

WHATEVER HAPPENED TO THE SEVELOFF FIX?

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ABSTRACT

This Article suggests that the Supreme Court has not deprived Alaska Native Villages of a valid basis for claiming the authority to create and enforce their own tribal alcohol regulations. Every federally recognized Alaskan Native Village is situated in an area over which Congress extended the federal Indian liquor laws in 1873, in an enactment Congress has never repealed; this should logically empower Alaska Native Villages to exercise the same federally-delegated authority within their federal Indian liquor law Indian country as lower-48 tribes have within their reservations or “dependent Indian communities.” Since this delegated authority is shared with the states, this postulate does not deprive the State of Alaska of any authority to enforce its own liquor laws; liquor transactions must conform to both state law and applicable tribal law.

INTRODUCTION

“Ways have to be found to provide communities with the power to create and enforce their own tribal alcohol regulations, ones that originate from the will of the people. Tribal authority, however, will not be feasible in light of the [Venetie] Court decision denying Alaska Natives tribal authority.”¹

Do Alaska Native Villages – as federally-recognized tribes – have

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1. BERNARD SEGAL ET AL., CENTER FOR ALCOHOL AND ADDICTION STUDIES, INSTITUTE FOR CIRCUMPOLAR HEALTH STUDIES, ALASKA NATIVES COMBATING SUBSTANCE ABUSE AND RELATED VIOLENCE THROUGH SELF-HEALING: A REPORT FOR THE PEOPLE 70 (1999) [hereinafter ICHS Study], available at http://www.uaa.alaska.edu/instituteforcircumpolarhealthstudies/research/arc_hives/alcoholsubstances/alc-sub_afn_1999.pdf.

any authority to enact their own ordinances concerning alcohol within their communities? This question is significant because of the well-documented deleterious effects alcohol abuse has had on Alaska's Native communities.² There are several respects in which Alaska Native villages might want to exercise alcohol authority beyond relying exclusively on state enforcement of state and local option laws.³

This article posits that the answer is "yes"; Alaska Native Villages can enact their own rules and impose their own sanctions for violations of those rules. Such ordinances would not supplant, but rather supplement, existing state and local option alcohol laws.

Part I reviews the argument that Alaska Native Villages lack such authority. Part II surveys the federal Indian liquor laws and their reformulation in 1953 away from their somewhat paternalistic origins into a more empowering federal delegation of authority to states and tribes. Part III analyzes how these laws were brought to Alaska, including the 1873 "Seveloff fix" and subsequent developments. Lastly, Part IV explores several implementation issues that could arise if, as this article posits, each federally recognized tribe in Alaska has a valid claim to occupying "Indian country" for purposes of the federal Indian liquor laws, providing a sufficient basis for enactment of tribal alcohol ordinances.

I. THE ARGUMENT THAT ALASKA NATIVE VILLAGES HAVE NO ALCOHOL AUTHORITY

The ostensible barrier to recognizing federally-delegated intoxicant authority in Alaska Native Villages is that they do not occupy "Indian country" as defined in 18 U.S.C. § 1151.⁴ The 1998 United States

2. Several of the many studies and statistics documenting the extent of alcohol damage to Alaska Native Villages are well summarized in Ryan Fortson's simultaneously published article "Advancing Tribal Court Criminal Jurisdiction in Alaska." Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 94-100 (2015). This author is indebted to Mr. Fortson for letting him cross-reference that article.

3. "Local option laws" are state statutes allowing Alaskan communities to hold an election on prohibiting the importation, sale, and/or possession under a specified menu of choices. ALASKA STAT. ANN. § 04.11.491 (West 2014). Although several Alaska Native Villages and municipalities have availed themselves of this option, many have been "frustrated with the statute's lack of effectiveness in deterring alcohol importation and use," and have tried to "adopt more assertive means of enforcement." Pat Hanley, *Warrantless Searches for Alcohol by Native Alaskan Villages: A Permissible Exercise of Sovereign Rights or an Assault on Civil Liberties?*, 14 ALASKA L. REV. 471, 472 (1997).

4. "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits

Supreme Court ruling in *Venetie v. State of Alaska*⁵ held that former reservation lands conveyed under the 1971 Alaska Native Claims Settlement Act (ANCSA)⁶ did not fall within this definition. Because ANCSA had revoked Venetie's reservation,⁷ and because there was no argument that its lands were an "allotment,"⁸ the sole question was whether it was a "dependent Indian community," a phrase the Court had not interpreted before. It held that "dependent Indian community" lands would have to be set aside by the Federal Government for the use of Indians as Indian land, and under federal superintendence. Notwithstanding conveyance of those lands by the recipient ANCSA Village Corporation to the corresponding governmental tribal council for that village, the Court held that the set-aside and superintendence requirements were not met, so the lands did not qualify as Indian country over which the council could exercise taxation authority.

Post-*Venetie*, courts have recognized that Alaska Native Villages retain inherent authority with respect to relations involving tribal members even though they do not occupy "Indian country."⁹ However, the objectors note, this inherent authority framework cannot provide a basis for alcohol authority, because the United States Supreme Court has already stated that "Congress has divested the Indians of any inherent power to regulate in this area," in the 1983 decision in *Rice v. Rehner*.¹⁰

Tribes in the lower 48 are able to exercise alcohol authority because they are tribes to which Congress has delegated some measure of federal alcohol authority—but statutorily that delegation only has effect within "Indian country."¹¹

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." 18 U.S.C. § 1151 (2012).

5. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532–34 (1998).

6. Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629h) (2012).

7. 43 U.S.C. § 1618 (2012) (revoking all Alaska reservations except Metlakatla).

8. *Venetie*, 522 U.S. at 527.

9. See *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999) (holding that Congress intended for Alaska Native Villages to retain governmental powers whether or not they occupy Indian country).

10. *Rice v. Rehner*, 463 U.S. 713, 724 (1983), discussed *infra* text accompanying notes 52–54.

11. Per federal statute:

Thus, the objectors posit, *Rice v. Rehner* took away the tribes' inherent authority, and *Venetie* took away the "Indian country" within which the tribes' federally-delegated authority might otherwise operate. As a result, there is no basis upon which Alaska Native Villages outside of Indian country can claim any authority over alcohol, whether inherent or federally-delegated.

There may be more than one flaw to this syllogism, but the particular component on which this article focuses starts with the fact that "Indian country" for purposes of the federal Indian liquor laws ("FILL" Indian country) is not the same as "Indian country" for general purposes ("full" Indian country), which is what the Supreme Court was interpreting in *Venetie*. The Indian commerce clause enables Congress to designate particular lands as "Indian country" for general purposes, or as "Indian country" for purposes solely of the federal Indian liquor laws, or neither, or both. This has been clear since at least 1876:

In view of this changed condition, it would be strange, indeed, if the commercial power, lodged solely with Congress and unrestricted as it is by State lines, did not extend to the exclusion of spirituous liquors intended to corrupt the Indians, not only from existing Indian country, but from that which has ceased to be so, by reason of its cession to the United States. The power to define originally the 'Indian country,' within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries, whenever, in the opinion of Congress, the interests of Indian intercourse and trade will be best subserved.¹²

Indeed, the current United States Code contains more than one definition of "Indian country." In 1949, Congress prefaced the definition of "Indian country" in 18 U.S.C. § 1151 by adding the clause, "Except as otherwise provided in sections 1154 and 1156 of this title," and those sections are part of the current federal Indian liquor laws. In twin passages in § 1154 and § 1156, Congress specified that "Indian country" for purposes of those laws would be somewhat different, generally

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.

18 U.S.C. § 1161 (2012).

12. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876).

narrower than the § 1151 definition (by excluding “fee-patented lands in non-Indian communities or rights-of-way through Indian reservations”),¹³ but with an exception if there was “a treaty or statute extending the Indian liquor laws thereto.”¹⁴ Thus, § 1151 defers to § 1154 and § 1156 if “Indian country” is being considered for purposes of the federal Indian liquor laws; but those two statutes in turn defer to a more specific treaty or statute extending the Indian liquor laws to a particular parcel of land if one exists, which can make that parcel “Indian country” for purposes of the federal Indian liquor laws even though it may be fee-patented land in a non-Indian community.

As such, the concept of “Indian country” is not as monolithic as the above *Rice v. Rehner/Venetie* syllogism assumes it to be. A piece of land might not be “Indian country” for purposes of allowing a tribe to impose a tax as in *Venetie*, but nevertheless might be a piece of land to which Congress has extended the Indian liquor laws.

It would be entirely feasible, then, for Congress to legislate an extension of the Indian liquor laws to certain areas in Alaska and thus give tribes the same authority over those areas as tribes in the lower 48 have currently.

And indeed Congress already has. The 1949 amendments were not the first occasion on which Congress bifurcated the concept of general Indian country from the concept of Indian country for purposes of Indian liquor laws. Congress did so in 1873, in an Alaska-specific piece of legislation this article refers to as the “*Seveloff fix*,” and it is the backdrop and subsequent history surrounding this enactment which needs to be analyzed.

II. THE FEDERAL INDIAN LIQUOR LAWS OVER TIME

To better understand the Alaska situation, it is necessary to summarize the origins and development of the federal Indian liquor laws.

13. In situations where the § 1154 definition excludes lands encompassed within the § 1151 definition, it is appropriate to recognize tribal authority over the broader swath of lands under the § 1151 definition. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (“By the express terms of §§ 1154(c), 1156, and 1151, the narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition in § 1151 applies to all other sections in the chapter”). The case does not speak to a situation where, as this article posits is the case in Alaska, the lands may fall outside the § 1151 definition, but fall within the exception in § 1154(c) because there is “a treaty or statute extending the Indian liquor laws thereto.” 18 U.S.C. § 1154 (2012).

14. 18 U.S.C. § 1154; 18 U.S.C. § 1156 (2012).

