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## Indian Law - State Regulation of Liquor Transactions on Indian Reservations - Rice v. Rehner

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**INDIAN LAW—State Regulation of Liquor Transactions On Indian Reservations. *Rice v. Rehner*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3291 (1983).**

During its most recent term, the Supreme Court was again called upon to define the permissible limits of state regulatory authority over Indian reservations.<sup>1</sup> The latest controversy arose when Eva Rehner, a federally licensed Indian trader operating a general store within the Pala Reservation, sought an exemption from California law requiring a license for the sale of liquor for off-premises consumption. When the exemption was denied, Ms. Rehner filed suit in federal district court for a declaratory judgment that she was exempt from the state licensing requirement. The district court dismissed the suit, holding that 18 U.S.C. section 1161<sup>2</sup> required her to obtain a state license.<sup>3</sup>

On appeal to the United States Court of Appeals for the Ninth Circuit, the decision was reversed on the ground that section 1161 preempted state jurisdiction over liquor sales occurring within Indian reservations.<sup>4</sup> The appellate court based its decision on two aspects of section 1161: First, because liquor transactions have historically been under federal control, an express grant of state jurisdiction was necessary before the state could impose licensing requirements.<sup>5</sup> Second, since section 1161 had given the Indians the authority to prescribe their own ordinances, subject to federal approval and certification, the tribal regulatory authority was safeguarded by federal supervision.<sup>6</sup> This combination of tribal self-regulation and federal supervision indicated a congressional scheme which left no room for additional burdens imposed by state law.<sup>7</sup>

In a six-to-three decision, the United States Supreme Court reversed the appellate court's decision, holding that section 1161 did not preempt state law, but instead authorized state regulation of tribal liquor transactions.<sup>8</sup> The Court also noted that in the narrow area of liquor transactions, the Indian tribes had been divested of any inherent right of self-government.<sup>9</sup> Therefore, it was not necessary that Congress expressly provide for state regulatory authority.<sup>10</sup> The Court also held that even if there was a tradition of tribal sovereignty which required an express grant of state regulatory authority, section 1161 met that requirement.<sup>11</sup>

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1. *Rice v. Rehner*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3291 (1983).

2. 18 U.S.C. § 1161 (1976) provides:

The provisions of sections 1154, 1156, 3113, 3488, and 3618, 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.

3. 103 S.Ct. at 3293.

4. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982).

5. *Id.* at 1343.

6. *Id.* at 1349.

7. *Id.* at 1349 (citing *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685, 689-91 (1965)).

8. 103 S.Ct. at 3293.

9. *Id.* at 3297-98.

10. *Id.* at 3295.

11. *Id.* at 3302.

## HISTORICAL BACKGROUND

*Rice v. Rehner* is the latest in a long line of cases defining the limitation on the state power to regulate Indian reservations. The principles applied in making this determination have not, however, remained static.

*The Tribal Sovereignty Doctrine*

The Indian tribes were once independent nations in what is now the United States.<sup>12</sup> Although much of the aboriginal sovereignty associated with their historical status has been lost through conquest or surrendered in return for federal protection and aid, the Indian tribes retain attributes of sovereignty over their members and their territory.<sup>13</sup> They possess a unique status, occupying "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."<sup>14</sup>

Early United States Supreme Court decisions recognized that the sovereignty retained by the tribes gave them the authority to regulate their internal matters free from state interference. This view was expressed by Chief Justice Marshall in *Worcester v. Georgia*,<sup>15</sup> which held that Indian reservations were distinct communities in which state laws could have no force.<sup>16</sup> Although reliance on tribal sovereignty as a barrier to state regulation has diminished in recent years,<sup>17</sup> the principle that Indian tribes have the authority to regulate their internal and social relations without state interference remains operative. For example, this principle was recently applied by the Supreme Court in *McClanahan v. Arizona State Tax Commission*,<sup>18</sup> where the Court held that a state could not tax reservation Indians on income derived solely from reservation sources; and in *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>19</sup> which held that states cannot tax an Indian's personal property located within a reservation. Although the Supreme Court has consistently guarded the right of tribal self-government,<sup>20</sup> the view that state law can never have force within a reservation has been rejected.<sup>21</sup> This change in position was prompted by recognition of the states' interest in regulating the activities of non-Indians occurring within reservations.<sup>22</sup> In the landmark decision of *Williams v. Lee*,<sup>23</sup> the Court formulated a new test to be applied when legitimate state regulatory interests were present: "Essentially, absent governing Acts of Congress, the question [is] whether the state action infringe[s] on the right of reservation Indians to make their own laws and be

12. *Williams v. Lee*, 358 U.S. 217, 218 (1959).

13. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

14. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

15. 71 U.S. (6 Pet.) 515 (1832).

16. *Id.* at 561.

17. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

18. 411 U.S. 165 (1973).

19. 447 U.S. 138 (1980).

20. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

21. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481-83 (1976).

22. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 165, 171 (1973).

23. 358 U.S. 217 (1959).

ruled by them."<sup>24</sup> Although this test has seen limited application,<sup>25</sup> "the right of reservation Indians to make their own laws and be ruled by them"<sup>26</sup> still stands as a barrier to the application of state law to activities occurring within the reservation or undertaken by tribal members.<sup>27</sup>

#### *The Shift to the Federal Preemption Doctrine*

In recent years, the trend has been away from tribal sovereignty as a bar to state regulation and toward a reliance on federal preemption.<sup>28</sup> A major reason for this shift is that there are few, if any, cases in which federal treaties and statutes do not define the boundaries of federal and state jurisdiction.<sup>29</sup> The preferred analysis now involves ascertaining all federal enactments pertaining to the activity at issue and then determining if these enactments preempt state regulation.<sup>30</sup> Unfortunately, there are no rigid rules which can be applied in making the preemption determination.<sup>31</sup> "The unique . . . origins of tribal sovereignty make it generally unhelpful to apply . . . those standards of preemption [which] have emerged in other areas of the law."<sup>32</sup> The Supreme Court attempted to provide guidance in this area in *White Mountain Apache Tribe v. Bracker*<sup>33</sup> by setting forth a specific preemption test to be used when a state attempts to exert regulatory authority over Indian reservations. This test calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."<sup>34</sup>

#### *The Federal Interest*

The federal government has two general interests at stake in the area of tribal regulation. The first of these arises from treaties with the individual tribes. As noted previously, the Indian tribes surrendered a portion of their independence in exchange for federal protection. The treaties involved in this process generally promised, either expressly or by implication, that the tribes would be subject only to the federal government, not the states.<sup>35</sup> These treaties also contained provisions covering such areas as the Indians' rights in ceded land, criminal and civil jurisdiction of reservations, and control of tribal affairs.<sup>36</sup> The federal government is obligated to protect these rights from state interference.<sup>37</sup> For example, in *Williams v. Lee*,<sup>38</sup> the tribe had been granted the right to maintain tribal courts. The attempted assertion of state jurisdiction over controversies arising within the reservation was held to be invalid as an impermissible infringement on this tribal right granted by treaty.

24. *Id.* at 220.

25. Mundell, *The Tribal Sovereignty Limitation on the Taxation of the Indians: From Worcester & Confederated Tribes and Beyond*, 15 LOY. L.A.L. REV. 145, 200 (1982).

26. 358 U.S. at 220.

27. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

28. *McClanahan v. Arizona Tax Commission*, 411 U.S. 165, 172 (1973).

29. *Id.* at 172 n.8.

30. *Id.* at 172.

31. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

32. *Id.* at 143.

33. 448 U.S. 136 (1980).

34. *Id.* at 145.

35. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 117 (1942).

36. *Id.* at 33.

37. *Williams v. Lee*, 358 U.S. 217, 221-22 (1959).

38. 358 U.S. 217 (1959).

The second federal interest is derived from the tribes' status as wards of the nation.<sup>39</sup> In an attempt to end the tribes' reliance on the federal government, Congress has enacted statutes under the Indian commerce clause<sup>40</sup> designed to promote tribal self-government and self-sufficiency.<sup>41</sup> State law which conflicts with these policies will be struck down by the supremacy clause.<sup>42</sup>

In *White Mountain Apache Tribe v. Bracker*,<sup>43</sup> this rationale was used to invalidate a motor carrier tax imposed on logging trucks engaged in lumber operations within the Fort Apache Reservation. Federal regulation, in the form of federal statutes, regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs were held to be so pervasive that there was no room for state taxation.<sup>44</sup> In addition, imposition of these taxes would threaten the overriding federal objectives of ensuring that profits would inure to the tribe.<sup>45</sup>

