a tribe or its members* is a fundamental attribute of sovereignty which the tribes retain unless divested of it . . . ." *Id.* at 152, (emphasis added). The emphasized phrases leave two clear factual bases on which to distinguish future tribal taxing attempts. By negative implication, the tribes may not have the inherent sovereignty to tax transactions within Indian country which occur on lands patented to non-Indians in fee or which do not "significantly" involve the tribes or their members. *Cf.* United States v. Mazurie, 419 U.S. 544, 557 (1975) (liquor transactions are matters which affect the internal and social relations of the tribes, even when such transactions do not occur on tribal trust lands).
114. 617 F.2d 537 (10th Cir. 1980), *cert. granted*, 101 S.Ct. 71 (1980) (No. 80-11, 1980 Term; renumbered 81——, 1981 Term).
115. *See* 617 F.2d at 539. The Jicarilla tribe enacted a severance tax in 1976 on " 'any oil and gas severed, saved and removed from Tribal lands.' " *Id.* The taxing ordinance specified that the tax, to be paid monthly, is assessed at the wellhead on all oil and gas that is to be removed from the reservation. *Id.* The *Merrion* appellants urged that: (1) the federal district court had jurisdiction over the claims against the tribe and the Secretary of the Interior, *id.* at 539-40; (2) the tribe does not have the inherent sovereignty to tax nonmembers, *id.* at 541-44; (3) the tribal tax is an impediment on commerce in violation of the commerce clause, *id.* at 544-46; and (4) Congress has preempted the tribal tax, *id.* at 546-48. The Tenth Circuit held that: (1) the tribe had waived its sovereign immunity and could therefore be subjected to suit in federal court, *id.* at 540; (2) the tribe had retained the sovereign power to tax the severance of oil and gas from reservation lands, *id.* at 544; (3) the tribal severance tax does not impede commerce, *id.* at 546; and (4) Congress has not explicitly or implicitly preempted the tribe's authority to levy a severance tax, *id.* at 549.

some element of territoriality,"[116] held that the tribe has the inherent power to tax the removal of minerals from lands reserved for tribal use and occupation by the federal government.[117]

One *Merrion* dissenter argued that whatever power the tribe may once have had to govern or otherwise regulate the conduct of nonmembers within the Jicarilla Reservation was relinquished when the United States acquired the territory.[118] The other dissenter concluded that Indian tribes had been divested of their inherent authority to levy severance taxes by Congress and that Congress had delegated such taxing authority to state and local governments.[119]

The ultimate Supreme Court decision in *Merrion* may go far to delineate the scope of inherent tribal authority to tax nonmembers. But the Court might also avoid the issue by finding, as the district court did, that the Jicarilla Apache severance tax is an impermissible impediment on commerce[120] and that tribal authority to levy such a tax has been federally preempted.[121]

Inherent tribal authority to tax transactions involving liquor is, however, much more limited than inherent authority to regulate or tax in any other substantive area. Both the *Colville* and *Merrion* courts recognized that the tribes, in levying the challenged taxes, were exercising elements of tribal sovereignty of which they had never been explicitly or implicitly divested.[122] Indian tribes have been both expicitly and implicitly divested of any authority whatsoever to regulate, or even to participate in, liquor transactions for more than one hundred and fifty years.[123] The federal Indian prohibition statutes that are still in effect and are still enforced in Indian country are evidence of this explicit divestiture.[124] The tribes' dependent relationship to the United States

116. *Id.* at 542 (citing Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Williams v. Lee, 358 U.S. 217 (1959); United States v. Mazurie, 419 U.S. 544 (1975)).

117. 617 F.2d at 544.

118. *Id.* at 552-56 (Seth, C.J., dissenting).

119. *Id.* at 561-63 (Barrett, J., dissenting).

120. *See* 617 F.2d at 544, 565-66.

121. *See id.* at 561-65 (Barrett, J., dissenting).

122. Washington v. Confederated Colville Tribes, 447 U.S. at 153-54; Merrion v. Jicarilla Apache Tribe, 617 F.2d at 541-44. Both courts noted that Indian tribes have been implicitly divested of the authority to assert criminal jurisdiction over nonmembers, the power to engage in relations with foreign nations, and the ability to alienate their lands without congressional approval. Washington v. Confederated Colville Tribes, 447 U.S. at 153-54; Merrion v. Jicarilla Apache Tribe, 617 F.2d at 541. Both courts recognized that the tribes' exercise of authority in these areas would be inconsistent with their dependent status. Washington v. Confederated Colville Tribes, 447 U.S. at 153; Merrion v. Jicarilla Apache Tribes, 617 F.2d at 541. Neither court indicated, however, that these are the only areas in which Indian tribes have implicitly or explicitly lost their sovereign regulatory authority. *See* Washington v. Confederated Colville Tribes, 447 U.S. at 153-54; Merrion v. Jicarilla Apache Tribe, 617 F.2d at 541-42.

123. *See* FEDERAL INDIAN LAW, *supra* note 2, at 381-93; May, *supra* note 7, at 517; text & notes 11-72 *supra*.

124. *See, e.g.*, 18 U.S.C. §§ 1154, 1156, 1161, 3113, 3488, 3618 (1976). Several tribes voluntarily relinquished any authority to regulate, or even to permit, liquor transactions within their

has been consistently cited by the federal courts as a primary basis of congressional authority to regulate liquor in Indian country,[125] and finding an inherent tribal authority to regulate liquor transactions would be inconsistent with the tribes' dependent status.[126] Thus, the tribes have been implicitly divested of their sovereign authority to regulate or tax liquor as well.

Finally, the Supreme Court pointedly declined to base its *Mazurie* holding—that Indian tribes have the power to require non-Indians to secure tribal licenses to sell liquor in Indian country—on a theory of inherent tribal sovereignty.[127] It is of course possible that the Court was reluctant to find that a tribe has the inherent power to license non-members whose operations are not on Indian land, one of the facts peculiar to the *Mazurie* case.[128] It is possible, however, that the Court recognized that grounding tribal authority to regulate liquor on the inherent sovereignty theory would be illogical in light of the long history of stringent federal liquor regulation in Indian country.[129] In other words, the *Mazurie* Court could not have based its holding on inherent tribal sovereignty without totally ignoring both the history and the well

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reservations in unambiguous terms in their treaties and agreements with the United States. *See* text & notes 46-47 *supra*.

125. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 548 (1975); United States v. Nice, 241 U.S. 591, 597 (1916); United States v. Sandoval, 231 U.S. 28, 47-48 (1913); FEDERAL INDIAN LAW, *supra* note 2, at 383; text & notes 20-21 *supra*.

126. Indeed, it would be entirely reasonable to argue that the inability of the Indian tribes to regulate or prevent the use of alcoholic beverages by their own members is the foundation upon which the entire federal guardianship relation to the tribes, and thus a major part of federal Indian law generally, was built. The traffic in liquor was regulated before any other aspect of commerce between Indians and non-Indians in American history, *see* text & note 2 *supra*, and Congress acted to regulate the Indian liquor trade almost before considering any other aspect of the contact between Indians and non-Indians. *See* text & notes 3-5, 11-16 *supra*. Furthermore, the entire body of federal law regulating, licensing, and conditioning non-Indian trade with Indian tribes rests upon the perception of the United States that it must stop the flow of liquor to the Indians for their own protection. *See* FEDERAL INDIAN LAW, *supra* note 2, at 380; text & notes 11-13 *supra*. The Indian liquor trade created the *need* for federal protection of the Indians and thus, their dependent status. It would thus be absurd to conclude that the tribes were not at least implicitly divested, by virtue of their status, of the inherent sovereignty to regulate the very item on which their dependency is primarily based. *See* United States v. Sandoval, 321 U.S. 28, 48 (1913) (federal Indian liquor laws apply within the pueblos of New Mexico because Congress intended to protect its Indian wards from the effects of alcoholic beverages).

127. *See* 419 U.S. at 557.

128. *See id.* at 545; text & note 91 *supra*. Title to lands which were at one time set aside by the United States for the use and occupation of Indian tribes has come to rest in non-Indians in two ways. First, the tribes ceded some of their lands to the United States which, in turn, patented these ceded lands to non-Indians. Second, the United States allotted land to individual Indians in fee, *see* text & note 28 *supra*, and they subsequently sold their allotted lands to non-Indians. Such lands and their owners are generally subject to state regulation when they are owned by non-Indians who either purchased their parcels from Indian allottees or were granted their parcels in fee by the federal government, and they are not considered part of Indian country except for application of the federal Indian liquor provisions. *See* United States v. Mazurie, 419 U.S. at 555; Perrin v. United States, 232 U.S. 478, 483-84 (1914); United States v. Dick, 208 U.S. 340, 344-45 (1908).

