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## Closing Time: Removing the State of Oklahoma from Alcohol Regulation in Indian Country

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## Closing Time: Removing the State of Oklahoma from Alcohol Regulation in Indian Country

The United States Constitution contemplates three types of sovereigns existing within the country's borders: the federal government, the states, and "the Indian tribes."<sup>1</sup> As to the relationship between the federal government and the tribes, the Supreme Court determined in 1831 that tribes constitute "domestic dependent nations," likening their relationship to the federal government as "a ward to his guardian."<sup>2</sup> From this language, the Court eventually held that Congress exercises plenary power over tribes. But the states do not hold any type of constitutional authority over tribes. In fact, one year after deeming the tribes as wards to their federal guardians, the Court established that state law did not apply in tribal territory.<sup>3</sup>

While this point of law has gained some nuance over the years,<sup>4</sup> a state's ability to impose its laws on a tribe remains subject to "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."<sup>5</sup> Those determinations generally come from litigation between states and tribes—not from federal legislation. But one major exception exists: 18 U.S.C. § 1161. This federal statute expressly requires that alcohol transactions in Indian country conform with state alcohol laws. Consequently, in the context of alcohol, tribes may not enact alcohol laws that conflict with those of the state. Through 18 U.S.C. § 1161, Congress has allowed state law to bleed into Indian country and bind tribal sovereigns.

The effects of this statutory scheme are magnified in Oklahoma. The State of Oklahoma coexists with thirty-eight other sovereigns located within its borders.<sup>6</sup> And those tribes do more than passively exist. For example, tribes generate substantial economic impact within the state: a

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1. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

2. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

3. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595 (1832).

4. *See Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561) ("[I]t was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.").

5. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980).

6. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5019, 5019-25 (Jan. 29, 2016).

2012 study estimated that tribes created \$10.8 billion of economic activity,<sup>7</sup> and in 2014, tribal gaming alone accounted for \$6.9 billion of economic impact.<sup>8</sup> Further, over one million acres<sup>9</sup> (and growing)<sup>10</sup> of Indian country<sup>11</sup> exist within the state, which inevitably leads to jurisdictional disputes as each sovereign attempts to govern its territory and citizens. In terms of civil regulatory jurisdiction, the state and tribes have disagreed over the state's ability to regulate non-Indians engaged in a number of activities in Indian country,<sup>12</sup> including alcohol regulation.<sup>13</sup>

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7. STEVEN C. AGEE ECON. RESEARCH & POLICY INST., OKLA. CITY UNIV., THE STATEWIDE IMPACTS OF OKLAHOMA TRIBES 15 (2012), <https://sovnationcenter.okstate.edu/sites/default/files/documents/Tribal%20Impact%20Report.pdf>.

8. KYLE D. DEAN & MATTHEW S. ROBINSON, OKLA. INDIAN GAMING ASS'N, STATEWIDE ECONOMIC IMPACTS FROM OKLAHOMA TRIBAL GOVERNMENT GAMING: 2015 ANNUAL IMPACT REPORT 5 (2015), <http://oiga.org/wp-content/uploads/2015/11/OIGA-2015-Annual-Impact-Report-singlepg.pdf>.

9. *District II*, U.S. DEP'T OF THE INTERIOR, <http://bia.gov/WhoWeAre/BIA/OJS/DOLE/DistrictII/index.htm> (last visited May 12, 2017) ("Of Oklahoma's 77 counties, 63 contain over a million acres of Indian country trust and restricted land.").

10. Under section 5 of the Indian Reorganization Act of 1934 (IRA), tribes may petition the Secretary of the Interior to convert "fee land to trust status by accepting legal title to the land in the name of the United States in trust for a tribe or individual Indian." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][b], at 1041 (Neil Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK]. The Supreme Court has held that the IRA land into trust provision is only available to those tribes under federal jurisdiction at the time of the IRA's enactment in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009). The Oklahoma Indian Welfare Act extended the "rights [and] privileges secured to an organized Indian tribe under the [IRA]" to tribes within Oklahoma. Oklahoma Indian Welfare Act of 1936 § 3, 25 U.S.C. § 5203 (2012) (formerly cited as 25 U.S.C. § 503). Accordingly, tribes within the state may acquire fee title to land and then have the land converted into trust, making it Indian country.

11. 18 U.S.C. § 1151 (2012) ("[T]he term 'Indian country', as used in this chapter, 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 allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

12. *See, e.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) (concerning motor fuels tax and income tax); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991) (concerning cigarette taxes).

13. *See Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 31 F.3d 964, 966 (10th Cir. 1994) (concerning low-point beer tax), *aff'd in part, rev'd in part and remanded sub nom. Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, *vacated in part sub nom. Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 64 F.3d 577 (10th Cir. 1995); *see*

The current alcohol regulatory structure in Indian country warrants review and revision. By allowing both states and tribes to regulate alcohol in Indian country, § 1161 clashes with current federal Indian policy. In direct contrast to the congressional policy of tribal self-governance, tribes located within Oklahoma are effectively forced by Congress to comply with the policy decisions of a competing sovereign—the State of Oklahoma. Congress should remove this barrier and expressly recognize that tribes may exclusively regulate alcohol in Indian country by virtue of their inherent sovereignty. Tribes also have a role to play here and should take affirmative steps to establish the regulatory and remedial procedures necessary to fully regulate alcohol within Indian country.

While courts have interpreted § 1161, the full scope of the statute remains ambiguous. Two specific applications (or attempted applications) of § 1161 demonstrate the external friction caused by this ambiguity: (1) state taxation of non-Indians in Indian country has led to state-tribal conflict and (2) attempts to impose civil tort liability (dram-shop liability)<sup>14</sup> on tribal alcohol transactions has caused disputes between tribes and non-Indian tort claimants.

The answer to easing this friction centers on tribal sovereignty. Sovereignty necessitates that a government possess the ability to choose its own policies. But § 1161 stifles tribal sovereignty as tribes remain bound by state law. To be clear, the argument here is not simply that tribes should be able to enact more *lenient* alcohol laws than the state. As sovereigns, however, tribes are best situated to devise their own alcohol policies, whatever form they may take. To allow sovereign flexibility, § 1161 should be amended to reflect inherent tribal sovereignty. Then the surviving issue of non-Indian alcohol transactions in Indian country may be solved through cooperative agreements between tribes and the state.

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also Matthew L.M. Fletcher, *Gaming Compact Dispute, Sales Tax and Liquor Disputes Between the Citizen Potawatomi Nation and the State of Oklahoma*, TURTLE TALK (Oct. 29, 2014), <https://turtletalk.wordpress.com/2014/10/29/gaming-compact-dispute-sales-tax-and-liquor-disputes-between-the-citizen-potawatomi-nation-and-the-state-of-oklahoma> (providing administrative case materials for *In re* Revocations of Licenses/Permits of Citizen Potawatomi Nation, No. JM-14-005-K (Okla. Tax Comm'n 2014)).

14. Dram-shop liability is the “[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer.” *Dram-Shop Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014).

*I. History of Alcohol Regulation in Indian Country*

Solving the current problem of § 1161 requires at least a general understanding of the complex history of alcohol regulation in Indian country. Even modernly, the prevalent stereotype of the “drunken Indian” persists.<sup>15</sup> For example, in a 2016 New York Times interview concerning the Washington NFL mascot controversy, Houston Texans owner Robert McNair stated that growing up in western North Carolina, everyone respected the Cherokee Indians,<sup>16</sup> although “[t]hey might not have respected the way they held their whiskey.”<sup>17</sup> Worse still, the stereotype exists within our criminal justice system: in a case involving an Indian charged with forcible assault, the jury foreman purportedly “told the other jurors that he used to live on or near an Indian Reservation, that ‘[w]hen Indians get alcohol, they all get drunk,’ and that when they get drunk, they get violent.”<sup>18</sup> This stereotype is neither remote nor new: even Benjamin Franklin once mused that “if it be the Design of Providence to extirpate these Savages in order to make room for Cultivators of the Earth . . . it seems not improbable that Rum may be the appointed Means.”<sup>19</sup>

The “drunken Indian” stereotype stands as enduring evidence of how other sovereigns have used alcohol regulation in Indian country as a means to self-serving ends. From early contact between Europeans and Native peoples, alcohol and its regulation served as a means of usurping tribal land and sovereignty.<sup>20</sup> In 1911, prohibitionist and Chief Special Officer of the

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15. For an in-depth discussion of the “drunken Indian” stereotype as manifested through policy and legislation, see generally Robert J. Miller & Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223 (1996).

16. The Eastern Band of Cherokee Indians, a federally recognized tribe, is headquartered at the Qualla Boundary, within the western portion of North Carolina. Interestingly, the Eastern Band of Cherokee Indians has extensively regulated alcohol within its Indian country. See Eastern Band of Cherokee Indians—Cherokee Code Chapter 18B, Regulation of Alcoholic Beverages, 77 Fed. Reg. 5265, 5267 (Feb. 2, 2012).

17. Mark Leibovich, *Undeclared*, N.Y. TIMES MAG., Feb. 7, 2016, at MM38, <http://www.nytimes.com/2016/02/07/magazine/roger-goodells-unstoppable-football-machine.html>.

18. *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (alteration in original).

19. PETER C. MANCALL, DEADLY MEDICINE: INDIANS AND ALCOHOL IN EARLY AMERICA 93 (1995) (alteration in original) (quoting BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 199 (Leonard W. Labaree ed., 1964)).