### *The Tribal Interest*

The switch to preemption analysis does not mean that tribal sovereignty is no longer a barrier to state regulation of Indian reservations. The Supreme Court has consistently emphasized that a state law cannot "[infringe] on the right of reservation Indians to make their own laws and be ruled by them."<sup>46</sup> However, the right of Indian self-government is not absolute, but instead must be weighed against the states' interest in asserting regulatory authority.<sup>47</sup> Therefore, tribal sovereignty plays a role in preemption analysis, not because it provides a definitive resolution but by informing the determination of whether state authority has been preempted by federal law by providing a backdrop against which applicable federal statutes and treaties must be read.<sup>48</sup> Ambiguities must be "construed generously to comport with the federal policy of encouraging tribal independence."<sup>49</sup> Therefore, an express preemption by Congress is not necessary.<sup>50</sup>

39. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1972) (Douglas, J., concurring in part, dissenting in part).

40. U.S. CONST. art. I, § 8, cl. 3.

41. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, n.10 (1980). In note 10, the Court set forth a portion of the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 which states in part: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources."

42. U.S. CONST. art. VI, cl. 2.

43. 448 U.S. 136 (1980).

44. *Id.* at 148.

45. *Id.* at 149. See *Warren Trading Post v. Tax Commission*, 380 U.S. 685 (1965) where the Court held a state tax on gross income could not be applied to a federally licensed Indian trader because a tax would disarray the statutory plan Congress had devised to protect the Indians.

46. *Williams v. Lee*, 358 U.S. 217, 220 (1959). This principle has recently been cited by the Court in *New Mexico v. Mescalero Apache Tribe*, \_\_\_ U.S. \_\_\_, \_\_\_, 103 S.Ct. 2378, 2385 (1983); and *Rice v. Rehner*, \_\_\_ U.S. \_\_\_, \_\_\_, 103 S.Ct. 3291, 3294 (1983).

47. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973).

48. *Id.* at 172.

49. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

50. *Id.* at 144.

A related rule of construction involves congressional delegation of regulatory power to the states. Since tribal sovereignty is subject to complete defeasance by Congress,<sup>51</sup> the federal government has the power to delegate portions of its regulatory power to the states. However, when there is a tradition of sovereign immunity from state regulation in a particular area, that immunity can only be repealed by explicit congressional directive.<sup>52</sup> In *Bryan v. Itasca County*,<sup>53</sup> the Court held that the history of immunity from state taxation of property located within a reservation required a more explicit grant of state jurisdiction than was present in the controlling federal statute.<sup>54</sup>

### *The State Interest*

"When on-reservation conduct involving only Indians is of issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."<sup>55</sup> More difficult questions arise when non-Indians engage in activities on the reservation.<sup>56</sup> In the area of state taxation, for example, a showing that the tax imposed has a relation to some services provided to reservation Indians will support the validity of state regulation, but a generalized interest in raising revenue alone is normally not sufficient.<sup>57</sup>

Alternatively, if the state demonstrates that activities occurring within the reservation cause off-reservation problems which require state intervention, an assertion of state regulatory power may be upheld.<sup>58</sup> For example, in *Payallup Tribe, Inc. v. Washington Game Dept.*,<sup>59</sup> the Court found the State of Washington to have jurisdiction to regulate fishing activities on the reservation. As an important consideration in the case, the Court cited the substantial state interest in conserving the steelhead trout population. A further factor was the large amount of state funds spent in maintaining fish hatcheries to promote the preservation of the species. Since the Indian fishermen were also deriving benefits from these state expenditures, the state could show a substantial interest in applying its fishing laws to reservation members.<sup>60</sup>

### THE PRINCIPAL CASE: RICE V. REHNER

In *Rice v. Rehner*, the Supreme Court addressed whether California could require a federally licensed Indian trader, operating a general store on a reservation, to obtain a state license for the sale of liquor for off-premises consumption.<sup>61</sup> The specific issue was the applicability of the

51. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

52. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973) (citing U.S. DEPT. OF THE INTERIOR, *Federal Indian Law* 845 (1958)).

53. 426 U.S. 373 (1976).

54. *Id.* at 391-93.

55. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

56. *Id.*

57. *Id.* at 150.

58. *New Mexico v. Mescalero Apache Tribe*, \_\_\_ U.S. \_\_\_, \_\_\_, 103 S.Ct. 2378, 2387 (1983).

59. 433 U.S. 165 (1977).

60. *Id.* at 175-76.