129. *See* text & note 126 *supra*.

developed current scheme of federal Indian liquor regulation.[130] If the tribes have the power to tax liquor transactions within their reservations, this power must necessarily be grounded on something other than inherent sovereignty.

The *Mazurie* Court found that Congress implicitly delegated to Indian tribes a portion of its own power to regulate liquor transactions within Indian country.[131] The same delegation rationale is insufficient, however, to support tribal taxation of liquor transactions for several reasons. First, implying that Congress delegated its taxing power to a quasi-sovereign entity, such as an Indian tribe,[132] raises serious constitutional questions, particularly where those who would be subject to the tribal taxes are not and may not be represented by the tribes.[133] Furthermore, it is very unlikely that Congress could delegate its taxing authority even in express terms.[134] That Congress either could or would delegate such authority by mere implication is even less likely. Finally, if the language of section 1161 of title 18, United States Code,

130. See text & notes 12-68 *supra*.

131. 419 U.S. at 558 (construing 18 U.S.C. § 1161).

132. Indian tribes are not equivalent to states, *see* Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959), nor are they instrumentalities of the federal government. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150 (1973). *But see* Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965). The Supreme court has found Indian tribes to be "domestic dependent nations," Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), with authority subordinate only to that of the federal government. United States v. Mazurie, 419 U.S. at 558; see text & note 101 *supra*.

133. Indian tribes possess sovereign immunity and are exempt from suit unless congressionally authorized. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512-13 (1940); *see* Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 172-73 (1977). Thus, non-members cannot directly challenge tribal taxes unless they can prove that the tribe has unequivocally waived its sovereign immunity for purposes of such suits. *See* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540-41 (10th Cir. 1980), *cert. granted*, 101 S.Ct. 71 (1981); Salt River Project v. Navajo Tribe, No. Civ. 78-352 (D. Ariz. 1978). The tribal officers responsible for levying or enforcing such taxes are not, however, immune from suit. *See* Santa Clara Pueblo v. Martinez, 436 U.S. at 59; Puyallup Tribe, Inc. v. Washington Dep't. of Game, 433 U.S. at 171-72; Salt River Project v. Navajo Tribe, No. Civ. 78-352 at 5-6.

Historically, the provisions of the United States Constitution have not constrained Indian tribes. Santa Clara Pueblo v. Martinez, 436 U.S. at 71-72; Talton v. Mayes, 163 U.S. 376, 384 (1896); Salt River Project v. Navajo Tribe, No. Civ. 78-352, at 6. Congress has imposed some restrictions on the exercise of tribal authority in the Indian Civil Rights Act, however. 25 U.S.C. §§ 1301-03 (1976). The Act requires tribes to afford procedural due process to those subjected to tribal authority, *id.* § 1302(8), and prohibits Indian tribes from taking property without just compensation. *Id.* § 1302(5). These provisions have been invoked as bases for challenging tribal taxes that have the effect of increasing the fees nonmembers must pay to continue to do business within a given reservation over and above those contracted for in lease and royalty agreements. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 617 F.2d at 540; Salt River Project v. Navajo Tribe, No. Civ. 78-352 at 2, 6-8; Kerr-McGee Corp. v. Navajo Tribe, No. Civ. 79-383M (D. Ariz., filed May 15, 1979). The Indian Civil Rights Act also requires Indian tribes to afford equal protection to those subject to tribal authority. 25 U.S.C. § 1302(8) (1976); *see* Santa Clara Pueblo v. Martinez, 436 U.S. at 51; Dodge v. Nakai, 298 F. Supp. 17, 24-25 (D. Ariz. 1968); Salt River Project v. Navajo Tribe, No. Civ. 78-352 at 7. The Supreme Court has recognized that tribal attempts to regulate liquor transactions involving nonmembers might give rise to such due process and equal protection challenges. United States v. Mazurie, 419 U.S. at 588 n.12.

134. *See* National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 289 n.15 (1978) (expressing the view that Congress must itself exercise its constitutionally derived power to tax).

can be construed as a valid delegation of Congressional power to tax liquor transactions,[135] the same language must logically be construed to delegate the same taxing and regulatory authority to the states,[136] despite the generally accepted limitations on state authority to regulate in Indian country in other substantive areas.[137]

If Indian tribes do not have the inherent authority to tax liquor transactions in Indian country, and if Congress could not delegate this authority to them, there remains only one basis on which tribal power to tax liquor sales involving nonmembers can be sustained. Federal courts have recognized that Indian tribes have the power to exclude nonmembers from their reservations and to establish the terms under which nonmembers may enter and do business therein.[138] Under this rationale, the tribes can require nonmembers to pay tribal liquor taxes as a condition of doing business on tribal lands.[139] Tribal taxation under this theory, however, can be challenged. Tribal taxes, the burden of which falls solely on nonmembers, may be subject to attack under the equal protection clauses in both the fifth amendment and the Indian Civil Rights Act.[140] Such tribal taxes may also be subject to due process challenges insofar as they constitute taxation without representation.[141] Finally, tribal attempts to enforce such taxes by excluding nonmembers who refuse to pay raise taking without just compensation issues when these nonmembers either own their lands in fee within reservation boundaries or have longterm leases of tribal land.[142]

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135. United States v. Mazurie, 419 U.S. at 557-59.

136. *See* text & notes 216, 255 *infra*. *But see* United States v. New Mexico, 590 F.2d 323, 328-29 (10th Cir. 1978).

137. *See* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976) (states have no authority to require tribal cigarette vendors to secure state licenses); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 173-75 (1973) (state tax on the income of reservation Navajos derived within the reservation has been federally preempted); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 687, 689 (1965) (state tax on gross income of federally licensed Indian trader preempted by federal scheme of regulation of such traders); Williams v. Lee, 358 U.S. 217, 220 (1959) (state may not assert jurisdiction in Indian country where such assertion would infringe on tribe's authority to make its own laws and be governed by them); text & notes 235-37 *infra*.

138. *See, e.g.*, Morris v. Hitchcock, 194 U.S. 384, 389 (1904); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 544 (10th Cir. 1978), *cert. granted*, 101 S.Ct. 71 (1981); Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See also* Salt River Project v. Navajo Tribe, No. Civ. 78-352 (D. Ariz. 1978); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 142 (N.M. ed. 1942).

139. *See* Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 544-45 (10th Cir. 1978), *cert. granted*, 101 S.Ct. 71 (1981); Salt River Project v. Navajo Tribe, No. Civ. 78-352, 15 (D. Ariz. 1978); Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 LAW & CONTEMP. PROB. 166, 177 (1966).

140. 25 U.S.C. § 1301-03 (1976); *see* Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 940-44 (D. Wyo. 1976). *See also* United States v. Mazurie, 419 U.S. 544, 556 n.12 (1975). *But cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (rejecting claim that provisions of Indian Civil Rights Act give rise to implied remedy of declaratory or injunctive relief in federal court, holding that only federal relief available under ICRA is habeas corpus).

141. *See* United States v. Mazurie, 419 U.S. at 558 n.12; Salt River Project v. Navajo Tribe, No. Civ. 78-352, 8-13 (D. Ariz. 1978).

142. *See* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 684-85 (10th Cir. 1980); Salt River Project v. Navajo Tribe, No. Civ. 78-352, 6-7; text & note 102 *supra*.

In summary, any attempt by an Indian tribe to tax nonmembers who are involved in liquor transactions within Indian country may be challenged on any of several bases, regardless of the rationale behind such tribal taxes. The validity of such taxes may depend on whether the legal incidence of the tax falls on the buyer or the seller,[143] whether the tax is applied in a discriminatory manner,[144] and whether the person on whom the tax burden falls is doing business on tribal land or land owned in fee.[145]

Even assuming that Indian tribes possess, in addition to their liquor licensing authority,[146] the authority to collect from nonmembers gross receipts or sales taxes on liquor sold within the exterior boundaries of their reservations, the tribes have no jurisdiction to fine or otherwise punish non-Indians who refuse to pay the tribal taxes or to secure tribal licenses.[147] The tribes must rely upon federal officers to enforce such provisions.[148] This cumbersome scheme, under which federal officers are responsible for enforcing tribal and possibly state liquor laws,[149] has already been criticized as unworkable.[150]

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143. See text & note 109 *supra*.

144. See text & notes 140-41 *supra*.

145. See text & notes 127-28 *supra*.

146. *See* United States v. Mazurie, 419 U.S. 544, 558 (1975); text & notes 94-107 *supra*.

147. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 208 (1978) (Indian tribes do not have jurisdiction to try non-Indians for crimes committed within reservation "absent affirmative delegation of such power by Congress"); Clinton, *supra* note 7, at 557-58.

148. *E.g.*, United States v. Mazurie, 419 U.S. 544, 557-58 (1975); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 940 (D. Wyo. 1976); FEDERAL INDIAN LAW, *supra* note 2, at 382-83. *But cf.* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 498-99 (1946) (affirming state court conviction of non-Indian for murder of another non-Indian within a reservation, rejecting claim that jurisdiction was properly in federal courts under 18 U.S.C. § 1152); Draper v. United States, 164 U.S. 240, 242-43 (1896) (holding that states have exclusive jurisdiction to try non-Indians for crimes committed against non-Indians in Indian country); United States v. McBratney, 104 U.S. 621, 624 (1881) (holding that federal court had no jurisdiction to try non-Indian for murder of non-Indian within Indian reservation); Clinton, *supra* note 7, at 524-27 (noting that the "*McBratney* trilogy" and the intra-Indian crimes exclusion in 18 U.S.C. § 1152 limit federal jurisdiction to interracial crimes within Indian country). Under the terms of 18 U.S.C. § 1161, the introduction, sale, consumption or possession of liquor within Indian country in a manner inconsistent with a tribal ordinance will expose those involved in the transaction to a federal prosecution because such transactions violate express federal law, *see* 18 U.S.C. §§ 1154, 1156, 1161 (1976), and, therefore, transactions involving only non-Indians probably do not fall within the *McBratney* exception to federal jurisdiction.

149. *See* text & notes 206-20 *infra*.

150. *See* Petitioner's Brief for Certiorari at 11-15, 18-19, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978) (noting that the decision of the circuit court leaves application of state liquor laws to the United States Attorneys with no guarantee that they will attach the same importance to enforcing them that the state would and arguing that the decision will require them to assume the role of the state liquor director in enforcing state liquor laws as to non-Indians within reservation boundaries). *See also* Comment, *Oliphant—The Aftermath*, 5 AM. INDIAN L. J. 11, 18-20 (1979) (noting that the *Oliphant* decision has had several negative consequences for tribal law enforcement efforts since tribal officers cannot assert their authority over non-Indians within reservation boundaries); AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE FOUR: FINAL REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 42-43 (Comm. Print 1976) [hereinafter *Report on Jurisdiction*] (noting that the United States Attorney's offices have no standards to determine which cases will be prosecuted, that exclusion of federal and tribal jurisdiction over crimes between non-Indians has disrupted law enforcement within Indian reservations, and

The Application of State Liquor Laws Within Indian Country

This section will analyze, in light of recent case law, state civil jurisdiction to license and tax Indian and non-Indian liquor transactions within Indian country, state criminal jurisdiction to enforce state liquor laws, and alternative arrangements through which either tribal or federal authorities may enforce state liquor laws notwithstanding the inability of the states to enforce these laws directly.

As a general rule, the states retain jurisdiction over non-Indians who transact business within Indian country.[151] Non-Indians have, for example, been held liable for state gross production and excise taxes on oil produced within Indian country,[152] real estate taxes on the transfer of certain restricted property from an Indian,[153] state severance taxes on coal mined on Indian land,[154] and state possessory interest taxes assessed upon leaseholds of Indian land.[155] There are, however, exceptions to this general rule.

In a series of decisions during the past twenty years, the Supreme Court has held inapplicable several state taxes on non-Indian activities within Indian country. In *Warren Trading Post v. Arizona Tax Commission*,[156] the Court held inapplicable a state transactions privilege tax on the gross income of a federally licensed Indian trader derived from the sale of goods within the Navajo Reservation.[157] The Court held that Congress had occupied the field of regulation of Indian traders within Indian country and had thus preempted the states' authority to impose additional burdens upon such traders.[158] The Court noted that the challenged Arizona tax would impose a financial burden upon the trader's Indian customers as well but did not base its decision upon this

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that the application of state laws relating to consensual crimes to Indians within Indian country permits the states to indirectly impose their moral standards upon the tribes); United States v. Mazurie, 419 U.S. at 553 n. 10 (noting testimony of the defendant to the effect that when he had trouble in his bar, he would call the county sheriff if the troublemaker was a non-Indian and tribal police if the problem was caused by an Indian).

151. FEDERAL INDIAN LAW, *supra* note 2, at 513-14; *see* United States v. McGowan, 302 U.S. 535, 539 (1938).

152. *See* Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 355 (1949); British-American Oil Producing Co. v. Board of Equalization, 54 P.2d 129, 133-34 (Mont.), *aff'd*, 299 U.S. 159 (1936); 25 U.S.C. §§ 398, 398c (1976). *See also* Helvering v. Producers Corp., 303 U.S. 376, 383-84 (1938). *But see* Gillespie v. Oklahoma, 257 U.S. 501, 505-06 (1922).

153. *See* Choctaw, O. & G.R.R. v. Mackey, 256 U.S. 531, 538 (1921); Utah & N. Ry. v. Fisher, 116 U.S. 28, 31-32 (1885); FEDERAL INDIAN LAW, *supra* note 2, at 853 ("When the lands pass from the tribe to non-Indians they become, ordinarily, subject to State taxation").

154. Crow Tribe v. Montana, 469 F. Supp. 154, 162 (1979); *see* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 510-11 (1975).

155. Fort Mohave Tribe v. County of San Bernadino, 543 F.2d 1253, 1256 (9th Cir. 1976); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971). *But see* Navajo County v. Peabody Coal Co., 23 Ariz. App. 101, 103, 530 P.2d 1134, 1136, *rehearing denied*, 23 Ariz. App. 259, 532 P.2d 201 (1975).

156. 380 U.S. 685 (1965).

157. *Id.* at 691-92.

158. *Id.* at 690-92 & n.18.

fact alone.[159]

The Court subsequently extended the state tax exemption it created in *Warren* for federally licensed traders to traders who are not federally licensed to do business in Indian country in *Central Machinery Co. v. Arizona Tax Commission*.[160] Central Machinery was not licensed to trade in Indian country,[161] the Arizona tax was levied upon a single sale transaction,[162] and the company did not maintain a regular place of business of business within the reservation[163]—all bases on which the Court might have distinguished *Warren*.[164] The Court chose not to rely upon these distinguishing facts, however, reasoning that it is not the administration of the federal trader licensing provisions but their mere existence that preempts such state taxes.[165]

Finally, the Supreme Court, in *White Mountain Apache Tribe v. Bracker*,[166] held inapplicable both a motor carrier license tax and a fuel use tax which Arizona sought to impose upon a non-Indian logging company engaged in hauling timber under a contract with a tribal enterprise.[167] Under the contract, the logging company operated solely and continuously upon an Indian reservation.[168] The Court held, relying upon *Warren*, that the scheme of federal regulation of timber harvesting and logging on Indian reservations is "so pervasive as to preclude the additional burdens" that the state sought to impose through the challenged taxes.[169]

The Supreme Court based the state tax exemptions in *Warren, Central Machinery*, and *White Mountain Apache Tribe* upon a federal preemption rationale. None of the three holdings stands for the proposition that a state may not impose a tax upon a non-Indian business activity within Indian country that will cast an economic burden upon

159. *See id.* at 691.

160. 448 U.S. 160, 165-66 (1980). *See generally* Comment, *Tribal Sovereignty and the States' Power to Tax Indians*, 22 ARIZ. L. REV. 249 (1980).

161. 448 U.S. at 164.

162. *See id.* at 169 (Stewart, J., dissenting).

163. *Id.* at 164.

164. The *Central Machinery* majority noted only two distinguishing features in the following language: "There are only two distinctions between Warren Trading Post . . . and the present case: appellant is not a licensed Indian trader, and it does not have a permanent place of business on the reservation." *Id.* at 164. The majority dismissed as irrelevant the states' claims that the sale involved was to a tribal enterprise and not directly to the tribe, *id.* at 164 n.3, and that the tax at issue fell upon the seller, not the tribal buyer. *Id.* The dissenters noted that "Even were the appellant administratively required to possess a [federal] license, taxation of an isolated sale by it to the Indians simply would not jeopardize those federal and tribal interests involved in the thorough regulation of on-reservation merchants trading continuously with the Indians—the situation dealt with in Warren. . . ." *Id.* at 169 (Stewart, J., dissenting, joined by Justices Powell, Rehnquist, and Stevens).

165. *Id.* at 165.