20. See Mimi Ajzenstadt & Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 INT’L J.L. & PSYCH. 127, 140 (1990).

Indian Service, William E. Johnson, stated that all Indian wars had been either directly or indirectly caused by alcohol.<sup>21</sup> As an early example of European influence, Hudson Bay Company traders used alcohol to establish contacts with Indians and encouraged them to drink so that the traders could take advantage of them (and thus boost profits).<sup>22</sup> In response to these types of actions, Congress enacted the first legislation specifically defining the contours of Indian affairs: the Trade and Intercourse Act of 1790.<sup>23</sup> This act (also referred to as the Nonintercourse Act) introduced federal regulation of trade with Indians, prohibited the purchase of Indian lands except by governmental agents, and created punishments for non-Indians who committed crimes in Indian country.<sup>24</sup>

While the original Trade and Intercourse Act was initially written to last for three years, Congress reenacted the statute every three years and ultimately passed a permanent Trade and Intercourse Act in 1802.<sup>25</sup> The 1802 Act carried forward the previous policies, and for the first time authorized the President “to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes.”<sup>26</sup> This statutory addition “responded to longstanding complaints against the use of alcohol as a means of defrauding Indian people and a catalyst to violent conflicts between whites and Indians.”<sup>27</sup> Partly because of its ambiguous definition of Indian country, the federal government loosely enforced the 1802 Act.<sup>28</sup> In fact, tribes did more during this time to regulate alcohol in their territories than the federal government.<sup>29</sup> For example, Tecumseh, prominent leader of the Shawnee, delivered lectures that “ruined the business of the whiskey peddler throughout the entire central west for a period of years,” and, “for a long time, intoxication became practically

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21. WILLIAM E. JOHNSON, *THE FEDERAL GOVERNMENT AND THE LIQUOR TRAFFIC* 160 (1911).

22. *Id.*

23. See COHEN’S HANDBOOK, *supra* note 10, § 1.03[2], at 35.

24. *Id.*

25. *Id.*

26. Act of Mar. 30, 1802, ch. 13, § 21, 2 Stat. 139, 146.

27. COHEN’S HANDBOOK, *supra* note 10, § 1.03[2], at 38 (citing FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 98-99 (Univ. Neb. Press 1984)).

28. Following the enactment of the Act of 1802, “regulations were made by the War Department to prevent the traffic. This, however, was in the days when the rum ration was rampant in the army, and the carrying out of a temperance measure was not very thoroughly done.” JOHNSON, *supra* note 21, at 197.

29. *Id.* at 180-87.

unknown among the western tribes.”<sup>30</sup> Further, many Indian temperance organizations arose during this period, and several tribes took the punishment of Indians who consumed alcohol into their own hands.<sup>31</sup>

The Act of 1834, passed during Andrew Jackson’s presidency, sought to more strictly regulate the alcohol trade in Indian country. Adding to the language of the 1802 Act, the 1834 Act constituted the first outright prohibition of alcohol in Indian country. This Act prohibited the introduction or attempted introduction of alcohol into Indian country, prohibited distilleries in Indian country, and established specific punishments for violations.<sup>32</sup> On the same day the Act of 1834 was passed, Congress placed all of Indian affairs under the jurisdiction of the War Department.<sup>33</sup> The Act of 1834 included an exemption for all liquor traffic that the War Department deemed necessary.<sup>34</sup> But because the War Department’s military forts and Indian agents served as the primary contact between reservation Indians and non-Indians, this exemption led to the non-enforcement of the prohibition.<sup>35</sup> Refusing to rely solely on federal regulation, several tribes passed their own legislation prohibiting the introduction of alcohol into their lands.<sup>36</sup>

To strengthen the Act of 1834, Congress again amended its Indian alcohol policy in 1862<sup>37</sup> and 1864.<sup>38</sup> These measures prohibited any person (including an Indian) from selling or providing liquor to Indians, regardless of whether or not the transaction occurred in Indian country.<sup>39</sup> In 1865, however, the Supreme Court distinguished the federal government’s power to prohibit alcohol for Indians who were government wards and the police power of states to regulate Indians who no longer had tribal ties.<sup>40</sup> The

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30. *Id.* at 183.

31. *Id.* at 183-87.

32. Act of June 30, 1834 (Trade and Intercourse Act of 1834), ch. 161, 4 Stat. 729, *as amended by* Act of Mar. 3, 1847, ch. 66, 9 Stat. 203; Act of July 29, 1848, ch. 118, § 3, 9 Stat. 252, 264; Act of Mar. 27, 1854, ch. 26, §§ 3-6, 10 Stat. 269, 270; Act of Feb. 13, 1862, ch. 24, 12 Stat. 338; Act of Mar. 15, 1864, ch. 33, 13 Stat. 29 (carried forward in REV. STAT. tit. 28, ch. 4, §§ 2139-2141 (2d ed. 1878)).

33. Act of June 30, 1834, ch. 162, 4 Stat. 735.

34. Trade and Intercourse Act of 1834, ch. 161, § 10.

35. JOHNSON, *supra* note 21, at 196-97.

36. *Id.* at 188-92 (summarizing the tribal governments passing prohibition legislation).

37. Act of Feb. 13, 1862, ch. 24, 12 Stat. 338.

38. Act of Mar. 15, 1864, ch. 33, 13 Stat. 29 (carried forward in REV. STAT. tit. 28, ch. 4, § 2140 (2d. ed. 1878)) (recodified in part at 18 U.S.C. § 3113 (1994)).

39. Act of Feb. 13 1862, ch. 24, 12 Stat. 338; JOHNSON, *supra* note 21, at 198-99.

40. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416 (1865).

jurisdictional confusion stemming from this distinction again led to loose enforcement of the prohibition.<sup>41</sup>

During the Allotment Era (1871-1928), Congress aimed to “civiliz[e] and assimilat[e]” Indians.<sup>42</sup> To further this policy, Congress passed legislation allowing for the allotment of tribal lands, attempting to push Indians toward a more agricultural lifestyle while (conveniently) creating surplus lands which could then be opened to white settlers.<sup>43</sup> Allotment led to the breakup of vast tribal land bases in Indian Territory (modern-day Oklahoma).<sup>44</sup> In 1895, Congress passed a special act to specifically prohibit alcohol in Indian Territory.<sup>45</sup>

In 1906, Congress passed the Oklahoma Enabling Act, which allowed for the admission of Indian Territory and Oklahoma Territory as the State of Oklahoma.<sup>46</sup> The statute specifically stated, “[N]othing in the [Oklahoma] constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians . . . or to limit or affect the authority of the [federal government] to make any law or regulation respecting such Indians.”<sup>47</sup> Following allotment and statehood, courts determined that lands “held in trust or restricted status for an Indian tribe are Indian country, regardless whether those lands constitute a ‘formal’ reservation.”<sup>48</sup> And in 1911, the Eighth Circuit specifically held that tribal lands of the Five Tribes (Chickasaw, Cherokee, Choctaw, Creek, and Seminole) remained Indian country for purposes of federal liquor laws.<sup>49</sup>

In 1919, Congress passed the National Prohibition Act, prohibiting alcohol for the entire nation.<sup>50</sup> The Twenty-First Amendment repealed national prohibition in 1933.<sup>51</sup> National prohibition and its subsequent repeal, however, did not affect Indian liquor laws.<sup>52</sup> Prohibition in Indian

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41. Miller & Hazlett, *supra* note 15, at 248.

42. COHEN’S HANDBOOK, *supra* note 10, § 1.04, at 72.

43. *Id.*

44. *See* JOHNSON, *supra* note 21, at 191.

45. Act of Mar. 1, 1895, ch. 145, § 8, 28 Stat. 693, 697; *see also* JOHNSON, *supra* note 21, at 203.

46. Act of June 16, 1906, ch. 3335, 34 Stat. 267.

47. *Id.*

48. COHEN’S HANDBOOK, *supra* note 10, § 4.07[1][b], at 292.

49. U.S. Express Co. v. Friedman, 191 F. 673, 679 (8th Cir. 1911).

50. Act of Oct. 28, 1919 (Volstead Act), ch. 85, 41 Stat. 305.

51. *See* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 1-21 (1979).

52. *See* Kennedy v. United States, 265 U.S. 344, 346 (1924) (holding that the National Prohibition Act did not repeal Indian liquor laws).



country remained in place until Congress adopted 18 U.S.C. § 1161 during the Termination Era.

## II. 18 U.S.C. § 1161 Analysis

Enacted in 1953, 18 U.S.C. § 1161 allows tribes to authorize liquor in the areas of Indian country under their jurisdiction. Section 1161—titled “Application of Indian liquor laws”—states:

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor 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.<sup>53</sup>

The five sections listed in § 1161 prohibit liquor in Indian country. Section 1154 prohibits the *distribution* of intoxicants in Indian country, stating, “Whoever sells, gives away, disposes of, exchanges, or barter[s] any [liquor] . . . into the Indian country” shall be fined and imprisoned (or both) for up to one year for the first offense, and fined and imprisoned (or both) for up to five years for subsequent offenses.<sup>54</sup> Section 1156 prohibits the *possession* of intoxicants and allows the same penalties listed in § 1154.<sup>55</sup> Section 3113 authorizes “any superintendent of Indian affairs, or commanding officer of a military post, or special agent of the Office of Indian Affairs” having probable cause to conduct searches of persons suspected of violating § 1154 or § 1156.<sup>56</sup> Section 3488 states that possession of intoxicants in Indian country constitutes “prima facie evidence of unlawful introduction.”<sup>57</sup> Finally, § 3669 allows for the seizure, libel, and forfeiture of any conveyance used to introduce intoxicants into Indian country.<sup>58</sup>

Most importantly here, § 1161 allows tribes to opt out of these prohibitions if liquor transactions in Indian country conform to (1) state law and (2) a tribal ordinance adopted by the tribe with jurisdiction in that area

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53. 18 U.S.C. § 1161 (2012).