61. 103 S.Ct. at 3293.

licensing requirement to liquor sales made to members of the reservation.<sup>62</sup> The resolution of this issue depended on the proper construction of the controlling federal statute, 18 U.S.C. section 1161, which provides:

The provisions of sections 1154, 1156, 3113, 3488, and 3618 [federal statutes establishing criminal sanctions and procedures for Indian country liquor violations] 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>63</sup>

The particular language in question was that requiring liquor transactions to conform to state law. Although the parties agreed that this provision requires conformity with state substantive law,<sup>64</sup> it was uncertain whether it also constituted a delegation to the states of regulatory authority over tribal liquor transactions.<sup>65</sup>

Justice O'Connor, writing for the majority, held that California licensing requirements could be applied to the Pala Reservation. In reaching this decision, the Court construed section 1161 not as preempting state law, but instead as expressly granting regulatory authority to the states.<sup>66</sup>

The Court began by determining the backdrop of tribal sovereignty to be used to inform the preemption analysis. The Court limited its examination to whether the Indian tribes had traditionally regulated tribal liquor transactions.<sup>67</sup> Since liquor transactions had historically been under comprehensive federal regulation, the Court held that there could be no tradition of tribal sovereignty.<sup>68</sup> For the same reason, there was no tradition of sovereign immunity which would require an express congressional grant to the state of regulatory authority.<sup>69</sup> Because there was no history of tribal self-government over liquor laws, and because of the substantial state interest in regulating liquor sales and distribution, the Court concluded that little if any weight should be given to the tribal sovereignty interest when making the preemption determination.<sup>70</sup>

The Court also rejected the contention that *United States v. Mazurie*<sup>71</sup> established tribal sovereignty in the area of liquor transactions.<sup>72</sup> *Mazurie*

62. The Court cited *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) as resolving the licensing requirement as applied to non-Indians. *Id.* at 3296 n.7. *Moe* held that a state may impose a nondiscriminatory tax on non-Indian customers of Indian retailers conducting business on a reservation, and may require Indians retailers to collect the tax.

63. 18 U.S.C. § 1161 (1976) as quoted in *Rehner v. Rice*, 678 F.2d 1340, 1344 (9th Cir. 1982). (Emphasis added).

64. 103 S.Ct. 3291 at 3307 (Blackmun, J., dissenting).

65. *Id.* at 3303 n. 18.

66. *Id.* at 3299.

67. *Id.* at 3396.

68. *Id.* at 3297.

69. *Id.* at 3299.

70. *Id.* at 3298.

71. 419 U.S. 544 (1975).

72. 103 S.Ct. at 3296, 3301.

held that the Wind River Indians had the authority to require persons selling liquor within the reservation to obtain a tribal liquor license. In *Rice*, the Court held that the power recognized in *Mazurie* did not come from powers inherent in tribal sovereignty, but was a result of a delegation of federal power through the provisions of 18 U.S.C. section 1161.<sup>73</sup> *Mazurie* only held that the Indian tribes possessed sufficient authority to exercise Congress' delegation.<sup>74</sup>

The second part of the opinion involved interpretation of the applicable federal statute, 18 U.S.C. section 1161.<sup>75</sup> The Court's examination of the plain language<sup>76</sup> and legislative history<sup>77</sup> of section 1161 led it to conclude that Congress had intended to authorize, rather than preempt, state regulation of tribal liquor transactions.<sup>78</sup> As further support of its interpretation, the Court cited the history of concurrent state and federal regulation of tribal liquor transactions as an indication that the federal government had not intended to retain exclusive jurisdiction of this area.<sup>79</sup> Since the states had been permitted and even required to impose regulations related to liquor transactions, the assumption that the states have no power to regulate within the reservations would be unwarranted.<sup>80</sup>

#### ANALYSIS OF THE COURT'S OPINION

The Court began its opinion by examining the tribal sovereignty interests at stake.<sup>81</sup> As mentioned previously,<sup>82</sup> the tradition of tribal self-government plays two major roles in preemption analysis. First, it provides a backdrop against which the applicable federal statutes must be read.<sup>83</sup> Any ambiguities in federal statutes must be construed generously in order to comport with traditional notions of tribal sovereignty and the federal policy of encouraging tribal independence.<sup>84</sup> In addition, case law has recognized certain areas, such as state taxation, in which the Indian tribes are immune from state regulation.<sup>85</sup> In these areas, state regulation will be prohibited unless expressly authorized by Congress. Repeal of this immunity by implication is not favored.<sup>86</sup>

In *Rice v. Rehner*, the Court appeared to confuse the separate notions of the right of tribal self-government and the tradition of tribal immunity

72. 103 S.Ct. at 3296, 3301.