166. 448 U.S. 136 (1980).

167. *Id.* at 137-38.

168. *Id.* at 138.

169. *Id.* at 148.

an Indian tribe or its members.[170] Indeed, the Court has sustained in several cases state taxes on transactions that indirectly imposed a financial burden upon the Indians. The Court has, for example, held that a state may require on-reservation cigarette vendors to prepay state cigarette taxes on sales to non-Indians.[171] It has also held that states may require such vendors to keep detailed records of sales to non-Indians to facilitate later state tax collection efforts.[172]

Applying the principles set forth above to liquor sales within Indian country, it seems likely that the various states may collect taxes on liquor sales by either Indians or non-Indians to non-Indians. It seems equally likely, however, that attempts by a state to tax liquor sold to Indians within Indian lands will be prohibited whether the seller is an Indian or not.[173]

State authority to require licensing of persons who wish to sell or dispense liquor,[174] to strictly control the number of such licenses which will be issued,[175] and to control the activities of licensees has been frequently challenged on constitutional grounds.[176] Courts have generally rejected such challenges by holding that citizens do not have a right to sell liquor, but a mere privilege which may be extended or denied by

170. *See* Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160, 169 (1980) (Stewart, J., dissenting) ("The Court has on more than one occasion sustained state taxation of transactions occurring on Indian reservations, notwithstanding the fact that the economic burden of the tax fell indirectly on the Indian tribe or its members"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 159 (1980) (Stevens, J., dissenting) ("As a general rule, a tax is not invalid simply because a non-exempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. . . ."); Washington v. Confederated Colville Tribes, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481 & n.17 (1976) ("The Tribe would carry these cases [McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)] significantly further than we have done. . . and urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because '. . . [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss.' ").

171. *See* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).

172. *See* Washington v. Confederated Colville Tribes, 447 U.S. 134, 159-60 (1980).

173. *See id.* at 163-64 (state may not impose excise taxes for privilege of using a motor vehicle, camper, or mobile home on tribal members' on-reservation use of such vehicles); Moe v. Salish & Kootenai Tribes, 425 U.S. at 479-81 (state may not tax personal property of Indians located within reservation and may not impose sales tax on cigarette sales on-reservation to Indians); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690-91 (1965) (state may not collect tax on gross receipts of licensed Indian trader derived from sales of goods to Indians within reservation).

174. *See, e.g.*, Arizona Liquor Bd. v. Poulos, 112 Ariz. 119, 121, 538 P.2d 393, 395 (1975); Mr. Lucky's, Inc. v. Dolan, 591 P.2d 1021, 1022 (Colo. 1979); Adams v. Department of Law Enforcement, 99 Idaho 255, 256-57, 580 P.2d 858, 859-60 (1978); Brown Distrib. Co., Inc. v. Oklahoma Alcoholic Beverage Control Bd., 597 P.2d 324, 326 (Okla. 1979).

175. *See, e.g.*, Chee Lee v. Superior Court, 81 Ariz. 142, 145, 302 P.2d 529, 532 (1956); Jennings v. Hoskinson, 152 Colo. 276, 278, 382 P.2d 807, 808-09 (1963); Crazy Horse, Inc. v. Pearce, 98 Idaho 762, 764-65, 572 P.2d 865, 867-68 (1977); Demos v. Board of County Comm'rs, 571 P.2d 980, 981 (Wyo. 1977).

176. *See, e.g.*, California v. LaRue, 409 U.S. 109, 113 (1972); Hooper v. Duncan, 95 Ariz. 305, 308, 389 P.2d 706, 707-08, *appeal dismissed*, 379 U.S. 27 (1964); Kochendorfer v. Board of County Comm'rs, 566 P.2d 1131, 1134 (Nev. 1977).

the states in the exercise of their authority to regulate intrastate liquor transactions.[177] State attempts to require Indian tribes to secure state liquor licenses as a prerequisite to tribal sales have not, however, met with such judicial deference.[178]

In *United States v. New Mexico*,[179] the United States Court of Appeals for the Tenth Circuit squarely considered state authority to require a tribe to secure a state license to sell or dispense liquor within an Indian reservation.[180] The court held that Congress did not, when it enacted 18 U.S.C. § 1161,[181] expressly or impliedly authorize the states to regulate tribal liquor transactions within Indian country.[182] The Tenth Circuit also rejected New Mexico's contention that the twenty-first amendment authorized the states to license Indian liquor sales.[183] Finally, the court affirmed, without modification, the order of the district court enjoining New Mexico officials from entering the Mescalero Apache Reservation to enforce state laws relating to the licensing and regulation of liquor sales and enjoining the state from prohibiting off-reservation liquor wholesalers from selling to unlicensed tribal outlets.[184]

The decision of the Tenth Circuit in *United States v. New Mexico* was arguably wrong in several respects. First, the court ran together the distinct § 1161 and twenty-first amendment questions raised by the state and by doing so neglected to answer the first question clearly.[185] Furthermore, the authority of the states to enforce their liquor laws within Indian country, blithely rejected by the court,[186] is at least debatable. Finally, the injunction issued by the district court was overbroad and infringes on the clearly established authority of the state to enforce its liquor laws outside Indian country.[187] The validity of the injunction will be addressed first.

The order of the district court, insofar as it enjoined the State of New Mexico from acting to prevent liquor wholesalers outside the

177. *See, e.g.*, Arizona State Liquor Bd. v. Poulos, 112 Ariz. 119, 121, 538 P.2d 393, 395 (1975); State v. Meyers, 85 Idaho 129, 133, 376 P.2d 710, 711 (1962); Brown Distrib. Co., Inc. v. Oklahoma Alcoholic Beverage Control Bd., 597 P.2d 324, 326 (Okla. 1979); Marcus v. State *ex rel.* Alcoholic Beverage Control Bd., 411 P.2d 539, 541 (Okla. 1966).

178. *See generally*, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); Rehner v. Rice, No. Civ. 77-2409 (9th Cir. 1978).

179. 590 F.2d 323 (10th Cir. 1978).

180. *Id.* at 325.

181. Pub. L. No. 83-277, § 2, 67 Stat. 586 (current version at 18 U.S.C. § 1161 (1976)); see text & notes 7-9, 66-68 *supra*.

182. United States v. New Mexico, 590 F.2d at 328-29.

183. *Id.* at 329.

184. *Id.* at 326, 329.

185. *See id.* at 326; text & notes 214-17 *infra*.

186. *See* United States v. New Mexico, 590 F.2d at 328-29.

187. See text & notes 189-92 *infra*.

Mescalero Reservation from selling to unlicensed tribal retailers,[188] was in error. The twenty-first amendment placed the power to regulate intrastate liquor transactions clearly in the hands of the states.[189] Consistent with this constitutional grant of authority, Congress has prohibited the mere introduction of alcoholic beverages into a state with an intention to evade state liquor laws.[190] New Mexico law prohibits a licensed wholesaler from selling liquor to anyone who does not have a state retail or dispenser's license.[191] Thus, a wholesaler who sells to an unlicensed tribal outlet is in violation of both state and federal law.[192]

The United States Supreme Court has considered, on more than one occasion, the scope of state power to regulate commerce in alcoholic beverages under the twenty-first amendment.[193] The Court has indicated that the amendment was intended to free the states from traditional commerce clause limitations upon their regulatory authority[194] subject to the authority of the federal government to regulate interstate commerce and to manage federal lands.[195] For example, the Court has held that state authority to regulate liquor under the twenty-first amendment does not extend to exclusive federal enclaves.[196] The Court has also held that the twenty-first amendment does not authorize the states to prevent altogether the importation of liquor into federal

188. *See* 590 F.2d at 326.

189. U.S. CONST. amend XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"); *see* California v. LaRue, 409 U.S. 109, 114-15 (1972); Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964) ("A state is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders"); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936).

190. *See* 27 U.S.C. § 122 (1976). The provision that made such illegal importation into a state a federal crime, 27 U.S.C. § 123, was repealed in 1936. *See* Act of June 25, 1936, ch. 815, § 9, 45 Stat. 1930.

Section 122 was intended by Congress to free the states from some of the traditional commerce clause limitations on state power. *See* Georgia v. Wenger, 187 F.2d 285, 287 (7th Cir.), *cert. denied*, 342 U.S. 822 (1950); Dugan v. Bridges, 16 F. Supp. 694, 707 (D.N.H. 1936), *appeal dismissed*, 300 U.S. 684 (1938).

191. N.M. STAT. ANN. § 60-7-5 (1978).

192. *See* 27 U.S.C. § 122 (1976); N.M. STAT. ANN. § 60-10-2 (1978).