Starting in colonial times and continuing through the birth of the United States, laws existed to prohibit the conveyance of liquor to Native Americans.¹⁵ The first such United States law was enacted in 1802 in response to a verbal plea from an Indian Chief to President Jefferson.¹⁶ The most definitive and long-lived of these federal Indian liquor laws were originally enacted as sections 20 and 21 of the 1834 Trade and Intercourse Act,¹⁷ the successors of which still remain in the current United States Code.¹⁸

As originally enacted, both sections were limited to operating within “Indian country,” which had a specific definition in section 1 of the 1834 Act.¹⁹

Debates ensued as to whether territories the United States acquired after 1834 were “west of the Mississippi and not within the States of Missouri and Louisiana or the Territory or Arkansas” within the 1834 definition of “Indian country.” Typifying this was the case of *United States v. Tom*,²⁰ in which Mr. Tom was indicted in Oregon for violating the liquor law provisions of the 1834 Act.²¹ Oregon had not been a territory in 1834, thus presenting the after-acquired territory issue.²²

15. Felix S. Cohen, *Handbook of Federal Indian Law* 352 (1942).

16. *Id.*

17. Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as amended at 18 U.S.C. § 1154(a)). Section 20 made it a five hundred dollar offense to supply liquor to an Indian within Indian country, and made it a three hundred dollar offense to bring liquor into Indian country (except for military liquor supplies). *Id.* Any liquor found could be destroyed by any person in the service of the United States or by “any Indian,” and the individual’s other goods, boats, packages, and peltries could be forfeited through a court action. *Id.* Section 21 prohibited distilleries within the limits of Indian country. *Id.*

18. See 18 U.S.C. §§ 1154 (“Intoxicants dispensed in Indian country”), 1156 (“Intoxicants dispensed unlawfully”), 3113 (2012) (“Liquor violations in Indian country”), 3488 (2012) (“Intoxicating liquor in Indian country as evidence of unlawful introduction”), 3669 (2012) (“Conveyances carrying liquor”); 25 U.S.C. § 251 (2012) (“Setting up distillery”); 25 U.S.C. § 253 (“Wines for sacramental purposes”).

19. Which read:

[A]ll that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has not been extinguished, shall, for the purposes of the act, be taken and deemed to be the Indian country.

Act of June 30, 1834, § 1.

20. 1 Or. 26 (Or. 1853).

21. *Id.* at 26.

22. At the time of the 1834 Trade and Intercourse Act, Oregon was still governed under an 1818 joint occupation agreement between the United States and Britain. *Id.* at 27. Oregon did not become an American Territory until 1846, some twelve years after the 1834 Act had been passed. L. Harris, *History of the*

Further, an Oregon-specific Congressional Act in 1850 had extended the 1834 Indian Trade and Intercourse Act over the Territory of Oregon “so far as [its provisions] may be applicable.”²³ Thus, there were two issues: whether the 1834 Act applied through its own terms, and whether it applied through the 1850 Act.

The three justices wrote three separate opinions, but the other two justices concurred in Chief Justice Williams’ statement that, “Oregon is generally supposed to be a part of the Indian country named in the act of Congress of June 30, 1834; but such is not the case.”²⁴ They parted ways on interpreting the “so far as may be applicable” clause in that 1850 Act; two decided that such language sufficed to make the liquor law provisions of the 1834 Act applicable within Oregon, one that it did not. Chief Justice Williams posited that the applicability of the Act should be adjudged by the criterion “whatever militates against the true interests of a white population is inapplicable,” but since sober Indians were in the true interests of the white population, the liquor laws should apply.²⁵ Justice Olney rejected that test, instead asserting that the question should be whether any of the provisions of the 1834 Act conflicted with the rights which white men had been exercising prior to 1850, “thus making the *rights* of the whites under existing laws the test of applicability,” and since white Oregonians had had the right of unrestricted traffic with Indians prior to 1850, the 1850 enactment should not override the white right to sell liquor to Indians.²⁶ Justice McFadden, called upon to cast the deciding vote, thought the test should turn on actual conflicts with other laws;²⁷ opining that the federal Indian liquor law provisions were “well suited to the state of affairs here,” he concluded that enforcement of the relevant provisions of the 1834 Act “would not be in contravention of any act of Congress, or in conflict with any of the laws of this territory,”²⁸ and so agreed with the Chief Justice that the 1850 Act made them enforceable.

Thus, although two of the three judges ruled that the 1850 Act should make the 1834 Act applicable to criminalize the sale of liquor to Indians in Oregon, all three agreed that the 1834 Act by itself did not encompass the later-acquired Territory of Oregon.

That aspect of the *Tom* ruling was criticized in an opinion by then-United States Attorney General Caleb Cushing: “The terms of the act

Oregon Code, 1 OR. L. REV. 129, 130 (April 1922).

23. Act of June 5, 1850, ch. 16, 9 Stat. 437.

24. *Tom*, 1 Or. at 27.

25. *Id.* at 27.

26. *Id.* at 29 (Olney, J., concurring and dissenting).

27. *Id.* at 30 (McFadden, J., concurring and dissenting).

28. *Id.*

are: 'All that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has not been extinguished, shall, for the purposes of the act, be taken and deemed to be the Indian country.' Why, I repeat, does not this description apply to Oregon with mathematical precision of certainty? Is not Oregon a 'part of the United States, west of the Mississippi'?"²⁹

In 1862, Congress partially mooted this question, by amending the 1834 Act so that certain liquor law provisions were applicable both inside and outside Indian country.³⁰ In subsequent cases, the United States Supreme Court made it clear that the 1834 definition had sufficient "adaptability" to extend to territories acquired after 1834, undermining the principle premise of the *Tom* ruling.³¹ More contemporary scholarship has indicated that the legislative history of the 1834 Act reflected intent to cover lands of several tribes in the Northwest.³² But as we shall see, the *Tom* case, whether correctly decided or not, was to play a role in developments in Alaska.