73. *Id.* at 3301.

74. *Id.* Congress does not have unlimited authority to delegate its legislative power. They cannot delegate to private, voluntary organizations, for example. However, since the Indian tribes possess a certain amount of independent authority over their internal affairs, the Congressional delegation was upheld. *Id.*

75. *See supra* note 2.

76. 103 S.Ct. at 3301.

77. *Id.* at 3299.

78. *Id.*

79. *Id.* at 3297.

80. *Id.*

81. *Id.* at 3296.

82. *See supra* notes 45-53 and accompanying text.

83. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

84. *Id.* at 174-75 and n.13.

85. *See Bryan v. Itasca County*, 426 U.S. 373, 391-92 (1976), where the Court found a tradition of sovereign immunity from state personal property tax.

86. *Id.* at 392.



from state regulation by stating that: “[t]he ‘backdrop’ in this case concerns the licensing and distribution of alcoholic beverages.”<sup>87</sup> Although limiting the examination of tribal sovereignty in this manner is appropriate when determining whether a tradition of tribal immunity from state regulation is present, the backdrop of tribal sovereignty as used in preemption analysis is not limited to looking solely toward a tradition of tribal regulation of the area in question. When the preemption analysis was first formulated, the Court noted: “[t]he tradition of Indian sovereignty *over the reservation and tribal members* must inform the determination whether the exercise of state authority has been preempted by operation of federal law.”<sup>88</sup> This principle was derived from the Court’s earlier decision in *Williams v. Lee*,<sup>89</sup> where the Court held that state law could not be applied within a reservation if it would infringe “on the right of reservation Indians to make their own laws and be ruled by them.”<sup>90</sup> It is the general right of tribal self-government which provides a backdrop “against which . . . federal enactments must always be measured.”<sup>91</sup>

As the dissent in *Rice* pointed out, preemption analysis “has *never* turned on whether the particular area being regulated is one traditionally within the tribe’s control.”<sup>92</sup> In previous cases, the Court has not found it relevant that Indians have not traditionally been involved in education,<sup>93</sup> cigarette sales,<sup>94</sup> or the operation of ski areas.<sup>95</sup> The majority’s response was that the *actual federal divestment* of tribal authority over liquor transactions distinguished *Rice* from cases where there simply had never been a tradition of tribal immunity from state regulation in a particular area.<sup>96</sup> This response confused the separate notions of tribal immunity from state regulation and the general right of reservation Indians “to make their own rules and be governed by them.”<sup>97</sup>

It is the latter notion, which is not dependent on a tradition of tribal regulation in the particular area in question, that is used to inform the preemption determination. Therefore, the Court incorrectly defined the “backdrop” of tribal sovereignty as tribal regulation of liquor transactions rather than the general right to self-government.

The majority’s analysis of tribal sovereignty can be seen as a result-oriented approach designed to insure that state regulation would be permitted. The notion of tribal sovereignty encompasses more than a determination of whether there is a tradition of tribal immunity in the particular

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87. 103 S.Ct. at 3296.

88. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). (Emphasis added).

89. 358 U.S. 217 (1959).

90. *Id.* at 220.

91. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

92. 103 S.Ct. at 3305 (Blackmun, J., dissenting).

93. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 3394 (1982), holding that a state could not impose a tax on the construction of an Indian School. *Id.* at 3396-97.

94. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1978), holding that a state could not require the operator of an on-reservation “smoke shop” to obtain a state cigarette license. *Id.* at 480-81.

95. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), where the Court held that a state could not impose a use tax on property installed in ski lifts at a tribal resort. *Id.* at 158.

96. 103 S.Ct. at 3298.

97. 358 U.S. at 220.

area in question. It serves as an independent barrier to state regulation when the assertion of state authority would infringe on the basic right "of reservation Indians to make their own laws and be ruled by them."<sup>98</sup>

In addition, tribal sovereignty provides a backdrop against which the applicable federal statute must be read.<sup>99</sup> By limiting its examination to the specific area of liquor transactions, the Court removed the potential barrier of the tribe's right to self-government. Since liquor transactions had historically been under comprehensive federal regulation, there could not have been a finding of a tradition of tribal sovereignty in this area.<sup>100</sup> By redefining the sovereignty "backdrop" to ignore the general right to self-government, the Court simply defined out of existence a preemption consideration which may have prevented the state from regulating liquor sales.