54. *Id.* § 1154.

55. *Id.* § 1156.

56. *Id.* § 3113.

57. *Id.* § 3488.

58. *Id.* § 3669.

of Indian country.<sup>59</sup> If a tribe chooses not to adopt such an ordinance, liquor remains prohibited in that area of Indian country.<sup>60</sup>

The Indian Termination policy of the era sheds light on why Congress enacted § 1161. The section was enacted under Public Law 277, titled “An Act to eliminate certain discriminatory legislation against Indians in the United States.”<sup>61</sup> The original bill applied only to Arizona, but the Committee on Interior and Insular Affairs made the measure generally applicable.<sup>62</sup> Senate Report 722 states, “[I]f this bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so.”<sup>63</sup> Further, the Senate Report included the input of Indians as a reason for the statute: “The Indians for many years have complained that the liquor laws are most discriminatory in nature. The Indians feel that, irrespective of the merits or demerits of prohibition, it is unfair to legislate specifically against them in this matter.”<sup>64</sup>

While its stated intent was to erase federal prejudice against Indians or tribes in the context of alcohol, § 1161 created a different prejudice by effectively precluding tribes from formulating their own substantive liquor laws. And this aligned with the termination efforts of the day as Congress aimed

as rapidly as possible to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens . . . to end their status as wards . . . and to grant them all of the rights and prerogatives pertaining to American citizens.<sup>65</sup>

As part of its attempt to erase federal exceptions for Indians, Congress enacted § 1161 to move away from extensive federal regulation of alcohol in Indian country. Reading beyond the references to “prejudice” in the legislative history, Congress more likely acted to further its termination goal of eradicating tribal and Indian statuses altogether. Senate Report 722 supports this view: “[The] committee is of the belief that all legislation discriminating against our Indian citizens should be abolished. Termination

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59. *Id.* § 1161.

60. *Id.*

61. Pub. L. No. 277, 1953 U.S.C.C.A.N. 660 (codified at 18 U.S.C. § 1161 (2012)).

62. S. REP. NO. 83-722 (1953), *as reprinted in* 1953 U.S.C.C.A.N. 2399, 2400.

63. *Id.*

64. *Id.*

65. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

of the subjection of Indians to Federal laws applicable only to Indians certainly appears to be desirable.”<sup>66</sup>

### *III. Supreme Court Review and Interpretation of Section 1161*

The Supreme Court first reviewed § 1161 in *United States v. Mazurie*.<sup>67</sup> *Mazurie* involved non-Indian bar owners convicted of introducing alcohol into Indian country for failure to obtain a tribal liquor license.<sup>68</sup> The bar owners had attempted to obtain a tribal liquor license, but their application was denied after tribal citizens protested.<sup>69</sup> Despite the license denial, the bar owners continued to sell liquor, which led to federal criminal prosecution and seizure of the alcoholic beverages.<sup>70</sup> *Mazurie* turned on the tribe’s ability to regulate liquor on non-Indian fee land within the reservation.<sup>71</sup> That analysis proves unhelpful in Oklahoma, where no formal reservations remain and the majority of Indian country is “trust land,” as defined by 18 U.S.C. § 1151(c).<sup>72</sup> But the Court’s reasoning on the tribal ability to enact and enforce liquor laws proves very instructive. The Court determined that Congress could delegate to tribes the power to regulate liquor within their territories.<sup>73</sup> Because Congress properly delegated this power, the Court did not address whether tribes possess independent and *inherent* power to regulate liquor.<sup>74</sup> Further, the Court rejected the argument that the tribe could not exercise regulatory jurisdiction over the bar owners because they were non-Indians.<sup>75</sup> Citing its opinion in *Williams v. Lee*,<sup>76</sup> the Court reiterated that tribes have authority over their land subject only to congressional defeasance.<sup>77</sup>

*Mazurie* validated tribal authority to regulate under § 1161. The Court similarly validated a state’s authority to regulate liquor in Indian country under § 1161 in *Rice v. Rehner*.<sup>78</sup> In *Rice*, a federally licensed Indian trader

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66. S. REP. NO. 83-722.

67. 419 U.S. 544 (1975).

68. *Id.* at 548.

69. *Id.*

70. *Id.*

71. *Id.* at 549.

72. *See* 18 U.S.C. § 1151 (2012).

73. *Mazurie*, 419 U.S. at 557.

74. *Id.* (“We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26.”).

75. *Id.* at 557-58.

76. 358 U.S. 217, 223 (1959).

77. *Mazurie*, 419 U.S. at 557-58.

78. 463 U.S. 713, 734-35 (1983).

who owned a store on the Pala Reservation challenged California's regulation requiring that he obtain a state liquor license.<sup>79</sup> The Ninth Circuit Court of Appeals held that California could not require a license because § 1161 had a preemptive effect, which conferred the authority to tribes subject to the approval of the Secretary of the Interior.<sup>80</sup> Interestingly, a legal commentator reviewing the Ninth Circuit's holding (before Supreme Court review) stated, "Although possibly intended as a method of achieving the assimilation of Indians into the U.S. mainstream, § 1161 at least recognizes the ability of the Indian tribes to govern and control their own lives as far as intoxicants are concerned."<sup>81</sup> Further, the article noted that "[e]conomic interests seem[ed] to be at the heart of [California's] claims for regulatory jurisdiction, rather than concerns for uniform, statewide enforcement."<sup>82</sup>

The Supreme Court reversed the Ninth Circuit, noting that tribal sovereignty served only as a backdrop to inform preemption analysis. The Court suggested that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians."<sup>83</sup> Whereas the *Mazurie* Court cited *Williams v. Lee* in support of tribal liquor regulation, the *Rice* Court concluded that the *Williams* presumption of sovereignty "would be unwarranted in the narrow context of the regulation of liquor."<sup>84</sup>

In establishing this exception, the Court cited the long history of federal and state regulation of liquor in Indian country.<sup>85</sup> Specifically, the Court highlighted that Congress required several states—including Oklahoma—to prohibit the sale of liquor to Indians as a condition of entry into the United States.<sup>86</sup> Further, the Court finally addressed the question of inherent tribal authority that it avoided in *Mazurie*, stating, "There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area."<sup>87</sup> Thus, the Court held that California possessed authority to require licensing under § 1161.<sup>88</sup> The Court concluded that "Congress did not

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79. *Id.* at 715-16.

80. *Id.* at 717.

81. Thomas E. Lilley, *Regulatory Jurisdiction over Indian Country Retail Liquor Sales*, 23 NAT. RESOURCES J. 239, 245 (1983).

82. *Id.*

83. *Rice*, 463 U.S. at 722.

84. *Id.* at 723.

85. *Id.*

86. *Id.*

87. *Id.* at 724.

88. *Id.* at 735.

intend to make tribal members ‘super citizens’ who could trade in a traditionally regulated substance free from all but self-imposed regulations.’<sup>89</sup>

The Supreme Court has not directly reviewed § 1161 since *Rice*, and the last time the Court even mentioned the statute was in the 1989 case of *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.<sup>90</sup> The Court recently had an opportunity to address the statute, at least tangentially, in the 2016 case of *Nebraska v. Parker*.<sup>91</sup> But the Court remained silent on § 1161. *Parker* originated in Omaha Tribal Court, where non-Indian business owners sought injunctive and declaratory relief from the Omaha Tribal Council members who attempted to enforce the tribal liquor license and tax scheme on them.<sup>92</sup> Instead of directly challenging the tribe’s jurisdiction to regulate alcohol under § 1161, the owners claimed that their businesses operated outside of Indian country because Congress intended to diminish the reservation boundaries when it passed an 1882 Act calling for allotment of the Omaha Reservation.<sup>93</sup> In other words, if the 1882 Act diminished the reservation, then the tribe possesses no regulatory jurisdiction over the business owners who own the land in fee. Despite this argument, the tribe prevailed in every court: the Omaha Tribal Court, the United States Court for the District of Nebraska,<sup>94</sup> the United States Court of Appeals for the Eighth Circuit,<sup>95</sup> and the Supreme Court<sup>96</sup> all held that the 1882 Act did not diminish the reservation, and so the tribe may enforce its alcohol regulations on the business owners.

Though *Parker* turned on land distinctions, it sheds light on the tension that § 1161 creates between states and tribes. The State of Nebraska intervened in *Parker* at the district court level after the Omaha Tribal Council demanded that the Nebraska Tax Commissioner remit the tribal share of the fuel tax revenue from retailers located within the reservation boundaries.<sup>97</sup> The Supreme Court briefs in *Parker* highlight a pointed

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89. *Id.* at 734 (citing *Rehner v. Rice*, 678 F.2d 1340, 1352 (9th Cir. 1982) (Goodwin, J., dissenting), *rev'd*, 463 U.S. 713 (1983)).

90. 492 U.S. 408, 428 (1989).

91. 136 S. Ct. 1072, 1078 (2016).

92. *Smith v. Parker*, 996 F. Supp. 2d 815, 817 (D. Neb.), *aff'd*, 774 F.3d 1166 (8th Cir. 2014), *aff'd sub nom.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

93. *Id.*

94. *Id.* at 844.