193. *See generally* United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1975); California v. LaRue, 409 U.S. 109 (1972); James B. Beam Distilling Co. v. Department of Revenue, 377 U.S. 341 (1963); Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938); cases cited note 189 *supra*.

194. United States v. Mississippi Tax Comm'n, 412 U.S. 363, 375 (1975); Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964).

195. *See* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 375 (19795) (indicating that the twenty-first amendment does not empower the states to tax, license, or otherwise regulate the importation or sale of liquor within federal enclaves over which the United States exercises exclusive jurisdiction); Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 385 (1944) (state has no power to regulate liquor imported into a federal military installation); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 527-30 (1938) (California Alcoholic Beverage Control Act is inapplicable to concessionaire operating under contract with Secretary of the Interior within the park).

196. *See* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 377-78 (1975); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938).

enclaves from sources outside state boundaries.[197] The Court based these holdings on the theory that the supply of liquor over which the respective states attempted to assert regulatory authority never came to rest within their boundaries and was therefore not "imported into the state[s] for delivery or use therein."[198]

The Supreme Court decisions alluded to above—*United States v. Mississippi Tax Commission*,[199] *Collins v. Yosemite Park & Curry Co.*,[200] and *Johnson v. Yellow Cab Transit Co.*[201]—lend support to the Tenth Circuit's final holding in *United States v. New Mexico* that the twenty-first amendment does not authorize the states to regulate on-reservation tribal liquor sales.[202] These decisions, however, also lend support for the argument of the state of New Mexico that the district court's injunction was too broad.[203] Under the theory on which *Mississippi Tax Commission, Collins*, and *Yellow Cab* were decided, once the liquor that eventually reached the Mescalero outlets came to rest in the general stocks of New Mexico liquor wholesalers, it became subject to the state's regulatory authority under the twenty-first amendment.[204] Thus, the state did, indeed, have the constitutional power to prohibit off-reservation wholesalers from selling to unlicensed tribal retailers, and the appeals court should have modified the injunction.[205] Further,

197. *See* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 385-87 (1944). *See also* James B. Beam Distilling Co. v. Department of Revenue, 377 U.S. 341, 343 (1963) (state tax on liquor imported into state from foreign country unconstitutional because in violation of import-export clause).

198. U.S. CONST. amend. XXI; *see* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 378 (1975); Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386 (1944); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938).

199. 412 U.S. 363 (1973).

200. 304 U.S. 518 (1938).

201. 321 U.S. 383 (1944).

202. United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978). An Indian reservation is not, however, an exclusive federal enclave in the sense that state law and state enforcement jurisdiction stop at the reservation boundary. *Cf.* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 378 (1973) (the federal military installations into which the liquor was imported "are to Mississippi as the territory of one of her sister states or a foreign land"). The states have, at minimum, the power to regulate and tax the activities of non-Indians within reservation boundaries, see text & notes 151-55 *supra*, and some states have been granted the authority by Congress to assert civil and/or criminal jurisdiction over Indians within Indian country. *See* 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976). *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535-75 (1975). Congress has also provided for states to assume civil and/or criminal jurisdiction over Indian reservations within their boundaries with the consent of the tribes that will be affected. *See* 25 U.S.C. §§ 1321-1326 (1976).

203. *See* Petitioner's Brief for Certiorari at 19-20, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978) (asserting that the state has at least the power to regulate sales by licensed wholesalers to the tribe off the reservation).

204. *See* text & note 201 *supra*. *See also* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 377 (1973); Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 333 (1964).

205. *But see* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386 (1944) (state may not prohibit importation of liquor, purchased outside state's boundaries, through its territory into an exclusive federal enclave). *Yellow Cab* is distinguishable on two grounds. First, the liquor seized by Oklahoma officers in *Yellow Cab* was ordered and purchased from a liquor retailer in another state, Illinois, *see id.* at 388, and transported directly from Illinois to Fort Sill within Oklahoma. *See id.* at 384, 388. Thus, the liquor at issue never came to rest within the portion of Oklahoma

the court of appeals apparently missed the significance of the distinction between the § 1161 and twenty-first amendment questions raised by the state and ran them together. The first question was whether Congress, in section 1161, made state laws relating to the licensing and regulation of alcohol applicable to tribal liquor outlets within Indian country.[206] The second question was whether Congress authorized the states to enforce state liquor laws on Indian tribes within Indian country.[207] The court noted that "the second question is a slightly different version" of the first.[208] Considering these questions in conjunction with the language of 18 U.S.C. § 1161,[209] however, crystallizes the distinction.

The Tenth Circuit relied upon the decision of the Supreme Court in *United States v. Mazurie*[210] as "virtually decid[ing]" the applicability of state liquor laws to tribes within Indian country and the authority of the states to enforce such laws.[211] Recall that the *Mazurie* Court held that Congress had delegated a portion of its authority to regulate liquor traffic in Indian country to the tribes.[212] But even if Congress did not, as the Tenth Circuit concluded, intend to delegate a similar portion of its regulatory authority to the states,[213] the language of section 1161 is evidence of Congress' intent to make state law applicable to liquor transactions within Indian country no matter who is involved in them.[214]

Section 1161 creates a safe harbor from the reach of the federal Indian prohibition statutes for acts or transactions in accordance with both state *and* tribal law.[215] Arguably, if Congress had intended for state liquor laws to have no effect upon liquor transactions within In-

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over which state authorities had jurisdiction. *Id.* at 386. Second, Oklahoma had no authority to enforce its liquor laws as to anyone involved in liquor transactions within the boundaries of Fort Sill, *i.e.*, federal jurisdiction was exclusive, *see id.* at 386-87, nor could Oklahoma enforce its liquor laws in Illinois where the sale occurred. *See id.* at 388.

The tribe involved in *United States v. New Mexico*, however, made its purchases from off-reservation wholesalers who are subject to state regulation, *see* Petitioner's Brief for Certiorari at 19-20, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), and New Mexico's laws do, indeed, apply to non-Indians who might sell, purchase, or consume the liquor within the Mescalero Reservation. *See id.*; text & notes 151-55 *supra*. Furthermore, the United States Supreme Court has held that Indian tribes are themselves subject to non-discriminatory state laws when they do business outside Indian country. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). It is indeed difficult to see how the Tenth Circuit can immunize the non-Indian liquor wholesalers from state law when not even the tribal buyers would be immune.

206. United States v. New Mexico, 590 F.2d at 326.
207. *Id.*
208. *Id.*
209. *See* 18 U.S.C. § 1161 (1976).
210. 419 U.S. 544 (1975).
211. *See* United States v. New Mexico, 590 F.2d at 326.
212. *See* United States v. Mazurie, 419 U.S. at 557-58; text & notes 100-02 *supra*.
213. 590 F.2d at 328-29.
214. *See* note 217 *infra*.
215. 18 U.S.C. § 1161 (1976); *see* FEDERAL INDIAN LAW, *supra* note 2, at 390. *Cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962) ("the sale of liquor on reservations has been

dian country, it would not have mentioned them in section 1161.[216] On the contrary, the legislative history surrounding the enactment of 18 U.S.C. § 1161 makes clear that the language Congress employed was intentional.[217] At the time section 1161 was adopted, no tribe had in

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permitted *subject to state law*, or consent of the tribe itself" (emphasis added)). See text & notes 8, 9, 67, 102 *supra*.

216. The Tenth Circuit underestimated the application of state law to Indian country when it stated, "[T]he cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes." United States v. New Mexico, 590 F.2d at 328. The Supreme Court has expressly rejected this rigid limitation on state regulatory authority. *See* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171 (1973) ("notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians"). After *McClanahan*, a state may arguably assert its regulatory authority within Indian country unless federally preempted from doing so or unless the state exercise of authority would "infringe on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959); *see* McClanahan v. Arizona Tax Comm'n, 411 U.S. at 171-73. Furthermore, the Supreme Court has quite recently held that tribal exercise of regulatory or taxing authority in a particular field does not preempt state regulation or taxation in the same field, Washington v. Confederated Colville Tribes, 447 U.S. 134, 158-59 (1980), and that the states may collect state taxes on tribal sales to non-Indians within Indian country and may require the tribal sellers to cooperate in collecting such taxes. *Id.* at 159-60.