Had the Court used the traditional view of tribal sovereignty as the right of reservation Indians to govern themselves, it is clear that tribal sovereignty would have played a greater role in the Court's decision. Since California limits the number of liquor licenses it distributes, the tribe may not be able to obtain a license.<sup>101</sup> This would prevent the tribe from passing its own ordinances pertaining to the sale of liquor within the reservation. This clearly infringes on the right of reservation Indians to make their own laws and be ruled by them, and should have stood as a potential barrier to state regulation.

The majority's decision can, however, be reconciled with prior case law. The Indian tribes' right to self-government is not absolute, but must be weighed against any state regulatory interests.<sup>102</sup> Preemption analysis involves balancing the state, federal, and tribal interests at stake.<sup>103</sup> The state's regulatory interest may outweigh the tribal interest in self-government. The Court is most likely to allow state regulation if there are "off-reservation effects that necessitate state intervention."<sup>104</sup> Tribal liquor sales can have a significant impact outside the reservation. Liquor sold within the reservation can easily flow "out of the reservation and into the hands of those whom . . . the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control."<sup>105</sup> Therefore, the need for state regulation outweighs the tribal interest in retaining its right of self-government. There is language in the opinion which suggests that this was the approach actually used by the Court: "[b]ecause . . . we must consider that the [sale of liquor] potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case."<sup>106</sup>

98. 448 U.S. at 142-43 (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

99. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). See *supra* notes 44-52 and accompanying text.

100. 103 S.Ct. at 3296-97.

101. *Id.* at 3296.

102. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

103. *Id.* at 145.

104. *New Mexico v. Mescalero Apache Tribe*, \_\_\_ U.S. \_\_\_, \_\_\_, 103 S.Ct. 2378, 2387 (1983).

105. 103 S.Ct. at 3298.

106. *Id.*

It is unclear whether *Rice v. Rehner* can be read as redefining the nature of the backdrop of tribal sovereignty used in preemption analysis. Although there is clear language which appears to define the backdrop of tribal sovereignty in the more narrow terms of tribal immunity,<sup>107</sup> there is also language which recognized that these two principles are distinct. For example, the Court noted that “[u]nlike the authority to tax certain transactions on reservations, . . . tradition simply has not recognized a sovereign immunity . . . in favor of liquor regulation by Indians”<sup>108</sup> and “we must determine whether there is a tradition of tribal sovereign immunity that may be repealed only by an explicit directive from Congress.”<sup>109</sup> In fact, the Court appeared to focus its inquiry almost entirely on whether there was a tradition of tribal sovereignty requiring an express grant of state regulatory authority. Once it was determined that no tradition of immunity existed, section 1161 was construed to authorize state regulation of tribal liquor transactions.<sup>110</sup> Therefore, the Court did not use notions of tribal sovereignty in interpreting section 1161. This approach is consistent with prior case law. As noted previously, preemption analysis requires an examination of the state, tribal and federal interests at stake.<sup>111</sup> Since the state has an overriding interest in regulating liquor transactions, little weight should be given to the tribal interests when determining whether state law has been preempted. Although the language used could have been clearer, this appears to have been the analysis used in *Rice*.<sup>112</sup>

The sovereignty analysis used in *Rice* is probably of little precedential value. In addition to the lack of clarity, the court employed an alternative rationale for its holding. When interpreting section 1161, the Court held that even if there was a tradition of tribal immunity which required an express grant of state regulatory authority, section 1161 met this requirement.<sup>113</sup> In reaching this decision, the Court relied in part on the language of the statute requiring liquor transactions to conform “both with the laws of the State . . . and with an ordinance duly adopted” by the governing tribe.<sup>114</sup> In an earlier case, *United States v. Mazurie*, the Court held that this language constituted congressional delegation of authority to the tribes to regulate reservation liquor transactions. The Court in *Rice* reasoned that if section 1161 indicated congressional intent to delegate authority to the tribes, the language of the statute requiring conformity with the laws of the state must indicate the same delegation to the states.<sup>115</sup> This construction creates a conflict between state and tribal regulation. As noted previously, the unavailability of a California liquor license could preclude all tribal regulation. In addition, the only ordinances which would not conflict with state law would be those which are more restrictive. Since this would put the tribe at a competitive disadvantage, it is unlikely that any ordinances would be passed.