95. *Smith v. Parker*, 774 F.3d 1166, 1169 (8th Cir. 2014), *aff'd sub nom.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

96. *Parker*, 136 S. Ct. at 1072.

97. *Parker*, 996 F. Supp. 2d at 831.

argument about tribal motivations for regulating liquor. For example, the petitioners' brief (Nebraska, et al.) concluded with the following statement:

Respondents' recent effort to assert jurisdiction in the disputed area is not a comprehensive plan to administer a broad array of government services in and around Pender, but rather simply to derive revenue from the sale of alcohol in Pender's liquor retailers and bars. In service of that goal, Respondents ask this Court to rewrite history.<sup>98</sup>

In other words, according to the State of Nebraska, the tribe's attempt to regulate alcohol amounted to nothing more than a money grab. Interestingly, this argument flips the observation made by the article discussing the Ninth Circuit's holding in *Rice* (this time, a state has accused a tribe of money-grabbing).<sup>99</sup>

The Omaha Tribal Council respondents argued that business owners attempted to hide behind a hypothetical jurisdictional confusion that could ensue if the reservation remains intact.<sup>100</sup> Refuting this argument, the Tribal Council members claimed that "[i]n light of [the] well-established doctrinal tools to protect the rights of non-Indians, Petitioners' and amici's poorly-defined and inaccurate 'parade of horrors' rings hollow."<sup>101</sup> They further argued that any jurisdictional problems could be jointly solved: "[S]tate, local, tribal, and federal officials can work cooperatively to allocate and, where appropriate, share jurisdiction."<sup>102</sup>

The National Congress of American Indians<sup>103</sup> ("NCAI") submitted an amicus brief in support of the tribal respondents, stating, "If tribal authority to regulate liquor sales in non-Indian communities in Indian country is problematic, the solution lies either with Congress or with a proper challenge to the scope of § 1161, not with the revision of this Court's well-established reservation-boundary jurisprudence."<sup>104</sup> NCAI implied that the

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98. Brief for Petitioners at 52, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

99. Lilley, *supra* note 81, at 245.

100. Brief for Omaha Tribal Council Respondents at 21, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

101. *Id.*

102. *Id.* at 59.

103. Founded in 1944, the National Congress of American Indians is the oldest and largest organization aimed at promoting the interests of tribal governments and communities. See NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/> (last visited May 12, 2017).

104. Brief for National Congress of American Indians *et al.* as *Amici Curiae* Supporting Respondents at 7, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

scope of § 1161 was the crux of the issue: “The Court’s inability to consider the scope of Section 1161 is another reason why the Court might wish to consider whether the writ was improvidently granted.”<sup>105</sup>

Despite these arguments, the Court limited its unanimous decision to the diminishment issue, holding that the 1882 Act did not diminish the Omaha reservation.<sup>106</sup> Justice Thomas authored the opinion and made no mention of § 1161. Although the statute played no role in the outcome of the case, the arguments raised by the parties illustrate that the scope of § 1161 remains in question and that the underlying policy reasoning of the statute warrants reevaluation.

#### *IV. State Taxation of Non-Indian Liquor Transactions in Indian Country*

While § 1161 presents a number of potential problems, two specific issues highlight the friction stemming from the statute: taxation and dram-shop liability. Issues of state taxation of non-Indians engaged in business in Indian country extend far beyond the context of alcohol. For example, Oklahoma and several tribes within the state have extensively litigated the state’s taxation of cigarettes and motor fuels purchased by non-Indians in Indian country.<sup>107</sup> Unlike those contexts, states have argued in the alcohol context that § 1161 provides direct congressional authorization of state-imposed taxation. Further, Oklahoma’s alcohol regulatory scheme aggravates this issue by conditioning the grant and retention of a liquor license on the payment of state taxes.<sup>108</sup> In an attempt to regulate tribes, Oklahoma has threatened to revoke tribes’ liquor licenses and has claimed the right to tax alcohol transactions by non-Indians in Indian country.<sup>109</sup>

The legal validity of these types of actions taken against tribes often turn on murky, case-by-case questions of Federal Indian law. The Supreme Court has held that states may tax the activities of non-Indian citizens in Indian country subject to a “flexible pre-emption analysis sensitive to the

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105. *Id.* at 7 n.4.

106. *Nebraska v. Parker*, 136 S. Ct. 1072, 1075 (2016).

107. *See Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450 (1995) (motor fuels tax); *see also Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (cigarette tax).

108. *See* 68 OKLA. STAT. § 212 (2011 & Supp. 2012); 37A OKLA. STAT. § 1-112 (effective Oct. 1, 2018), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=479532>.

109. *In re Revocations of Licenses/Permits of Citizen Potawatomi Nation*, No. JM-14-005-K (Okla. Tax Comm’n 2014).

particular facts and legislation involved.”<sup>110</sup> But the Court has not directly addressed whether § 1161 permits states to bypass the standard preemption analysis and automatically impose state taxes on non-Indian alcohol transactions in Indian country. The judicial trend in the taxation cases does not ensure a tribal victory through litigation. Therefore, the best answer—even beyond the alcohol context—remains to involve tribes in the existing Streamlined Sales and Use Tax system, which apportions tax collection between sovereigns. Alternatively, states and tribes may enter into specific cooperative agreements similar to those that have been employed in the tobacco context.

As applied to tribes, Oklahoma’s alcohol scheme presents a specific problem because of the state’s ability to revoke licenses upon failure to timely remit state sales taxes.<sup>111</sup> Title 37, section 528 of the Oklahoma Statutes states, “Any [liquor] license issued . . . may be revoked or suspended if . . . the licensee has . . . [h]ad any permit or license issued by the Oklahoma Tax Commission and required by the Oklahoma Alcoholic Beverage Control Act, suspended or revoked by the Tax Commission.”<sup>112</sup> The revocability of a license for tax purposes applies to both low-point beer<sup>113</sup> and alcoholic beverages,<sup>114</sup> which is defined as “alcohol, spirits, [non low-point] beer, and wine.”<sup>115</sup>

While *Rice* suggests that tribes in Oklahoma must obtain Oklahoma liquor licenses in order to comply with state law, the Supreme Court has not addressed how taxation might factor into a state liquor regulatory scheme when applied to tribes. And lower courts have yet to decide a case involving a sales tax imposed via § 1161 strictly analogous to the Oklahoma liquor tax scheme. But courts have addressed other states’ alcohol schemes imposed under § 1161. In *Squaxin Island Tribe v. Washington*, the Ninth Circuit broadly construed § 1161, holding that Washington could tax tribal liquor sales to nontribal members.<sup>116</sup> Washington operated a monopoly liquor system in which the state Liquor Control Board purchased liquor from distributors and then retailed it through state stores at board-fixed prices.<sup>117</sup> Tribes in Washington,

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110. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

111. 37 OKLA. STAT. § 577(F) (2011).

112. *Id.* § 528(A)(7).

113. *Id.* § 163.16(4).

114. *Id.* § 528(A)(7).

115. *Id.* § 506(3).

116. 781 F.2d 715, 724 (9th Cir. 1986).

117. *Id.* at 717.



however, purchased liquor from out-of-state distributors and sold it in tribal liquor stores with prices including tribal taxes but excluding state taxes and surcharges.<sup>118</sup> Following *Rice*, Washington demanded that tribes obtain vendor agreements with the state which required prepayment of liquor costs and state liquor sales taxes.<sup>119</sup> Four tribes then brought suit against the state, claiming that Washington lacked authority to tax tribal liquor enterprises.<sup>120</sup>

The tribes argued that the state tax on tribal liquor sales aimed purely to maximize revenue and thus fell outside of the narrow holding of *Rice*, which applied solely to liquor licensing.<sup>121</sup> The Ninth Circuit disagreed, noting that *Rice* held that tribal sovereignty interests were only implicated in sales of liquor to tribal members, and therefore the tribes' claims "[did] not merit serious consideration."<sup>122</sup> Further, the court found that "the 'primary purpose of the liquor control system in Washington is control,' not revenue."<sup>123</sup> Under this expansive reading of *Rice* and § 1161, the Ninth Circuit essentially conflated the power to require liquor licensing with the power to tax tribal liquor sales in Indian country.

The tribes in *Squaxin* additionally argued that the state taxation directly burdened<sup>124</sup> tribal members and the operation of tribal government and thus was impermissible.<sup>125</sup> Again, the court flatly rejected this argument, noting that the backdrop analysis in *Rice* identified no tradition of sovereign immunity or inherent authority of liquor regulation by Indians.<sup>126</sup> Under this characterization of *Rice*, a state could presumably attach any condition to liquor licensing. This directly conflicts with the Supreme Court's statements in *Rice* that liquor licensing is a narrow exception to the general rule of tribal sovereignty. *Squaxin* has received no direct negative treatment and remains good law within the Ninth Circuit.

Note that the liquor control scheme applied in Washington differs significantly from the scheme in Oklahoma, which more resembles the California free enterprise system reviewed in *Rice*. In *Rice*, California sought to *regulate* the state liquor industry through licensing whereas in

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118. *Id.*

119. WASH. REV. CODE § 82.08.150 (amended 1989).

120. *Squaxin*, 781 F.2d at 717-18, 718 n.4.

121. *Id.* at 720.

122. *Id.*

123. *Id.*

124. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *see also Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965).

125. *Squaxin*, 781 F.2d at 719.