The Tenth Circuit also indicated, in *United States v. New Mexico*, that Congress may delegate to the states the authority to regulate liquor transactions within Indian country but must delegate this authority in express terms. 590 F.2d at 328. If Congress had not intended for state liquor laws to apply within Indian country, it need only have drawn 18 U.S.C. § 1161 to make legal liquor transactions within Indian country that are in conformity with the law of the tribe having jurisdiction. Congress instead required the transaction to also conform to the law of the state where the reservation is located. This is of course not the same as delegating to the states the authority to enforce state liquor laws, but the Supreme Court's holding in *Mazurie* solves this delegation issue. If, as the Court held, Congress delegated to the tribes the authority to regulate all liquor transactions within Indian country in 18 U.S.C. § 1161, *see* United States v. Mazurie, 419 U.S. 544, 558 (1975), then in the same words on which the Court relied for its holding, Congress must also have delegated this regulatory authority to the states. To hold that Congress intended to delegate its regulatory authority to the tribes alone in the phrase "*in conformity both with* the laws of the state . . . and with an ordinance . . . adopted by the tribe . . . ." 18 U.S.C. § 1161 (1976) (emphasis added), is to totally ignore the plain language of the statute and to imply that Congress intended to limit the regulatory authority of the states while increasing that of the tribes. *See* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 177 n.16 (1973).

217. The original version of section 1161 introduced in the House of Representatives provided as follows:

> Sec. 2 That the said Federal laws discriminating against Indians shall not hereafter apply to any act or transaction within the State of Arizona outside an Indian reservation which is in conformity with the laws of Arizona.
>
> Sec. 3. That the said Federal laws discriminating against Indians shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation.

H.R. 1055, §§ 2.3.83d Cong., 1st Sess. (1953). Section 4 of the proposed bill would have given the state of Arizona federal consent to change the Indian prohibition provision in its constitution. *Id.* § 4. See text & note 51 *supra*. Section 5 of the bill imposed on the Secretary of the Interior the duty to publish legalization ordinances adopted by Arizona tribes in the federal register. *See* H.R. 1055, § 5, 83d Cong., 1st Sess. (1953).

The bill that was finally passed by both houses of Congress was a substitute submitted by the Interior Department, *see* Petitioner's Brief for Certiorari at 13 n.6, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), and was substantially different from the original version. The adopted version provided that:

> Sec. 2. Title 18, United States Code, is hereby further amended by inserting in chapter 53 thereof immediately after section 1160 a new section, to be designated as section 1161, as follows:
>
> § 1161. Application of Indian liquor laws.
>
> 'The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not

effect laws regulating alcoholic beverages, nor could the tribes have enacted such ordinances without violating federal law or the terms in their respective treaties or both.[218] Furthermore, there did not exist then and still does not exist a body of federal liquor law to regulate alcoholic beverage transactions within Indian country.[219] In light of these circumstances, it seems entirely reasonable to conclude that Congress intended to assimilate the only well-developed bodies of liquor regulation provisions—those of the states.[220]

The logic behind Congressional assimilation of state laws regulating liquor is clear. In the first place, state law was the only law existing against which federal law enforcement offices could test the legality of a given liquor-related transaction or occurrence in Indian country. State law is still the only substantive law these officers can refer to

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apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.'

Act of August 15, 1953, Pub. L. No. 83-277 § 2, 67 Stat. 586. Thus, it is clear from the differences between the original bill and the version finally adopted that Congress purposely broadened the original bill to cover Indians throughout the United States and made both state and tribal law the benchmarks against which the legality of a given on-reservation liquor transaction would be measured.

218. See text & notes 46-47 *supra*.

219. The Assimilative Crimes Act might, however, use state substantive law to create this missing body of federal liquor regulations. The Assimilative Crimes Act, 18 U.S.C. § 13 (1976), was adopted by Congress in 1948 to fill gaps in the federal criminal code applicable to federal reservations by using state law. United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979); United States v. Marcyes, 557 F.2d 1361, 1365 (9th Cir. 197); Clinton, *supra* note 7, at 533. This adoption of state law takes place only if no federal provision covers the same crime. United States v. Brown, 608 F.2d at 553; United States v. Marcyes, 557 F.2d at 1364. The Act is among the "general laws of the United States" which are applicable to Indian country through the General Crimes Act, 18 U.S.C. § 1152 (1976). Clinton, *supra* note 7, at 533-35. *See generally* Williams v. United States, 327 U.S. 711 (1946). Thus, where there is no federal penal provision covering a particular act within Indian country, state substantive law has been assimilated into the federal criminal code and made applicable to Indian country in a federal prosecution. *See, e.g.* Williams v. United States, 327 U.S. at 718-20; United States v. Marcyes, 557 F.2d at 1364-65; United States v. Sosseur, 181 F.2d 873, 875 (7th Cir. 1950); Clinton, *supra* note 7, at 536. The Supreme Court considered applying the Assimilative Crimes Act to make a liquor transaction within a federal enclave, which would have been criminal if it had occurred outside the enclave, a federal crime. *See* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 388-390 (1944). The Court declined to apply the Act but did not foreclose its use to make state liquor laws applicable within federal enclaves. *Id.* at 389-90.

Applying the foregoing to the present issue, it seems clear that state liquor laws would have been applicable within Indian country if Congress had chosen to repeal federal Indian prohibition altogether. The second paragraph of the General Crimes Act, 18 U.S.C. § 1152, however, states that the general criminal laws of the United States will not apply to purely intra-Indian crimes, *see* Acunia v. United States, 404 F.2d 140, 141 (9th Cir. 1968); Clinton, *supra* note 7, at 29-32. Furthermore, the Assimilative Crimes Act is arguably inapplicable to illegal liquor transactions between Indians or between Indians and non-Indians within Indian country because there is no identifiable victim in such a consensual crime to trigger the General Crimes Act, the basis for application of the Assimilative Crimes Act. *See* Clinton, *supra* note 7, at 535-36.

220. *See* note 219 *supra*. Congress might well have determined in 1953 that it must assimilate state liquor provisions directly or leave a complete regulatory vacuum in Indian country in this subject area. Congress arguably determined that using state law to measure the legality of liquor transactions in Indian country was a wiser alternative than either using no law at all or relying upon the circuitous Assimilative Crimes Act-General Crimes Act route. See note 219 *supra*.

when the tribe with jurisdiction over a particular reservation has not enacted a comprehensive set of ordinances to cover every aspect of the alcoholic beverage trade.[221] In fact, many tribal legalization ordinances, including the one adopted by the Mescalero Apache Tribe, expressly refer to state law as the benchmark against which the legality of on-reservation liquor transactions are to be measured.[222] Furthermore, it seems inconceivable that Congress would substitute a regulatory vacuum for more than 150 years of total prohibition,[223] particularly in light of its dissatisfaction with federal efforts to stifle bootlegging and enforce the prohibition provisions.[224] Finally, it is reasonable to assume that Congress intended to promote uniformity in liquor regulatory standards within each state.[225] The implicit conclusion of the court of appeals in *United States v. New Mexico*, that state liquor laws are inapplicable to Indian tribes within their reservations,[226] leaves open the possibility that there may exist as many as twenty-six different sets of tribal liquor laws within the state of New Mexico alone.[227] This conclusion also leaves gaps in the tribal regulatory scheme and makes the job of enforcing the federal Indian liquor provisions more difficult.[228] Congress surely did not intend this disuniformity and these un-

221. Most tribes have adopted simple ordinances legalizing the introduction, possession, and consumption of liquor within their reservations. *See* May, *supra* note 7, at 218; Petitioner's Brief for Certiorari, Appendix H, at 28a-32a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); text & notes 76-79 *supra*. A few tribes have adopted ordinances legalizing the sale of alcoholic beverages within their reservations, but only a handful of these ordinances specify hours of sale, conditions of sale, etc. *See* May, *supra* note 7, at 218, 224-27; Petitioner's Brief for Certiorari, Appendix H. at 28a-32a, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); text & note 77 *supra*. On the other hand, the states have enacted comprehensive schemes to regulate virtually every phase of alcohol traffic. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 521-22 (1938); Axion Export Co. v. Cook, 318 F. Supp. 1076, 1078 (S.D. Ohio 1970). *See generally*, ARIZ. REV. STAT. ANN. §§ 4-101 through 253 (1956 & Supp. 1980-81): CAL. BUS. & PROF. CODE § 23000 *et seq.* (West 1964 & Supp. 1981); MONT. REV. CODES ANN. § 16-1-101 *et seq.* (1979); TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* (Vernon 1978 & Supp. 1980); WASH. REV. CODE § 66.04.010 *et seq.* (1962 & Supp. 1981).