If the definition of "Indian country" occasioned litigation during the 1850's, it became even more susceptible to arguments when it disappeared. When Congress codified its first several decades of legislation into the "Revised Statutes" of 1873,³³ only certain parts of the

29. Indians in Oregon, 7 Op. Att'y Gen. 293, 295-96 (1855).

30. Prior to the amendment, section 20 forbade persons to "sell, exchange, give, barter, or dispose of any spirituous liquor or wine to an Indian (in the Indian country)." Act of June 30, 1834, ch. 161, 4 Stat. 729. In the amendment, the phrase "an Indian (in the Indian country)" was changed to "an Indian under the charge of an Indian superintendent or agent appointed by the United States," so the crime of conveying liquor to an Indian no longer required a showing of "Indian country." Act of Feb. 13, 1862, ch. 24, § 1, 12 Stat. 338-39. A separate clause forbade persons to "introduce or attempt to introduce any spirituous liquor or wine into the Indian country," and that remained unchanged, so a conviction for importation still contained Indian country as a required element. *Id.*

31. See *Bates v. Clark*, 95 U.S. 204, 207 (1877); see also *Ex Parte Crow Dog*, 109 U.S. 556, 561 (1883) ("that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, . . . although much of it has been acquired since the passage of the act of 1834").

32. Including the Walla Wallas, the Chinooks, and the Clackamas - the very tribe the *Tom* decision indicated the 1834 Act did not cover. D. Niedermeyer, "The True Interests of a White Population": the Alaska Indian Country Decisions of Judge Matthew P. Deady, 21 N.Y.U. J. INT'L L. & POL. 195, 233-35 (1988).

33. The "Revised Statutes" was the first official codification of the laws in the then-sixteen volumes of the United States Statutes at Large. Congress created a commission to undertake the task in 1866. Act of June 27, 1866, ch. 140, 14 Stat. 74. Upon receiving the commission's work product, Congress appointed a Congressional Committee to review the work and prepare a bill. Act of Mar. 3,

1834 Trade and Intercourse Act were included in those Revised Statutes. The federal Indian liquor laws (FILL), found in §§ 20 and 21 of the 1834 Act, became §§ 2139, 2140 and 2141 of the Revised Statutes. These provisions still criminalized both importation of liquor into Indian country and conveyance of liquor to an Indian inside or outside of Indian country,³⁴ furthermore maintaining a duty for any Indian within Indian country to take and destroy any liquor.³⁵

But the Revised Statutes omitted, and did not replace, the definition of “Indian country” from § 1 of the 1834 Act.³⁶ Still, several other provisions of law in the Revised Statutes continued to reference “Indian country,” making it necessary for the courts to determine which areas were and were not encompassed. In the ensuing decades the courts made their determinations as best they could, using the 1834 definition as the starting point for those analyses, even though it was excluded from the Revised Statutes.³⁷

1873, ch. 241, 17 Stat. 579. The resulting “1873 Revised Statutes of the United States” was published February 22, 1875; however, numerous errors surfaced, leading to some corrections. *See* Act of Feb. 18, 1875, ch. 80, § 3, 18 Stat. 316; Act of Feb. 27, 1877, ch. 69, 19 Stat. 240. Eventually authorization was given for the publication of a corrected version of the entire Revised Statutes, resulting in the more accurate “Revised Statutes of 1878.” Congress subsequently amended the 1877 Act to specify that the 1878 Revised Statutes would only be “prima facie” evidence of the law, which could be countered by reference directly to the Statutes at Large. Act of Mar. 9, 1878, ch. 26, 20 Stat. 27.

34. Congress removed in 1862 the “Indian country” requirement from section 20 of the 1834 Act. *See supra* note 30. The 1875 Revised Statutes § 2139 arguably may have put that back in, by adding “Every person, except an Indian, in the Indian country, who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent . . .” But the corrections Congress enacted in 1877 removed the clause “except an Indian, in the Indian country.” Act of Feb. 27, 1877, ch. 69, 19 Stat. 244.

35. Revised Statutes § 2140, ch. 26, 20 Stat. 27 (1878). The original section 20 of the 1834 Act had provided “it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.” Act of June 30, 1834, § 20, 4 Stat. 732. An amendment in 1864 substituted “the duty” for “lawful” in that passage. It remained a duty in section 2140 of the Revised Statutes.

36. “In the Indian Intercourse Act of June 30, 1834 (4 Stat. at L. 729, chap. 161), the first section defined the ‘Indian country’ for the purposes of that act. But this section was not reenacted in the Revised Statutes, and it was therefore repealed by § 5596, Rev. Stat.” *Donnelly v. United States*, 228 U.S. 243, 268–69 (1913).

37. The Supreme Court remarked:

Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be

Congress did not redefine “Indian country” by statute until 1948. Drawing upon the decades of case law in which the judiciary had developed the concept, Congress fashioned the three-part definition—reservations, dependent Indian communities, allotments—noted above.³⁸

The following year, Congress amended that definition, bifurcating “Indian country” for purposes of the FILL from Indian country for other purposes and explicitly providing that the FILL definition should yield as to a particular parcel of land if there was a specific “treaty or statute extending the Indian liquor laws thereto.”³⁹

By 1949, federal enforcement of the FILL was faltering. Earlier in the twentieth century, as prohibition was gaining momentum, Congress had toughened certain FILL provisions,⁴⁰ but in the aftermath of prohibition’s repeal, enthusiasm for enforcing the FILL waned as well.⁴¹

considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country, where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force.