126. *Id.*

*Squaxin*, Washington sought to completely *operate* the state liquor industry through a monopoly system. Thus, the court in *Squaxin* may have deferred more broadly to Washington because a tribal competitor likely posed a significant threat of competition to a heavily state-controlled system.<sup>127</sup>

The State of Oklahoma has prevailed in imposing at least one of its alcohol taxes in Indian country. In *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, the Tenth Circuit upheld the imposition of an Oklahoma tax on 3.2% beer wholesale distributors who sold to tribal retail stores.<sup>128</sup> In addition to the low-point beer tax, *Chickasaw Nation* also involved challenges to the state motor fuel taxes and state income taxes.<sup>129</sup> The tribe argued that the holding in *Rice* did not equate the state's power to regulate liquor transactions with the power to tax those transactions.<sup>130</sup> The Tenth Circuit agreed only to an extent, stating, "We agree that the power to regulate does not automatically encompass the power to tax."<sup>131</sup> The Tenth Circuit further clarified that taxation could be regulatory so long as it played "an integral part of the overall regulatory structure."<sup>132</sup> In determining whether the tax played an integral part, the court focused on two facts. First, the court found the tax primarily regulatory in nature because it was located in title 37 (which regulates intoxicating liquors) of the Oklahoma Statutes and thus differed from other taxes (including sales taxes) in title 68.<sup>133</sup> Second, the court found that the legal incidence of the tax fell on the distributors because the tax was imposed on distributors and not directly on the tribe.<sup>134</sup> Accordingly, the court upheld the tax as an integral part of the overall alcohol regulatory scheme.<sup>135</sup> The Tenth Circuit's reasoning illustrates the formalistic approach modernly taken in

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127. This aligns with the Supreme Court's reasoning in the tribal tobacco cases, in which the Supreme Court held that tribes were essentially marketing a "tax exemption." *See, e.g.,* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.").

128. 31 F.3d 964, 967-68 (10th Cir. 1994), *aff'd in part, rev'd in part and remanded sub nom. Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, *vacated in part sub nom. Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 64 F.3d 577 (10th Cir. 1995).

129. *Id.* at 966.

130. *Id.* at 968.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 969.

135. *Id.* at 968.

Indian taxation cases. But, as a practical matter, whether the legal incidence falls on the distributor, the tribe, or the consumer carries little relevance because the tax will inevitably raise the overall price and negatively affect tribal interests.

Following the Tenth Circuit's decision in *Chickasaw Nation*, the Supreme Court granted certiorari, but only on the issues of the motor fuels tax and income tax.<sup>136</sup> While the tax on low-point beer was not granted certiorari, the Supreme Court's review of the motor fuels tax and income tax in *Chickasaw Nation* illustrates Oklahoma's persistence on taxing tribal businesses and forecasts the actions the state may take if litigation over alcohol taxation occurs in the future.

Ultimately, the Supreme Court held that Oklahoma could not apply its motor fuels tax to fuel sold by the tribe in Indian country but that the state could tax income of all persons residing in the state outside of Indian country.<sup>137</sup> Oklahoma argued that the Court should weigh the relevant state and tribal interests in reviewing the motor fuels tax.<sup>138</sup> The Court, however, employed a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians."<sup>139</sup> Under this categorical approach, the case turned on the legal incidence of the tax: "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization."<sup>140</sup>

Unsurprisingly, the motor fuels tax at issue<sup>141</sup> failed to specify which party the legal incidence rested on.<sup>142</sup> In the absence of express language, the Court determined the legal incidence fell on tribal retailers because the taxing statute required fuel distributors to remit the amount of tax due "on behalf of a licensed retailer."<sup>143</sup> Furthermore, the tax did not impose liability on a consumer for purchasing or possessing untaxed fuel.<sup>144</sup>

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136. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452-53 (1995).

137. *Id.* at 467.

138. *Id.* at 457.

139. *Id.* at 458 (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)).

140. *Id.* at 459 (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976)).

141. 68 OKLA. STAT. § 505(c) (1991) (repealed 1996).

142. *Chickasaw Nation*, 515 U.S. at 461.

143. *Id.* (emphasis omitted) (quoting 68 OKLA. STAT. § 505(c) (1991) (repealed 1996)).

144. *Id.* at 462.

Ultimately, the Court affirmed the Tenth Circuit's finding that the legal incidence fell on the tribe, thus rendering the tax impermissible.<sup>145</sup>

In reaction to the Supreme Court's decision in *Chickasaw Nation*, Oklahoma restructured the motor fuel tax and recodified it at title 68, sections 500.1–531 of the Oklahoma Statutes.<sup>146</sup> The Oklahoma legislature rewrote the code and expressly placed the legal incidence on consumers: "It is the intent of the Legislature that the taxes imposed on motor fuel have always been and continue to be declared and conclusively presumed to be a direct tax on the ultimate or retail consumer."<sup>147</sup> Further, the legislature identified the specific reason for the statutory rewrite: "The purpose of this recodification is a result of the interpretation of the motor fuel tax code of this state by the federal courts, specifically the decision by the Supreme Court of the United States in '*Oklahoma Tax Commission v. Chickasaw Nation*.'"<sup>148</sup>

As illustrated in *Chickasaw Nation*, courts question whether a tax serves regulatory or pecuniary purposes in determining its applicability in Indian country. The Tenth Circuit deemed the low-point beer tax primarily regulatory simply based on its location in title 37 of the Oklahoma Statutes.<sup>149</sup> Other Oklahoma liquor permits, however, differ from the tax on low-point beer upheld in *Chickasaw Nation*. For example, while the mixed beverage tax permit is also located in title 37, the requirement of a sales tax permit in that section refers explicitly to title 68 of the Oklahoma Statutes.<sup>150</sup> This is distinguishable from the tax on low-point beer which does not refer to any other section of the state code.<sup>151</sup> If a court followed the reasoning of the Tenth Circuit in *Chickasaw Nation* as to the mixed beverage permit, the fact that the condition of a sales tax permit refers back to title 68 could indicate a more pecuniary purpose. In any event, under the Supreme Court's formalistic approach, the legal incidence of the tax likely controls the outcome. And the Oklahoma Sales Tax expressly states that "this Code shall be construed as imposing a tax upon the sale of tangible

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145. *Id.*

146. *See* Ryals v. Keating, 2000 OK CIV APP 24, 2 P.3d 378 (discussing changes to the Motor Fuel Tax Code after *Chickasaw Nation*).

147. 68 OKLA. STAT. § 500.2 (2011)).

148. *Id.* (internal citation omitted).

149. *Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 31 F.3d 964, 968 (10th Cir. 1994), *aff'd in part, rev'd in part and remanded sub nom. Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, *vacated in part sub nom. Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 64 F.3d 577 (10th Cir. 1995).

150. 37 OKLA. STAT. § 577(E) (2011).

151. *Id.* § 163.6.

personal property and services, not otherwise exempted, to the consumer.”<sup>152</sup>

Litigation is currently underway on this exact issue in the federal court system. For example, in the United States District Court for the District of South Dakota, *Flandreau Santee Sioux Tribe v. Gerlach* involves a dispute between South Dakota and the Flandreau Santee Sioux Tribe over the applicability of the state’s use tax to non-Indian liquor transactions within the tribe’s Indian country.<sup>153</sup> The tribe holds three state liquor licenses granted pursuant to South Dakota law.<sup>154</sup> Similar to the Oklahoma scheme, these licenses are conditioned upon the remittance of state taxes.<sup>155</sup>

When the tribe sought to renew its licenses in 2009 and 2010, South Dakota denied the applications, stating that taxes incurred by non-Indians had not been remitted.<sup>156</sup> The state based its decision on section 35-2-24 of the South Dakota Codified Laws, which states in pertinent part:

No license granted under this title may be reissued to an Indian tribe operating in Indian country controlled by the Indian tribe or to an enrolled tribal member operating in Indian country controlled by the enrolled tribal member's tribe until the Indian tribe or enrolled tribal member remits to the Department of Revenue all use tax incurred by nonmembers as a result of the operation of the licensed premises, and any other state tax has been remitted or is not delinquent.<sup>157</sup>

Following an adverse decision in a state administrative proceeding, the tribe filed suit in federal court, seeking a preliminary injunction.<sup>158</sup> In one of its specific claims, the tribe alleges that section 35-2-24 violates 18 U.S.C. § 1161.<sup>159</sup> The State then moved for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c).<sup>160</sup>

The court denied the State’s motion for judgment on the pleadings and thus the case remains at the district court level.<sup>161</sup> The ultimate resolution of this case should garner the attention of tribes within Oklahoma, given the

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152. 68 OKLA. STAT. § 1351 (2011) (emphasis added).

153. *Flandreau Santee Sioux Tribe v. Gerlach*, 155 F. Supp. 3d 972, 977 (D.S.D. 2015).

154. *Id.*

155. *Id.*

156. *Id.*

157. S.D. CODIFIED LAWS § 35-2-24 (2011).

158. *Flandreau Santee Sioux*, 155 F. Supp. 3d at 977.

159. *Id.* at 978.

160. *Id.*

161. *Id.*

similarities in the two states' alcohol regulatory schemes. In the interim, District Judge Lawrence Piersol's opinion denying the motion for judgment on the pleadings proves instructive. The arguments articulated in *Flandreau* resemble those at the heart of this article and likely to appear if litigation occurs between tribes and Oklahoma on this issue. South Dakota argues that the tribe consented to the state's licensing scheme, and thus state taxation, when it applied for a state liquor license.<sup>162</sup> The tribe counters with two arguments. First, the state cannot "convert invalid on-reservation taxes into valid taxes by merely conditioning alcohol licensure on paying the taxes."<sup>163</sup> Second, the state's power to regulate under § 1161 "does not empower the state to attach tax conditions to licensures that have no nexus to alcohol regulation."<sup>164</sup> Ultimately, this case turns on the scope of § 1161.