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107. *Id.* at 3296. See *supra* notes 84-91 and accompanying text.

108. *Id.* at 3297.

109. *Id.* at 3296.

110. *Id.* at 3299.

111. See *supra* note 82 and accompanying text.

112. See *supra* note 99 and accompanying text.

113. 103 S.Ct. at 3302.

114. *Id.* at 3301 (citing 18 U.S.C. § 1161 (1976)).

115. 103 S.Ct. at 3301.

This conflict can be avoided if the language "the laws of the state" is construed to refer only to state substantive law, such as the legal drinking age, hours of operation, and Sunday closures. This was the construction given to section 1161 by the appellate court.<sup>116</sup> In reaching this construction, the appellate court also relied on the language of the statute which requires liquor transactions to be "in conformity both with the laws of the State in which such an act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such an area of Indian country."<sup>117</sup> The word "jurisdiction" specifically modifies the phrase "duly adopted by the tribe," inferring that the jurisdiction has been conferred to the tribes. In contrast, the phrase "laws of the State" is modified by the phrase "in which such act or transaction occurs," which contains no jurisdictional inference. Had Congress intended to cede jurisdiction to the states, it could easily have done so by modifying "laws of the State" with a phrase containing a jurisdictional grant, as it did in modifying "the tribe." This grammatical interpretation led the appellate court to hold that section 1161 to be congressional recognition of "the tribe's jurisdiction over liquor transactions, with the state functioning only as the source of law to be applied by the tribal government."<sup>118</sup>

The appellate court also applied the doctrine of *in parens materia* in interpreting section 1161. This doctrine requires statutes which pertain to the same subject matter to be construed together.<sup>119</sup> The Court compared section 1161 with other statutes regarding the applicability of state law in Indian country to show that Congress knows how to use precise language to grant regulatory jurisdiction to the states. The circuit court compared 18 U.S.C. section 1162(a)<sup>120</sup> ("Each of the States . . . shall have jurisdiction over offenses . . .") and 28 U.S.C. section 1360(a)<sup>121</sup> ("Each of the States . . . shall have jurisdiction over civil causes of action . . .") with 18 U.S.C. section 1161<sup>122</sup> ("ordinance duly adopted by the tribe having jurisdiction. . ."). The similarity of the language used by Congress indicates it was the Indian tribes who were granted jurisdiction over liquor transactions. In light of the clear language used in other statutes pertaining to the same subject matter, it is questionable that a mere reference to "the laws of the State" should be construed to be a similar conferral of jurisdiction to the states.

The Supreme Court dismissed this in-depth analysis in a single footnote by finding congressional intent to be so clear that such an analysis was unnecessary.<sup>123</sup> However, much of the legislative history offered by the Court in support of its decision does not distinguish between state substantive law and state jurisdiction over liquor transactions.<sup>124</sup> The one exception is a

116. *Rehner v. Rice*, 678 F.2d 1340, 1346 (1982).

117. 18 U.S.C. § 1161 (1976).

118. 678 F.2d at 1345.

119. *Id.* at 1345 n.9.

120. 18 U.S.C. § 1162(a) (1982).

121. 28 U.S.C. § 1360 (a) (Supp. VI 1981).

122. 18 U.S.C. § 1161 (1976).

123. 103 S.Ct. at 3302 n.17.

124. For example, the Department of the Interior's unofficial report urged an end to all prohibition on reservations as long as "transactions are not contrary to state law." *Hearings on H.R. 1055 Before the Subcommittee on Indian Affairs of the House Committee on*

Senate Report which stated: "if this bill is enacted, a State or local municipality . . . if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so."<sup>125</sup> Just what was intended by the language "to restrict" is not clear. It may only refer to application of substantive restrictions, such as the legal drinking age.