Ex Parte Crow Dog, 109 U.S. 556, 561 (1883).

38. See *supra* note 4 (except that the twelve prefatory words were not part of the 1948 enactment, having been added in 1949); see FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW sec. 3.04[2][c], at 189-98 (Nell Jessup Newton ed., 2012) (discussing in depth Congress’s definition of “Indian Country”). The new definition was part of a systematic revision of the federal criminal code Congress undertook in 1948. Simultaneously, several portions of the FILL were brought from Title 25 (Indians) into Title 18 (Criminal). Sections 241, 250, 252 and 254 of Title 25 were repealed, and essentially became new sections 1154 and 1156 of Title 18. Left in Title 25 were two unrepealed sections, one prohibiting distilleries in Indian country, 25 U.S.C. § 251, and one creating an exception to allow sacramental wines within Indian country or reservations, 25 U.S.C. § 253.

Prior to 1948, the FILL had been housed in Title 25 since Congress approved that title in 1926, Pub. L. No. 61-440, 44 Stat. 777, and Pub. L. 61-441, 44 Stat. 778, both enacted June 30, 1926. Prior to 1926 they were referred to by their Revised Statutes section numbers, 2139-2141. Other portions of the Revised Statutes had been recodified into a criminal code in 1909, Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088-1159, but the federal Indian liquor laws were not encompassed in that recodification.

39. Act of May 24, 1949, ch. 139, §§ 25, 27-28, 63 Stat. 94. 18 U.S.C. §§ 1154(c), 1156 (2012). See *supra* text accompanying notes 13-14. Still, as of 1948, the law prohibiting conveyance of alcohol to an Indian applied both inside and outside Indian country.

40. In 1918 Congress had gone beyond the importation and sale prohibitions, to prohibit possession by itself within Indian country. Act of May 25, 1918, 40 Stat. 561, 563 (codified in part at 18 U.S.C. § 1156 (2012)).

41. S. REP. NO. 1423, 73rd Cong. (2d Sess. 1934):

In a number of cases, in statutes authorizing the opening of certain parts of Indian reservations to sale, settlement, etc., Congress has

By the mid-twentieth century, objections mounted that the FILL seemed anachronistic, paternalistic, patronizing, and inconsistent with developing notions of civil rights and individual freedoms of Indians as citizens of the United States,⁴² and not in keeping with the general emphasis on assimilation that was starting to dominate the federal policy of that era.⁴³

In 1953, Congress responded to these concerns, not by repealing the FILL, but rather by truncating them in two respects. First, they would only have application in Indian country.⁴⁴ Second, even in Indian country, they would not have any application to a liquor transaction as long as that transaction was performed in compliance with the laws of both the relevant state and the relevant tribe for that particular parcel of Indian country.⁴⁵

This inspired solution relieved the federal government of most of its enforcement burden, as the federal law would function only as a

provided that the Indian liquor laws shall continue in force for certain periods, usually 25 years, or until otherwise provided by Congress During the first few years after the throwing open of such lands to sale and settlement, it has been considered advisable to have the special Indian liquor laws continued in force for the protection of the Indians. However, the proportion of white population has largely increased, towns of considerable size have grown up, and many of the inhabitants do not believe that they should be subject to the sweeping prohibitions governing Indian and Indian reservations. Since national prohibition has been repealed, many protests have been received against the enforcement of these laws in such areas. It is becoming increasingly difficult to enforce the Indian prohibition laws in such areas. The present appropriation for this work is entirely inadequate to employ sufficient men to make the law effective.

Id. (The bill supported by this report, H.R. 8662, to modify the operation of the Indian liquor laws on lands which were formerly Indian lands, was enacted as Pub. L. 73-478, 48 Stat. 1245.).

42. "A law restricting only a certain race of people is, therefore, discriminatory and against the principles of this free country." 99 Cong. Rec. A1978 (daily ed. Apr. 18, 1953) (extension of remarks of Sen. Goldwater, presenting letter from Clarence Wesley, Chairman, San Carlos Apache Tribal Council, San Carlos, Arizona).

43. "In his letter Mr. Wesley refutes the claims of those who think the Indians have not reached a place where they can assume their rightful place in our society, alongside their white brothers." *Id.*

44. 18 U.S.C. § 1161 ("The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country . . .").

45. *Id.* ("[N]or 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.").

backup; it made Indian country subject to state alcohol laws, in keeping with the assimilative zeitgeist, and it gave the tribes the ability to enact their own ordinances, which could be more restrictive than state law but would not provide a shield against enforcement of state law.

This newly shared-authority structure was challenged, first by non-Indian bar owners resisting tribal authority. In *United States v. Mazurie*,⁴⁶ the owners of the Blue Bull Bar, situated on one of the substantial tracts of non-Indian-held land scattered within the Wind River Reservation, argued they had a right to operate that bar by reason of their license from the State of Wyoming and could not be required to also obtain a license from the Wind River Tribes.⁴⁷ After about a year of operating without a tribal license, the owners were prosecuted and convicted under the FILL.⁴⁸ They appealed to the Tenth Circuit, which reversed, ruling that insofar as 18 U.S.C. § 1161 authorized Indian tribes to adopt ordinances controlling the introduction by non-Indians of alcohol onto non-Indian land, it was an invalid congressional attempt to delegate authority.⁴⁹ The Supreme Court reversed the Tenth Circuit, holding that Congress could validly regulate such sales and could validly delegate its authority to the Tribe⁵⁰:

[W]hen Congress, delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'⁵¹

A mirror-image challenge to state authority was resolved in *Rice v.*

46. 419 U.S. 544 (1975).