In considering the State's motion, the court began by reciting the plain language of § 1161 and then summarized the *Rice* decision.<sup>165</sup> On the specific issue of whether a state may condition liquor licenses upon the remittance of taxes, the court stated that the *Rice* decision "departs from relevance" because of its silence on "the more discrete issue of what conditions may be attached to licensure."<sup>166</sup> Further, the court characterized South Dakota's argument to mean "that the state laws the tribes must comply with may be of indeterminate scope and contemplate a vast array of subject matter unrelated to alcohol regulation."<sup>167</sup> The court also dismissed the State's reliance on *Squaxin*, stating that the "state tax [in *Squaxin*] was valid as it was confined strictly to alcohol sales marketed toward non-members who were being empowered to avoid state tax impositions."<sup>168</sup> Unlike *Squaxin*, the South Dakota scheme shares no apparent nexus with alcohol.<sup>169</sup>

Ultimately, the court deemed the tribe's pleadings adequate and denied the State's motion.<sup>170</sup> Further, the court identified that the core issue of the case turns on the reconciliation of a state's regulatory authority under § 1161 with the fact that a "state's authority to tax in Indian country is operationally curtailed by a tribe's sovereign immunity."<sup>171</sup> Though the case

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162. *Id.* at 997.

163. *Id.* at 998.

164. *Id.*

165. *Id.*

166. *Id.* at 999.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1000.

171. *Id.* at 999-1000.

remains at an early stage, the Flandreau Santee Sioux Tribe won a battle by surviving South Dakota's motion. The district court could have easily shoehorned this case under a broad reading of *Rice* or attempted to resolve the case on other grounds. But, for the time being, it seems a federal district court stands poised to address the effect of § 1161 on state taxation in Indian country.

This issue could also lead to litigation in Oklahoma. For example, the Citizen Potawatomi Nation ("Nation") recently prevailed in arbitration over the State of Oklahoma on the issue of the state's ability to impose taxes on non-Indian liquor sales in Indian country.<sup>172</sup> The dispute began in 2014 when the Oklahoma Tax Commission ("OTC") filed an administrative complaint against the Nation and sought to revoke the Nation's state liquor licenses for failure to remit state taxes.<sup>173</sup> In this initial complaint, the OTC claimed that Oklahoma sales taxes apply to all sales by the Nation to nontribal members.<sup>174</sup> The Nation argued that its gaming compact with Oklahoma required OTC to pursue its claim through arbitration.<sup>175</sup> After arbitration began, the OTC threatened to close all of the Nation's businesses for failure to comply with Oklahoma tax laws.<sup>176</sup>

The arbitrator (former Oklahoma Supreme Court Justice Daniel J. Boudreau)<sup>177</sup> "characterized the underlying dispute in [the] proceeding as centering primarily on the Nation's contention that they have no obligation to accede to the State's demand for all of the Nation's businesses to collect, report and remit sales taxes on sales of goods and services to nontribal members."<sup>178</sup> Much of the arbitration award focuses on the Indian Gaming Regulatory Act and the gaming compact between the Nation and the state. But ultimately, the Nation won on the argument that even if Oklahoma's Tax Code applies to the Nation's sales to non-Indians, it would be preempted by the federal balancing test established by the Supreme Court in *White Mountain Apache Tribe v. Bracker*.<sup>179</sup> The arbitrator agreed, and he did so based on four findings. First, the Nation identified "significant federal and tribal interests in the Nation's self-governance, economic self-

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172. Citizen Potawatomi Nation v. Oklahoma, No. 01-15-0003-3452 (Am. Arb. Ass'n Apr. 4, 2016) (Boudreau, Arb.) [hereinafter Arbitration Award].

173. *Id.* at 2.

174. *Id.*

175. *Id.*

176. *Id.*

177. See Daniel J. Boudreau, DISP. RESOL. CONSULTANTS, <http://www.drc-ok.com/boudreau-cv/> (last visited May 12, 2017).

178. Arbitration Award, *supra* note 172, at 3.

179. *Id.* at 4-5; see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

sufficiency, and self-determination.”<sup>180</sup> Second, “the Nation alone invests value in the goods and services that it sells, does not derive such value through an exemption from State sales taxes, and imposes its own equivalent tribal sales tax on the sales.”<sup>181</sup> Third, “the State possesses no economic interest beyond a general quest for additional revenue in imposing [its] sales tax.”<sup>182</sup> And fourth, “the federal and tribal interests at stake predominate significantly over any possible State interest in the transactions.”<sup>183</sup>

Interestingly, the arbitrator applied the *Bracker* balancing analysis,<sup>184</sup> which was developed in 1980 and significantly predates the more categorical and formal approach taken by the Supreme Court in *Chickasaw Nation*.

While this arbitration award bodes well for tribes in Oklahoma, the State of Oklahoma has shown a willingness to amend its statutes to circumnavigate adverse decisions, as illustrated by the legislative actions taken following *Chickasaw Nation*. While amending § 1161 could erase the question of the statute’s current scope, taxation questions may persist. On a practical level, better avenues than litigation exist, including seeking inclusion in Oklahoma’s existing Streamlined Sales and Use Tax statute or through direct cooperative agreements with the state.

#### *V. The Taxation Solution: Inclusion in the Sales and Use Tax Scheme and Cooperative Agreements*

As discussed above, the issue of taxation causes friction between the state and tribes as each sovereign attempts to maximize its tax base. The Supreme Court has held that a tribe’s authority to tax is an inherent government function.<sup>185</sup> But for products without “reservation generated value,” the state may tax non-Indian purchases of that product in Indian country.<sup>186</sup> For example, courts likely will not find reservation-generated value in tribal cigarette sales when the cigarettes are imported from outside of Indian country.<sup>187</sup> This creates a potential double taxation problem where

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180. Arbitration Award, *supra* note 172, at 5.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See Bracker*, 448 U.S. at 144-45.

185. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982).

186. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (no preemption for tribes that were merely “market[ing] a [tax] exemption”).

187. *Id.*



both the tribe and the state may tax a non-Indian purchase. And the extra tax necessarily raises the overall price, which negatively affects a tribe's ability to compete.

The State of Oklahoma and tribes have addressed tax issues in compacts concerning certain industries, including gaming,<sup>188</sup> tobacco,<sup>189</sup> and hunting,<sup>190</sup> among others. In the tobacco context, compacts focus directly on taxation. For example, the compact between Oklahoma and the Absentee Shawnee Tribe of Indians of Oklahoma states that "the Tribe acknowledges that the State tobacco tax does apply to sales to non-members of the Tribe, even if they occur on tribal lands."<sup>191</sup> The compact then outlines a detailed description of how tobacco taxes are to be imposed and apportioned between the tribe and state.<sup>192</sup>

The Model Tribal Gaming Compact, however, does not address taxes with the same specificity as the tobacco compact. The compact does contemplate the sale of alcohol in gaming facilities: "The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal and tribal law in regard to the licensing and sale of such beverages."<sup>193</sup> But on the issue of taxation, the compact only states, "Nothing in this Compact shall be deemed to authorize the state to impose any tax, fee, charge or assessment upon the tribe or enterprise except as expressly authorized pursuant to this Compact."<sup>194</sup> From a facial reading, these two statements remain ambiguous as to whether the state may tax non-Indian liquor transactions in tribal gaming facilities. Of course, the Citizen Potawatomi Nation recently won an arbitration award on this issue. But instead of litigating or arbitrating<sup>195</sup> the issue, the state and tribes could negotiate which state taxes, if any, apply in this context through either cooperative

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188. See Model Tribal Gaming Compact, 3A OKLA. STAT. § 281 (2011).

189. See, e.g., Tobacco Tax Compact Between the State of Oklahoma and the Absentee Shawnee Tribe of Indians of Oklahoma (Okla. Sec'y of State No. 47739, Sept. 18, 2015), <https://www.sos.ok.gov/documents/filelog/90775.pdf> [hereinafter Absentee Shawnee Tobacco Compact].

190. See Hunting and Fishing Compact Between the State of Oklahoma and the Cherokee Nation (Okla. Sec'y of State No. 47580, June 1, 2015), <https://www.sos.ok.gov/documents/filelog/90614.pdf>.

191. Absentee Shawnee Tobacco Compact, *supra* note 189, at art. 2, § 6.

192. *Id.*

193. 3A OKLA. STAT. § 281 pt. 5(I) (2011).

194. *Id.* § 281 pt. 11(D).

195. The Model Tribal Gaming Compact requires arbitration before a suit can be filed in federal court. *Id.* § 281 pt. 12(2).

agreements, the Streamlined Sales and Use Tax Agreement, or a combination of both.

Oklahoma has a statutory scheme in place that may solve the issue of state taxation of non-Indian liquor transactions in Indian country. To more efficiently levy its taxes, Oklahoma adopted the Streamlined Sales and Use Tax Administration Act.<sup>196</sup> This statute aims to alleviate the burdens of tax compliance between states by using a central simplified system to apportion state sales and use taxes.<sup>197</sup> The statute serves as a template agreement for states—as separate sovereigns—to cooperate in the administration and collection of their respective taxes. The statute, however, makes no reference to tribes—the only sovereigns contemplated are other states and the District of Columbia.<sup>198</sup> Courts have yet to consider tribal inclusion in the scheme and few Oklahoma cases address the Streamlined Sales and Use Tax Administration Act.<sup>199</sup> NCAI advocates for the inclusion of tribes in the Streamlined Sales and Use Tax Agreement, yet efforts to include tribes in the scheme have yet to gain widespread acceptance.<sup>200</sup> Tribal inclusion could prove enormously beneficial in Oklahoma, where thirty-eight sovereign tribal governments exist.