The Court placed heavy emphasis on an administrative opinion prepared by the Department of the Interior, Bureau of Indian Affairs, which had been heavily involved in drafting the bill which became section 1161.<sup>126</sup> A memorandum prepared by the Bureau Solicitor stated: "if any person . . . licensed by the State were to sell liquor on the reservation for on-premises consumption in accordance with his license, presumably he would be immune from State prosecution and, thus, the license issued by the State agency would be fully effective as far as State law is concerned."<sup>127</sup> The Court in *Rice* stated that this opinion showed that the Bureau contemplated liquor transactions to be subject to state laws, including licensing requirements.<sup>128</sup>

The dissent in *Rice* viewed the implications of this memorandum differently:

[T]he sole question presented to the Solicitor . . . was whether § 1161 authorized a tribe to limit the types of liquor sales permitted in a reservation, *i.e.*, whether the tribe could permit package sales but not sales for on-premises consumption. The Solicitor stated that the tribe could impose such a limit, and that an individual who sold liquor for on-premises consumption would be subject to federal prosecution even if he had obtained a state license . . . presented in this case . . .<sup>129</sup>

When the Bureau Solicitor directly addressed this issue, he interpreted section 1161 not as a grant of jurisdiction to the states, but instead as only requiring "state liquor laws to be used as the standards of measure - to define lawful and unlawful activity on the reservation."<sup>130</sup>

Although the legislative history of section 1161 does not clearly resolve whether the states were granted jurisdiction over tribal liquor transactions, it must be remembered that *Rice* does not involve an area where there has been a tradition of sovereign immunity. Therefore, it was not necessary that Congress expressly grant jurisdiction to the states.<sup>131</sup>

*Interior and Insular Affairs*, 83rd Cong., 1st Sess. May 6, 1953). The sponsor of the bill stated that "if this bill was passed . . . the Indians would still have to comply with state law in every regard. . . ." *Id.* (June 2, 1953). Neither of these quotes clearly distinguishes between substantive and regulatory state law.

125. S. REP. NO. 722, 83d Cong., 1st Sess. 1, reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2399, 2400.

126. 103 S.Ct. at 3300.

127. *Liquor-Tribal Ordinance Regulating Traffic Withing Reservation*, No. M-36241 (Sept. 23, 1954), reprinted in II Opinions of the Solicitor of the Department of the Interior relating to Indian Affairs 1917-1974, at 1650.

128. 103 S.Ct. at 3300.

129. *Id.* at 3308 n.7 (Blackmun, J., dissenting).

130. *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39, 40 (February 3, 1971).

131. See *supra* notes 49-53 and accompanying text.

Furthermore, it is hard to believe that Congress intended to make tribal members free from all but self-imposed regulation. The potential problems which could develop were too great. In addition, the substantial state interest in regulating liquor transactions occurring within its borders make it easier to find an implicit grant of state jurisdiction in both the language and legislative history of section 1161.

One other proposition offered by the Court in support of its decision was the history of concurrent state and federal regulation of the use and distribution of liquor within Indian reservations.<sup>132</sup> The Court said that since the states had been permitted and even required to enforce federal regulation through their own criminal laws, Congress did not retain exclusive jurisdiction of tribal liquor transactions.<sup>133</sup> The dissent in *Rice* gave little credence to this proposition. The history of concurrent regulation did not even suggest that the states had independent authority to determine who should be given liquor licenses or the power to impose their own regulations on tribal liquor transactions.<sup>134</sup> Any state law which conflicted with the absolute federal prohibition would be struck down.<sup>135</sup> Since the states would be preempted by federal law if they tried to place less restrictive regulations on the tribe, and since total prohibition made additional restrictions unnecessary, state regulation was effectively precluded. Therefore, the history of concurrent regulation offers little support for a finding of independent state regulatory authority, and little support of the Court's decision.

#### CONCLUSION

It is apparent that the Court in *Rice* was not willing to allow tribal members to become "super-citizens" able to sell liquor free from all but self-imposed regulation. In its haste to find a congressional grant of state regulatory authority, the Court failed to articulate any basis which would clearly support its decision. Therefore *Rice* supplies little clarification of the complex question of state regulation of Indian reservations. If anything, it added further confusion by appearing to redefine the notion of tribal sovereignty used in preemption analysis in the more restrictive terms of tribal immunity. If the Court was redefining tribal sovereignty, it is unlikely that *Rice* will have much precedential value. In addition to the lack of clarity in the opinion, the Court used an alternative basis for its holding which made the resolution of the tribal sovereignty issue dicta.

*Rice* does, however, show the importance of the rule played by the state interest in preemption analysis. If the states can show a substantial regulatory interest, the Court will be more likely to find a grant of state authority in less than explicit language.

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132. 103 S.Ct. at 3297.

133. *Id.*

134. *Id.* at 3306 (Blackmun, J., dissenting).

135. *United States v. McGowan*, 302 U.S. 535, 539 (1938).