47. *See id.* at 546-48 (discussing the owner of the Blue Bull's situation).

48. *Id.* at 548-49.

49. *Id.* at 549-50. The owners raised other arguments as well: that the bar's location on fee-patented land in a non-Indian community brought it within the meaning of 18 U.S.C. § 1154 and thus outside Indian country for purposes of the FILL, and that the meaning of "non-Indian community" was unconstitutionally vague. The Tenth Circuit agreed, but the Supreme Court disagreed. *Id.* at 550, 552-53.

50. *Id.* at 553-58.

51. *Id.* at 557.

Rehner.⁵² A federally licensed trader operating a general store on an Indian reservation sought a declaratory judgment that she was not required to obtain a state liquor license to sell liquor there. Although the Ninth Circuit agreed, the Supreme Court did not. The assumption that States have no power to regulate the affairs of Indians on a reservation was “unwarranted in the narrow context of the regulation of liquor.”⁵³ Under the 1953 law,

It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinance and state law. It is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States⁵⁴

Thus, the 1953 enactment was a valid delegation to states and tribes, each of which can impose their own restrictions on intoxicant transactions, and neither of which can claim to exercise such authority to the exclusion of the other. Notably, neither in *Mazurie* nor in *Rice* was the state suing the tribe or vice versa. Rather, in each case, a private business sought to escape one government’s regulation by arguing that the other government’s authority was exclusive. Each argument failed.

If this works in the lower 48, it likely could work in Alaska. But we have not yet completely unraveled the *Venetie/Rice* syllogism. FILL Indian country can be created by Congressional extension of the FILL to a particular parcel of land, without making that land into “full” Indian country within the definition of 18 U.S.C. § 1151. But this only establishes that Congress has the authority to do so; it remains to be established that there was some point at which Congress extended the Indian liquor laws to Alaska.

III. THE FEDERAL INDIAN LIQUOR LAWS IN ALASKA

Alaska was acquired by the United States in 1867, at which point the federal Indian liquor laws were still housed in sections 20 and 21 of the 1834 Act.⁵⁵ At that point, Indian country was still defined as lands

52. 463 U.S. 713 (1983).

53. *Id.* at 723. It was in this context that the Court stated “there can be no doubt that Congress has divested the Indians of any inherent power to regulate in the area.” *Id.* at 724.

54. *Id.* at 728.

55. As amended by the Acts of Feb. 13, 1862 and March 15, 1864, *see supra* notes 30, 35. Thus, portions of section 20 of the 1834 Act now applied to

“west of the Mississippi and not within the States of Missouri and Louisiana or the Territory or Arkansas.” Secretary of State William Seward and President Andrew Johnson had just acquired a large chunk of such lands,⁵⁶ and Congress embarked on the task of deciding what laws would apply thereto.

A. 1868: New Customs for Alaska

In 1868, the first Congressional enactment concerning Alaska made the newly acquired land a customs collection district with no governor, no legislature, and no courts. Legal issues were to be addressed to the federal district courts of California, Oregon, or the Washington Territory.⁵⁷ The 1868 law extended the federal laws “relating to customs, commerce, and navigation” to Alaska’s “mainland, islands and waters . . . so far as the same may be applicable thereto.”⁵⁸ This logically encompassed the 1834 Trade and Intercourse Act, enacted pursuant to the Indian commerce clause.⁵⁹

providing liquor to Indians inside and outside Indian country.

56. Treaty of Cession, June 20, 1867, 15 Stat. 539.

57. Act of July 27, 1868, ch. 273, § 7, 15 Stat. 240.

58. *Id.* § 1.

59. Section 4 of the 1868 Act, 15 Stat. at 241, gave the President “power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and distilled spirits into and within the said territory.” President Andrew Johnson initially prohibited importation of all firearms, ammunition and liquor, except that the Secretary of the Treasury could prescribe regulations under which they could be sold “in limited quantities” and only “to such persons as the military or other chief authority in said Territory may specially designate in permits for that purpose.” JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3865 (1897). “Such persons” were limited to whites. Letter from Hugh McCulloch, Treasury Secretary, to Wm. S. Dodge, Special Agent and Acting Customs Collector at Sitka (Feb. 5, 1868) (on file with National Records Seattle, Records of U.S. Customs Service) (“Wines and distilled spirits, in limited quantities . . . may be transported from any port in the United States on the Pacific Coast, to the said port of Sitka, and to none other in the Territory aforesaid, for the purposes of sale to resident white citizens of said Territory. . .”). President Grant kept in place the liquor prohibition. Larry Arthur Sparks, *The Failure of Prohibition in Alaska: 1884-1900* 12-13 (1974), available at <http://www.skepticalthayne.com/prohibition.pdf>. The understanding continued to be that liquor was absolutely prohibited to Natives, but not to whites. See Letter from William Kapus, Collector, to Vincent Colyer, Special U.S. Indian Comm’r, Sitka, Alaska (Oct. 25, 1869), in ANNUAL REPORT OF THE COMMISSION ON INDIAN AFFAIRS 579 (1869) (“The liquors that were seized by me in the month of August from on board the steamship Active were sold at this port on the 14th instant, but were delivered to the purchasers only in limited quantities for the use of white inhabitants, and, as the law requires, upon the written permits of the general commanding the department.”).