222. Mescalero Apache Tribal Ordinance No. 15, 30 Fed. Reg. 3553, § 1 (1965) (legalizing the introduction, sale and possession of liquor within the jurisdiction of the tribe "*Provided*, that such introduction, sale and possession is in conformity with the laws of the state of New Mexico. . . ."); see text & note 83 *supra*.

223. See text & notes 5, 6, 11-68 *supra*.

224. *See* May, *supra* note 7, at 217. *See also* FEDERAL INDIAN LAW, *supra* note 2, at 392-93 (discussing enforcement of federal Indian Prohibition by the Office of Indian Affairs).

225. *Cf.* United States v. Marcyes, 557 F.2d 1361, 1365 (9th Cir. 1977) (Congress intended, when it enacted the Assimilative Crimes Act, 18 U.S.C. § 13 (1976), to make state prohibitory laws covering conduct not specifically covered by federal statute uniformly applicable throughout the state); United States v. Best, 573 F.2d 1095, 1099 (9th Cir. 1978) (the Assimilative Crimes Act effectuates congressional policy of providing criminal law for federal enclaves which conforms to the local law applicable to the area surrounding the enclave).

226. *See* United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978).

227. There are 26 Indian reservations and pueblos within the state of New Mexico covering in excess of 11,000 square miles. Petitioner's Brief for Certiorari at 6, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978). As of 1978, the tribes with jurisdiction over 10 of these areas had enacted legalization ordinances. *Id.* at 6; *see id.*, Appendix H. at 28a-32a.

228. Tribal legalization ordinances covering 104 reservations in 20 states had been enacted by 1978. *See* Petitioner's Brief for Certiorari, Appendix H, at 28a-32a, United States v. New Mexico,

certainties in enforcement when it enacted section 1161.[229]

Congress did not specify in section 1161, or anywhere else for that matter, which portions of state law regulating the possession, consumption, service, and sale of liquor it intended to make applicable to Indian tribes within Indian country.[230] Thus, it is not clear whether the entire body of state law, including licensing and taxing provisions, were intended to apply to the tribes.[231] The sale of liquor without a state tax stamp or without a state license is criminal in most states.[232] Thus, unlicensed or untaxed sales by Indian tribes are not "in conformity . . . with . . . state law"[233] and should subject those involved in such sales to federal prosecution if title 18, section 1161 of the U.S. Code is applied according to its plain language.[234]

State regulatory jurisdiction is, as noted above, limited within Indian Country. As a general rule, a state has no jurisdiction to tax or license tribal operations within Indian country.[235] The Supreme Court set forth a test to be applied to such state attempts to assert regulatory jurisdiction over Indians within Indian lands in *McClanahan v. Arizona*

590 F.2d 323 (10th Cir. 1978). Section 1161 makes liquor transactions within Indian country legal only if conducted "in conformity both with" state law and a legalization ordinance enacted by the tribe or tribes with jurisdiction over the area. 18 U.S.C. § 1161 (1976); *see* text & notes 7-9, 217 *supra*. Thus, liquor transactions which involve either Indians or non-Indians are legal within these 104 reservations only if conducted in conformity with the law of the state in which each reservation is located and with the applicable tribal legalization ordinance. *See* United States v. Mazurie, 419 U.S. 544, 558 (1975); Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934, 936 (D. Wyo. 1976); FEDERAL INDIAN LAW, *supra* note 2, at 382-83. *But see* United States v. New Mexico, 590 F.2d 323, 328-29 (10th Cir. 1978). If all 104 tribal ordinances are interpreted to conform to the laws of the states in which those 104 reservations are located, the authorities enforcing the ordinances need only look to state law to fill gaps in the tribal provisions. The Tenth Circuit's holding precludes such references and forces these authorities to fill vacuums in tribal ordinances by guesswork.

229. Indeed, Congress enacted § 1161 partly because enforcement of the federal liquor provisions within Indian country was already weak. *See* Bryan v. Itasca County, 426 U.S. 373, 379-80 (1976); May, *supra* note 7, at 217. To accept the conclusion of the Tenth Circuit—that Congress did not intend for state liquor laws to apply within Indian country when it enacted § 1161—is to assume that Congress intended to prepare federal officers for battle by taking away their swords.

230. *See* 18 U.S.C. § 1161 (1976); note 217 *supra*.

231. *See* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 480 (1976) (holding that a state may not require tribal cigarette vendors to secure a state vendor's license to sell on-reservation and that a state may not require such vendors to collect state taxes on sales to Indians).

232. *See, e.g.*, ARIZ. REV. STAT. ANN. § 4-241 through 244, 4-246, 42-1216, 42-1217 (1956 & Supp. 1980); ARK. STAT. ANN. §§ 48-901 through 955 (1947 & Supp. 1979); KAN. STAT. §§ 41-801 through 806, 41-901 through 905, 41-1001 through 1009 (1973).

233. 18 U.S.C. § 1161 (1976); see text & notes 7-9, 67, 68, 217 *supra*.

234. *See* Petitioner's Brief for Certiorari at 10, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); text & note 121 *supra*. *See also* United States v. Mazurie, 419 U.S. 544, 558 (1975) (federal prosecution of non-Indian for failure to secure tribal license); FEDERAL INDIAN LAW, *supra* note 2, at 382-83 (noting that when state license permits sale for consumption on premises but tribal ordinance only permits sale for consumption off premises, state licensee will be immune from state, but not federal, prosecution if he sells for on-premises consumption); text & note 102 *supra*.

235. *See, e.g.*, Washington v. Confederated Colville Tribes, 447 U.S. 134, 163 (1980); Moe v. Salish & Kootenai Tribes, 425 U.s. 480-81 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 173 (1973). *Cf.* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (tribes are subject to state tax laws outside reservation boundaries).

State Tax Commission.[236] In applying this test, a court must determine whether the federal government has so occupied the area in which the state seeks to regulate that it has preempted state law.[237] If the court cannot discern a federal intention to preempt the state regulation at issue, the court must determine whether the state's application of its law would infringe upon a tribe's power to make its own laws and be governed by them.[238]

The first part of the *McClanahan* test is easily applied to the attempt by the state of New Mexico to require the Mescalero Apache Tribe to secure a state license to sell liquor. First, the federal government has never shown that it intended to occupy the field of liquor licensing in Indian country so as to preempt state licensing provisions.[239] In fact, the language of 18 U.S.C. § 1161 is a clear indication that Congress intended to delegate part of its authority to regulate in this field to some other sovereign or sovereigns.[240] Furthermore, congressional reference to state law in section 1161 militates against this preemption argument.[241] Finally, the Supreme Court recently rejected the argument that a tribal scheme set up to regulate and tax in a particular substantive field preempts state power to tax or regulate in the same field.[242] Thus, state authority to tax, license, or otherwise regulate liquor transactions within Indian country does not appear to have been federally preempted. The second part of the *McClanahan* test must be applied, therefore, to determine whether state taxes on tribal liquor sales to either Indians or non-Indians or state liquor licensing provisions infringe on the right of the tribes to make their own laws and be governed by them.[243]

Application of this part of the test, however, yields inconclusive results. The Supreme Court has clearly defined the limits of state authority to tax tribal sales of goods within Indian country. The Court held, in *Moe v. Salish & Kootenai Tribes*,[244] that the states may require tribal cigarette vendors to collect a state sales tax on sales to non-Indians within the reservation, notwithstanding the fact that adding such a

236. 411 U.S. 164 (1973).

237. *Id.* at 172 ("the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption").

238. Williams v. Lee, 358 U.S. 217, 220 (1959).

239. *See* United States v. McGowan, 302 U.S. 531, 539 (1938) (states may enforce state laws that do not conflict with federal enactments within Indian country); text & note 58 *supra*.

240. 18 U.S.C. § 1161 (1976); *see* United States v. Mazurie, 419 U.S. 544, 558 (1975). *See also* McClanahan v. Arizona Tax Comm'n, 411 U.S. at 177 n.16 (noting that Congress may have intended to make state liquor laws applicable within reservations).

241. 18 U.S.C. § 1161 (1976); see note 217 *supra*.

242. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158-59 (1980).