North Dakota has entered into sales and use tax agreements with tribes located within its borders.<sup>201</sup> Chapter 57-39.8, titled “State-Tribal Sales, Use, and Gross Receipts Tax Agreements,” grants the governor the authority to enter agreements “relating to administration and allocation of state and tribal sales, use, and gross receipts taxes.”<sup>202</sup> These agreements allow tribes and the state to work out tax allocation on their own terms, instead of having their rights determined through litigation. Further, tribes and the state may enter into general tax agreements, such as the Streamlined Sales and Use Tax Agreement, and then specifically compact for certain

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196. 68 OKLA. STAT. §§ 1354.14-1377 (2011).

197. *Id.* § 1354.18.

198. *Id.* § 1354.15(12).

199. *See* *Am. Airlines, Inc. v. Okla. Tax Comm’n*, 2014 OK 95, 341 P.3d 56 (holding that the Streamlined Act contained an exception for purchases of electricity and natural gas utility services); *see also* *City of Tulsa v. State*, 2012 OK 47, 278 P.3d 602 (mentioning the Streamlined Act in a footnote).

200. *See* Nat’l Cong. Of Am. Indians [NCAI], Relationship Between Tribal Governments and the Streamlined Sales and Use Tax Agreement, Res. GBW-05-028 (June 12-15, 2005), [http://www.ncai.org/attachments/Resolution\\_IPFkSFtsxQhOxSVbIExyTLYzvpRTaNthUNURQEYNrTuVPkWvjYK\\_GBW-05-028\\_SSTP\\_Resolution.pdf](http://www.ncai.org/attachments/Resolution_IPFkSFtsxQhOxSVbIExyTLYzvpRTaNthUNURQEYNrTuVPkWvjYK_GBW-05-028_SSTP_Resolution.pdf).

201. N.D. CENT. CODE § 57-39.8-01 (Supp. 2015).

202. *Id.*

taxes (tobacco, alcohol, etc.) in which the state may possess an increased regulatory interest separate from purely raising revenue.

*VI. Tribes Should Accept Dram-Shop Liability for Liquor Sales  
in Indian Country as an Exertion of Sovereignty*

As discussed above, courts have interpreted § 1161 to mean that states may, at the very least, require tribes or individuals selling liquor in Indian country to obtain state liquor licenses. Tribes, however, remain generally shielded from tort liability arising out of liquor transactions in Indian country by virtue of sovereign immunity. This presents a problem for consumers in Indian country and for those living near Indian country, which constitutes a significant population given the patchwork of Indian country in Oklahoma. Tribes can address this issue by enacting tribal tort claim acts or through other remedial measures.

Dram-shop liability is defined as “[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer.”<sup>203</sup> Tort claimants alleging injuries arising out of liquor transactions in Indian country have argued that § 1161 grants courts jurisdiction over tribes in this context. Courts, however, have generally construed § 1161 narrowly in these cases, finding that the statute does not waive tribal sovereign immunity.<sup>204</sup> *Furry v. Miccosukee Tribe Indians of Florida*<sup>205</sup> illustrates a narrow construction of § 1161 and *Rice* in the context of a tribe’s dram-shop liability. In *Furry*, a father brought a wrongful death suit against the tribe, claiming that his daughter died from being over-served by a tribal entity.<sup>206</sup> The father argued that the tribe’s application for a state liquor license “amounted to a broad agreement to be bound by Florida law in all respects.”<sup>207</sup> The Eleventh Circuit disagreed, clarifying that the narrow *Rice* holding only addressed California’s ability to require liquor licensing.<sup>208</sup> Thus, the court held that the tribe had not expressly waived its sovereign immunity and could not be sued for dram-shop liability as a result of possessing a liquor license.<sup>209</sup>

Oklahoma recently addressed the issue of tribal dram-shop liability in *Sheffer v. Buffalo Run Casino, PTE, Inc.* and held that (1) the tribe was

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203. *Dram-Shop Liability*, *supra* note 14.

204. COHEN’S HANDBOOK, *supra* note 10, § 7.05[1][b], at 639-40.

205. 685 F.3d 1224 (11th Cir. 2012).

206. *Id.* at 1226.

207. *Id.* at 1228.

208. *Id.* at 1230.

209. *Id.* at 1236-37.

immune from suit in state court for compact-based torts claims and (2) the tribe did not waive its sovereign immunity by obtaining a liquor license.<sup>210</sup> The court noted that the *Rice* holding was “very narrow” and “limited to a regulatory jurisdictional analysis.”<sup>211</sup> Consequently, the court held that Oklahoma’s regulatory power under § 1161 did not extend to a private party’s tort claim against a tribe.<sup>212</sup> Furthermore, the court explained, “applying for and accepting a state liquor license ‘is nothing more than a promise to comply with state liquor laws.’”<sup>213</sup> Other state courts have similarly held that obtaining a liquor license does not abrogate tribal sovereign immunity,<sup>214</sup> although at least one state supreme court has determined that a state can require that tribes obtain dram-shop insurance before a liquor license may be granted and that procuring insurance constitutes a waiver of sovereign immunity.<sup>215</sup>

While at first blush these cases seem to be explicit tribal victories, they highlight a central problem: a class of tort victims may have no remedy (or, perhaps more accurately, may not have the *best* remedy). The cases upholding sovereign immunity were correctly decided and tribes have no existing legal duty to adopt tort claim statutes or provide a remedy in these situations. But, in terms of asserting sovereignty, such a move may prove beneficial.

Similar to the taxation context, some compacts explicitly address tort liability. For example, Part 6 of Oklahoma’s Model Tribal Gaming Compact addresses tort claims and limited consent to suit.<sup>216</sup> The compact requires that tribal enterprises maintain tort liability insurance of not less than \$250,000 for any one person, \$2,000,000 “for any one occurrence for

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210. 2013 OK 77, ¶ 50, 315 P.3d 359, 373.

211. *Id.* ¶¶ 37, 40, 315 P.3d at 369-70 (emphasis omitted).

212. *Id.* ¶ 43, 315 P.3d at 371.

213. *Id.* ¶ 45, 315 P.3d at 371 (quoting *Bittle v. Bahe*, 2008 OK 10, ¶ 36, 192 P.3d 810, 836 (Kauger, J., dissenting)).

214. *See, e.g., Foxworthy v. Puyallup Tribe of Indians Ass’n*, 169 P.3d 53, 59 (Wash. Ct. App. 2007) (“The Puyallup Tribe has not waived its sovereign immunity to private lawsuits in state court. Nor has Congress chosen to abrogate tribal immunity in private dram shop actions . . . .”); *see also Filer v. Tohono O’Odham Nation Gaming Enter.*, 129 P.3d 78, 84 (Ariz. Ct. App. 2006) (“The Court in *Rice* certainly did not hold that California, let alone a private citizen, could sue the tribe in state court, despite a claim of sovereign immunity, if the action had some connection to the state’s regulation of alcohol.”); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. Ct. App. 1997) (“We cannot conclude, however, that tribal sovereign immunity is waived for a *private suit* brought under the Texas Dram Shop Act.”).

215. *See Ex parte Poarch Band of Creek Indians*, 155 So. 3d 224, 230-31 (Ala. 2014).

216. 3A OKLA. STAT. § 281 pt. 6 (2011).

personal injury,” and \$1,000,000 “for any one occurrence for property damage.”<sup>217</sup> Similar to a governmental tort claims act, the compact requires tribal enterprises to first review a tort claim and make a determination whether to resolve the claim.<sup>218</sup> A claimant may only bring suit after the tribal enterprise reviews and decides not to resolve the claim.<sup>219</sup> And this provision only applies to “patrons,” which is defined as “any person who is on the premises of a gaming facility, for the purpose of playing covered games authorized by this Compact.”<sup>220</sup> Thus, in order to file a compact tort claim, the claimant must have been at the casino with the purpose of gambling.

Keeping in mind the Model Compact definition of patron, consider this hypothetical: a casino patron becomes intoxicated at a tribal casino, then drives away and hits a driver on a state highway. If that driver is injured in the wreck, damages may only be recovered from the drunken-driver and not from the gaming facility, because the injured drivers would not fit within the definition of “patron.” And, of course, the result would not be the same if the drunken-driver had been over-served at a local bar governed by state law. So while gaming compacts may cover some liquor transactions (and the possible dram-shop liability) in Indian country, they fall far short of comprehensive. Moreover, a tribe may operate restaurants or convenience stores not covered by the compact. Tribes can cover these facilities by enacting tribal tort claim statutes. Tribal tort claim acts could also extend to gaming facilities and provide remedies for non-patrons who may be injured by dram-shop torts.

Adoption of a tort claim act gives tribes both internal and external legitimacy. Internally, tribal members who may be victims of torts arising out of tribal liquor transactions (or other torts) would benefit from an explicit statutory remedy. Externally, such a measure would grant non-Indians (and non-patrons) specific protections and would encourage the use of tribal courts. On a practical level, adopting tort claim acts could deter future litigation on the issue. In *Michigan v. Bay Mills Indian Community*, the Supreme Court hinted that a future case (with the right facts) might warrant a reevaluation of sovereign immunity in a way that would affect the non-patron issue discussed above.<sup>221</sup> There, the Court noted that it has not “specifically addressed (nor, so far as we are aware, has Congress) whether

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217. *Id.* at pt. 6(A)(1).