Either under the 1834 geographical definition of Indian country,⁶⁰ or under the 1862 amendment removing the Indian country limitation for certain Indian liquor law offenses,⁶¹ or as a function of the 1868 Act extending the federal commerce laws to Alaska, the widespread assumption—both among the public and within governmental agencies—was that the terms of the 1834 Trade and Intercourse Act prohibited conveying alcohol to Alaska Natives. An April 1869 issue of the *Alaska Times* warned readers that “[t]he law against selling liquor to Indians in Alaska is very strict,” and “call[ed] the attention of the merchants of this Territory to the laws of Congress, concerning [sic] the safe [sic] of liquors to Indians . . . ,” setting out verbatim the Act of Feb. 13, 1862 (amending the Trade and Intercourse Act of June 30, 1834).⁶²

Officials within the Departments of Treasury⁶³ and State⁶⁴ had concluded that Alaska was Indian country shortly after its acquisition. Secretary of State Seward, who had negotiated the original Treaty of Cession, expressed the same view.⁶⁵ This certainly appeared to be the

60. Act of June 30, 1834, ch. 161, 4 Stat. 729. *See supra* note 19.

61. Congress had twice amended section 20 of the 1834 Act by the time Alaska was purchased. *See supra* notes 30, 35.

62. ALASKA TIMES, April 30, 1869.

63. Letter from W.A. Howard, Captain U.S.R. Marine, Special Agent Treasury Dep’t, to Honorable Hugh McCulloch, Sec’y of the Treasury, in RUSSIAN AMERICA, H.R. DOC. NO. 40-177, at 196 (2d Sess. 1868) [hereinafter RUSSIAN AMERICA] (“Until laws or regulations are perfected for the government of this territory I shall consider it as an Indian reservation, so far as liquors are concerned.”); *see also* Letter from Hiram Ketchum Jr., Custom-House, Port of Sitka and Dist. of Alaska, to Bvt. Maj. Gen. J.C. Davis, U.S. Army, commanding Dep’t of Alaska (Dec. 15, 1868), *quoted in* Letter from Ketchum to Treasury Secretary Hugh McCulloch (Dec. 15, 1868), in ALASKA BOUNDARY TRIBUNAL, Vol. II, 338, 452–53 (1903) (stating a similar sentiment).

64. Letter from E. Peshine Smith, Examiner, to Bureau of Claims (Sept. 5, 1867), in RUSSIAN AMERICA, *supra* note 63, at 96 (“I think, therefore, that the new territory became a part of the Indian country on the 20th June last.”).

65. The relevant portion of Seward’s letter reads as follows:

I understand the decision of the Supreme Court of the United States in the case of Harrison vs. Cross, (16 Howard, 164-202), to declare . . . that upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach to and take effect within such territory ipso facto . . . I can see no reason for a discrimination in this respect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes. . . . The act of June 30, 1834, (4 Stat., 729) defines the Indian country as, in part, ‘all that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana, or the Territory of Arkansas.’ This, by a happy elasticity of expression, widening as our dominion widens, includes the territory ceded by Russia.

Letter from Wm. H. Seward to the Sec’y of War (Jan. 30, 1869), *quoted in* WILLIAM

assumption of the Department of War.⁶⁶

This assumption, however, came to an abrupt end when the *United States v. Seveloff*⁶⁷ case came before Oregon Federal District Court Judge Matthew Deady in 1872.

B. 1872: *Seveloff* and a Brief History of *Tom*

Ferueta Seveloff, a Sitka Creole, was arrested by military authorities in Sitka and subsequently indicted by an Oregon grand jury for introducing spirituous liquors into the Indian country (Sitka) and for giving liquor to “one John Doe,” an Indian residing at the Sitka Indian agency under the charge of the Indian Agent for Sitka.⁶⁸

Judge Deady, tasked with ruling on Seveloff’s demurrer that the 1834 Act should not apply in Alaska, reviewed the three separate opinions in the *Tom* case of twenty years earlier,⁶⁹ dismissed Attorney General Cushing’s critique, and adopted the view that the 1834 Act did not by itself extend to lands subsequently acquired by the United States.⁷⁰

However, where the *Tom* court had concluded that the subsequent 1850 Oregon Act sufficed to extend the liquor law provisions to Oregon, Judge Deady decided that the analogous “extending” provision in section 1 of the 1868 Alaska Act did not extend the liquor law provisions to Alaska.⁷¹ Judge Deady acknowledged that the 1834 Act was a law relating to commerce:

W. BELKNAP, U.S. WAR DEP’T, JURISDICTION OF THE WAR DEPARTMENT OVER THE TERRITORY OF ALASKA, H.R. EXEC. DOC. NO. 44-135 at 5 (1876) [hereinafter WAR JURISDICTION].