243. Williams v. Lee, 358 U.S. at 220; *see* text & note 238 *supra*.

244. 425 U.S. 463 (1976).

state tax to the sales price would damage or completely destroy the tribal vendors' competitive advantage over off-reservation vendors.[245] The Court recently extended its holding in *Moe*. In *Washington v. Confederated Tribes of the Colville Reservation*,[246] the Court held that a state may require tribal cigarette vendors to keep detailed records of sales to nonmembers to facilitate state collection of sales taxes on such sales[247] and that the state may seize shipments of cigarettes bound for the reservation if tribal sellers do not cooperate in the state's effort to collect its taxes on sales to nonmembers.[248] The *Colville* Court also held that the states may require tribal vendors to collect state sales taxes on sales to Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred.[249] Thus, *Moe* and *Colville* completely foreclose any argument that might be raised that state sales and excise taxes on liquor sold within an Indian reservation to nonmembers infringe upon the right of the tribe with jurisdiction to make its own laws.[250] These decisions, however, cut the other way with respect to state attempts to tax sales to members of the tribe within the reservation.[251]

The decision of the Supreme Court in *Moe* sheds some light on the authority of the states to require tribal vendors to secure state licenses to do business within Indian reservations. The Court held that the state of Montana has no authority to require cigarette vendors who are members of the tribe and whose shops are located within the reservation to pay a state vendors' licensing fee.[252] This holding arguably supports the decision of the Tenth Circuit in *United States v. New Mexico* that the state may not require a tribe to secure a state liquor license to sell liquor within its reservation.[253] The language of 18 U.S.C. § 1161[254] is still troublesome, however, because of the Supreme Court's holding in *Mazurie* that Congress delegated licensing authority to an

245. *Id.* at 482-83. The Court noted that the tax at issue in *Moe* was levied on the cigarette purchaser, not on the seller, and distinguished Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) on this basis. 425 U.S. at 482. The Court expressly recognized that requiring the Indian seller to collect the state tax on sales to non-Indians did not "frustrate" tribal self-government. *Id.* at 483.

246. 447 U.S. 134 (1980).

247. *Id.* at 159-160. The Court once again rejected the tribes' argument that the state's imposition of its sales tax on sales to non-Indians would deprive the tribes of revenues and thus infringe upon their powers of self-government. *Id.* at 158-59.

248. *Id.* at 161. *But cf.* United States v. New Mexico, 590 F.2d at 329 (enjoining state from prohibiting off-reservation liquor wholesalers from selling to unlicensed tribal retailers).

249. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. at 160-61.

250. *See id.* at 158-59, 161; Moe v. Salish & Kootenai Tribes, 425 U.S. at 483.

251. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. at 160-61; Moe v. Salish & Kootenai Tribes, 425 U.S. at 475-81.

252. Moe v. Salish & Kootenai Tribes, 425 U.S. at 480.

253. United States v. New Mexico, 590 F.2d 323, 328-29 (10th Cir. 1978).

254. 18 U.S.C. § 1161 (1976); *see* note 217 *supra*.

Indian tribe in precisely the same language.[255] To hold that Congress did not intend to delegate the same licensing authority to the states in section 1161 is to ignore the plain language of the statute.[256]

The decision of the Tenth Circuit in *United States v. New Mexico* runs counter to generally accepted concepts of jurisdiction in Indian country in yet another respect. The court affirmed a district court order enjoining New Mexico liquor control officials from entering the Mescalero Apache Reservation to enforce state liquor laws as to anyone involved in liquor transactions therein.[257] Even the United States did not argue for such an extreme position because it prevents the state from enforcing its liquor laws against non-Indians who have committed violations within reservation boundaries.[258] Commentators have consistently recognized that the states do not have criminal jurisdiction to arrest and prosecute Indians for crimes committed in Indian country,[259] but courts have consistently held that states have criminal jurisdiction to try non-Indians for crimes committed within Indian country.[260] The Tenth Circuit noted that *United States v. New Mexico* was concerned with state power to require an Indian tribe to secure a state license[261] and apparently based its broad holding on the theory that state jurisdiction is territorially limited in scope.[262] State jurisdiction under the federal Indian law, however, depends on the race of the participants and not on the site of the crime.[263] The states retain exclusive jurisdiction to try non-Indians for crimes committed against non-Indians within Indian country[264] and concurrent jurisdiction, at minimum, to try non-Indians for consensual crimes therein.[265] In summary,

255. *See* United States v. Mazurie, 419 U.S. 544, 558 (1975); *see* note 216 *supra*.

256. In the words of the state of New Mexico:

> It makes little sense . . . to apply the licensing requirement except as a component part of a regulatory and enforcement apparatus by which the licensee is controlled in the operation of his liquor business. This overall apparatus . . . is exactly what Congress intended. . . . The concern of Congress with the lack of federal enforcement effort with respect to liquor in Indian country suggests that it simply would not leave the application and enforcement of State law solely to the federal government.

Petitioner's Brief for Certiorari at 15, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978).

257. *See* 590 F.2d at 326.

258. Petitioner's Brief for Certiorari at 9, 16-19, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978); see text & note 150 *supra*.

259. *See, e.g.*, Seymour v. Schneckloth, 368 U.S. 351, 359 (1962); Clinton, *supra* note 7, at 564; Vollman, *supra* note 7, at 387-91; D. GETCHES, *supra* note 7, at 387.

260. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 498-99 (1946); Draper v. United Staes, 164 U.S. 240, 242-43 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881); text & note 148 *supra*.

261. United States v. New Mexico, 590 F.2d at 329.

262. *See id.* at 327-29; Petitioner's Brief for Certiorari at 16 n. 9, United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978).

263. *See* D. GETCHES, *supra* note 7, at 386-87; Clinton, *supra* note 7, at 513-520.

264. *See generally*, Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).

265. *See* Clinton, *supra* note 7, at 529-30.

the Tenth Circuit erred in *United States v. New Mexico* by extending traditional Indian immunity from state law for acts and transactions within Indian country to non-Indians.[266]

Conclusion

For more than one-hundred fifty years, Congress absolutely prohibited the introduction, sale, consumption, and even the mere possession of liquor within the vaguely defined limits of "Indian country." During the same period, federal law prohibited the dispensing or sale of liquor to tribal Indians anywhere within the United States. The guardian-ward relationship between the United States and the Indian tribes and the constitutional authority of Congress to regulate commerce with the Indian tribes—the two primary foundations of the entire body of federal protective and remedial legislation known as the Federal Indian Law—grew out of the federal need to protect the Indians from the ill effects of liquor and to promote their peaceful coexistence with the non-Indian population.

In 1953, Congress enacted Public Law 83-277, removing Indian prohibition outside Indian country and delegating to the tribes part of the federal authority to regulate liquor transactions within their reservation boundaries. The Supreme Court has held that Congress delegated to the tribes the authority to require liquor retailers to secure tribal liquor licenses to sell liquor within the exterior boundaries of reservations. Tribal authority to tax such liquor sales, particularly where the incidence of the tax is on non-Indians, is as yet uncertain.

The only court which has considered the issue so far, the United States Court of Appeals for the Tenth Circuit, has held that Congress did not implicitly or explicitly make state liquor laws applicable within Indian country and did not delegate to the states the authority to license or otherwise regulate liquor transactions within Indian country. These holdings are contrary to the general rule that the states retain the

266. The Supreme Court has expressly decried tribal attempts to extend Indian immunity from state tax laws to nonmembers. In Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), the Court noted that the competitive advantage which tribal cigarette vendors enjoyed as a result of their willingness to sell cigarettes to non-Indians without collecting a state sales tax thereon was dependent upon the willingness of the purchaser "to flout *his* legal obligation to pay the tax." *Id.* at 482 (emphasis in original). The Court condemned the tribes' extension of their tax immunity in even stronger terms in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980). In the words of Justice White, writing for the *Colville* majority:

> It is painfully apparent that the value marketed by the tribal smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation . . . . We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155 (citations omitted).

authority to enforce their laws as to non-Indians within Indian country and defy the plain language of Public Law 83-277, now section 1161 of title 18 of the United States Code. Furthermore, the decision of the Tenth Circuit in *United States v. New Mexico* cuts into state authority to enforce state liquor laws outside Indian country under the twenty-first amendment. Finally, the decision denies state authority to require even Indian tribes to collect state taxes on the sale of virtually any commodity to nonmembers within reservation boundaries. In this respect, the circuit court decision is contrary to recent decisions of the Supreme Court that have held that Indian tribes may not extend their immunity from state civil jurisdiction to nonmembers.

Liquor has arguably done more damage to the health and welfare of the Indians of North America than has any other single commodity. Nonetheless, the decisions analyzed herein have created a scheme to regulate liquor within Indian country which places tremendous interpretative and enforcement burdens upon federal officers who are already overburdened by their responsibility to enforce the laws, whatever they might be, within Indian reservations. These decisions, and the language of 18 U.S.C. § 1161, may insure that liquor transactions within Indian country are subject to either sporadic and discriminatory regulation or no regulation at all. Surely this scheme is not what Congress had in mind after devoting more than one hundred and fifty years to regulating these very transactions.