218. *Id.* at pt. 6(A)(8).

219. *Id.* at pt. 6(A)(9).

220. *Id.* at pt. 3(20).

221. 134 S. Ct. 2024, 2036 n.8 (2014).

immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct.”<sup>222</sup> Further, assuming dram-shop liability could vitiate Oklahoma’s possible argument that tribes remain incapable or unwilling to legitimately regulate liquor within their Indian country. This argument has been raised in *Parker*, with Nebraska claiming that the tribe simply sought to gain revenue as opposed to instituting a comprehensive regulatory plan.<sup>223</sup>

In terms of economic development, outside investors and customers would likely be more attracted to conduct business with tribal entities with a more solid legal framework in place.<sup>224</sup> These concerns have prompted some tribes to adopt statutory provisions similar to Article 9 of the Uniform Commercial Code. While tort claim acts present some obvious benefits, one legitimate downside is cost. Tribes must be willing to pay for tort liability arising out of alcohol transactions. Several tribes have mitigated this financial risk by taking out insurance policies on future liability and, in certain contexts, tribes may be bound by compacts to require such insurance.<sup>225</sup> Tribes may also place a statutory cap on damages recoverable directly from the tribe in these cases. The Absentee Shawnee Tribe of Indians of Oklahoma adopted this approach in its Tort Claim Act, expressly prohibiting awards of exemplary or punitive damages.<sup>226</sup> Other tribes, including the Mississippi Band of Choctaws, have enacted similar statutes requiring tort claimants to file a claim notice with the tribe’s attorney general within one year of the alleged tortious act.<sup>227</sup> The attorney general

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222. *Id.*

223. Brief for Petitioners, *supra* note 98, at 52.

224. Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1309 (2008) (“In the modern day, many tribal governments and reservations are not considered business friendly locations. This is not necessarily because they are anti-business, but because they often have not yet enacted the laws and regulatory codes considered crucial for the success of business and for attracting new businesses and investments.”).

225. *See* 3A OKLA. STAT. § 281 pt. 6(A)(1) (2011) (“During the term of this Compact, the enterprise shall maintain public liability insurance for the express purposes of covering and satisfying tort claims.”).

226. Absentee Shawnee Governmental Tort Claims Act § 7(B) (2010) (“No award for damages in an action or any claim against the Tribe shall include punitive or exemplary damages.”).

227. *See* MISS. BAND OF CHOCTAW INDIANS TRIBAL CODE § 25-1-6(3) (2015), [http://www.choctaw.org/government/tribal\\_code/Title%2025%20-%20Choctaw%20Torts%20Claim%20Act.pdf](http://www.choctaw.org/government/tribal_code/Title%2025%20-%20Choctaw%20Torts%20Claim%20Act.pdf).

then has six months to evaluate the claim.<sup>228</sup> The statute also grants the tribal chief and the secretary/treasurer to settle any tort claim up to a specified statutory amount.<sup>229</sup> These approaches clearly define the rights of customers making alcohol transactions in Indian country and those who suffer torts because of those transactions. Further, these acts are exercises of sovereignty and manifest tribes' willingness to regulate alcohol within their Indian country.

### VII. Fixing the Section 1161 Problem

Though the prospect of spurring Congress to action seems daunting, the exercise of fixing the statutory language is straightforward. Recall the statutory language:

The provisions of section 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor 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.<sup>230</sup>

First, the language "both with the laws of the State in which such act or transaction occurs and" should be deleted, removing the regulatory authority delegated to states.

Next, Congress should add language recognizing tribal inherent authority, as opposed to delegated authority, to regulate liquor within Indian country. The Supreme Court case of *Duro v. Reina*<sup>231</sup> and the subsequent "Duro fix" illustrate the need for inherent authority language. In *Duro*, the Court held that tribes lack inherent authority to exercise criminal jurisdiction over nonmember Indians.<sup>232</sup> In response to the *Duro* decision, Congress amended the Indian Civil Rights Act ("ICRA") to reflect "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise

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228. *Id.* § 25-1-6(1).

229. *Id.* § 25-1-7(3).

230. 18 U.S.C. § 1161 (2012).

231. 495 U.S. 676 (1990).

232. *Id.* at 698.

criminal jurisdiction over all Indians.”<sup>233</sup> This legislative move was coined as the “Duro fix.”<sup>234</sup> The Supreme Court subsequently validated the Duro fix in *U.S. v. Lara*, admitting that “the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.”<sup>235</sup>

To clarify the Duro fix, consider the following illustration. Tribal sovereignty should not be considered as a rock that cannot be restored once chipped away. Instead, tribal sovereignty should be considered as an inflated balloon: although the balloon may be compressed, the balloon expands upon removal of the compression. Congressional solutions such as the Duro fix can remove such compression on tribal sovereignty.

Inherent authority language is necessary in § 1161. Recall the Supreme Court’s language in *Rice*: “There can be no doubt that Congress has divested the Indians of any inherent power to regulate [alcohol].”<sup>236</sup> In *Mazurie* and *Rice*, the Court looked to congressional delegation or divestiture of authority in the alcohol regulation context.<sup>237</sup> Using the Duro fix to recognize inherent authority in this context ensures that courts reviewing an amended § 1161 will not undermine tribal authority on congressional delegation or divestiture grounds.

Other legal commentators have noted the need for congressional recognition of tribal inherent sovereignty in this context.<sup>238</sup> For example, the Supreme Court’s decision in *Alaska v. Native Village of Venetie Tribal Government* made federal statutes concerning Indian country (including § 1161) generally inapplicable to Alaska Natives.<sup>239</sup> As a result, as to Alaska Natives, it has been argued that § 1161 should be amended to reflect inherent tribal sovereignty, which “would ensure that Alaska Native tribes have the authority to regulate alcohol transactions and consumption by tribal members residing in the village and would remove the risks and

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233. 25 U.S.C. § 1301(2) (2012); *see also* United States v. Lara, 541 U.S. 193, 215-16 (2004) (Thomas, J., concurring) (discussing Congress’s amendment of the Indian Civil Rights Act in response to *Duro*).

234. *Lara*, 541 U.S. at 216 (Thomas, J. concurring).

235. *Id.* at 210 (majority opinion).

236. *Rice v. Rehner*, 463 U.S. 713, 724 (1983).

237. United States v. Mazurie, 419 U.S. 544, 557 (1975); *Rice*, 463 U.S. at 734-35.

238. *See, e.g.*, Catherine E. Polta, *Tribal Jurisdiction over Social and Minor Crimes: The Only Feasible Resolution for Institutional Racism in Alaskan Criminal Law Enforcement*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 273 (2014).

239. 522 U.S. 520, 534 (1998).



administrative burden of litigation to explore the scope of inherent tribal sovereignty.”<sup>240</sup>

In addition to recognizing tribal inherent sovereignty, Congress should retain the federal statutory prohibition of alcohol in Indian country (§§ 1154, 1156, 3113, 3488, and 3669). Of course, once a tribe acts on its inherent sovereignty and adopts an ordinance, the federal prohibition disappears from Indian country under that tribe’s jurisdiction. Keeping the federal prohibition ensures a default law applies to alcohol in Indian country in the event that a tribe chooses not to act. Additionally, the requirement of certification by the Secretary of the Interior and publication in the Federal Register should be kept if not only for the purpose of notifying government actors—both federal and local—and the public that federal prohibition of alcohol in that area of Indian country no longer applies.

Considering all of these issues, the statutory rewrite could be as simple as this:

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in *conformity with an ordinance duly adopted by the tribe, in exercise of its inherent sovereignty to regulate alcohol and having jurisdiction over such area of Indian country*, certified by the Secretary of the Interior, and published in the Federal Register. (emphasis added to proposed language).

Through such a revision, tribes would be able to regulate liquor in their jurisdiction without having to genuflect to state law.

### VIII. Conclusion

The strained relationship between Oklahoma and tribes can be seen by looking at the amount of past litigation between the parties (not to mention the contentious history more generally). As for alcohol regulation in Indian country, many issues remain on the horizon as this article seeks to point out. Instead of solely relying on judges to craft piecemeal solutions (or perhaps piecemeal confusions) to questions of regulatory authority over alcohol, Congress should revisit a main source of these problems: 18 U.S.C.

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240. Polta, *supra* note 238, at 283.

§ 1161. Put simply, § 1161 remains as a relic of the Termination Era and conflicts with Congress's current policy of self-determination.

Many tribes perform significant governmental functions such as environmental regulation and healthcare provision. Moreover, tribes in Oklahoma have already exhibited the specific ability and willingness to regulate liquor within their own jurisdictions. For example, the Chickasaw Nation devotes an entire chapter of its code to alcohol, stating that "it is necessary to adopt strict controls over the operation of certain beverage sales conducted in Indian Country which is under the jurisdiction of the Chickasaw Nation."<sup>241</sup> The regulation of alcohol should no longer contradict the general rule that tribes possess the inherent sovereignty to make their own laws and be governed by them.

*Ryan Wilson*

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241. CHICKASAW NATION CODE §§ 3-201.1-201.12 (2015), <https://www.chickasaw.net/Documents/Long-Term/Chickasaw-Code/Title-03.aspx>.