66. WAR JURISDICTION, *supra* note 65, at 22. “The opinion of the Attorney General [Cushing] . . . and the communication from the Secretary of State [Seward] to the Secretary of War, dated January 30, 1869, have heretofore been regarded as authority upon the points. . . .” *Id.*

67. 27 F. Cas. 1021 (D. Or. 1872) (No. 16,252).

68. *Id.* at 1022; SIDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 214 (1994). Seveloff was apparently arrested on June 19, 1872 and sent to Portland on August 19, 1872. Message Of The President Of The United States, Communicating, In Answer To A Senate Resolution Of January 7, 1876, Information In Relation To Military Arrests In The Territory Of Alaska During The Past Five Years, S. Exec. Doc. No. 33, 44-1, at 3 (1st Sess. 1876) [hereinafter Military Arrests 1871-1876].

69. *Seveloff*, 27 F. Cas. at 1023.

70. *Id.*

71. Extending “the laws of the United States relating to customs, commerce and navigation” to Alaska, “so far as the same may be applicable thereto,” language that echoed that “so far as [its provisions] may be applicable” clause that Chief Justice Williams had found permitted application of the liquor law prohibitions to Oregon. *Id.* at 1024.

Unless, then, there is something in the circumstances of the case or in the act, from which it appears that congress did not intend to use the phrase, 'laws relating to commerce,' in an unqualified sense, it follows that the act of 1834 is in force in Alaska, as a regulation of commerce with the Indian tribes therein.⁷²

However, he also posited two circumstances that, by implication, persuaded him that Congress did not intend to use the term "laws relating to commerce" in an unqualified sense. First, he thought "commerce" should mean solely commerce with foreign nations and the several states, not commerce with Indian tribes.⁷³ Second, he thought section four of the 1868 Alaska Act, giving the President the authority to deal with spirituous liquors, should be given a pre-emptive reading and govern the whole subject.⁷⁴ He acknowledged that his legal conclusion might be at odds with the facts on the ground in Alaska (which he had not visited)⁷⁵: "the territory of Alaska is not a part of 'the Indian country,' so declared by law, whatever it may be in fact."⁷⁶

Judge Deady correctly noted that the separate count charging Seveloff with giving spirituous liquors to Indians did not depend on whether Alaska was Indian country or not.⁷⁷ But he further stated that "[i]t has been so common a habit of congress upon the acquisition of territory to specially extend the laws of the United States over it, that an impression seems to prevail that without such action these laws would not affect territory acquired after their passage."⁷⁸ He let that prevailing impression control his decision, although simultaneously observing "[f]or my own part, I can see no good reason why any general law of the United States does not become in force at once, in any country acquired

72. *Id.*

73. *Id.* This seems irreconcilable with the United States Supreme Court opinion in *United States v. Halliday* on the same federal Indian liquor laws:

The act in question . . . is, we think, still more clearly entitled to be called a regulation of commerce. . . . The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

70 U.S. 407, 416-17 (1865).

74. *Id.*

75. Judge Deady did visit Alaska, but not until 1880. Niedermeyer, *supra* note 32, at 221.

76. *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D. Or. 1872) (No. 16,252).

77. *Id.*

78. *Id.*

by it, without reference to the time of its passage.”⁷⁹

With the indictments dismissed, Seveloff was free to continue conveying as much liquor as he pleased to the Alaska natives without fear of prosecution. Judge Deady expressed reservations about his ruling: “I would not be understood as stating this conclusion without doubt. On the contrary, I have reached it with hesitation, and express it subject to correction.”⁸⁰ Nonetheless, he thought it “safer to err . . . by declining jurisdiction than to accept it. If congress should think it desirable that this or any other provision of the Indian intercourse act should be in force in Alaska, it can so provide, beyond doubt.”⁸¹

As it happened, Congress did think it desirable that sections 20 and 21 of the 1834 Act should be in force in Alaska and did so provide, almost immediately.

C. 1873: The *Seveloff* Fix, Or One Thing Leads to Another

The *Seveloff* ruling alarmed the War Department⁸² and threw its policy into “complete confusion.”⁸³ Three days after the decision, Brigadier General Canby wrote a letter asking that the Secretary of War press for legislation to remedy the situation.⁸⁴

Interior Secretary Delano endorsed this request and expressed in writing to Speaker of the House James Blaine that distilled liquors, manufactured in Alaska, were being sold to the Indian tribes to the Indians’ “great injury and demoralization.”⁸⁵ Delano suggested amending the original 1868 Alaska Act by extending to Alaska the liquor law provisions of the 1834 non-intercourse act.⁸⁶

Congress quickly adopted Delano’s suggestion. Less than three months after the *Seveloff* decision,⁸⁷ Congress explicitly made sections 21

79. *Id.*

80. *Id.*

81. *Id.*

82. Op. Sol. Gen. of Dep’t of the Interior, M-36975 at 18 (Jan. 11, 1993), <http://www.doi.gov/solicitor/opinions/M-36975.pdf>.

83. HARRING, *supra* note 68, at 214.

84. WAR JURISDICTION, *supra* note 65, at 22 n.26.

85. F. Rives et al., THE CONGRESSIONAL GLOBE: CONTAINING THE DEBATES AND PROCEEDINGS OF THE THIRD SESSION FORTY-SECOND CONGRESS; WITH AN APPENDIX, EMBRACING THE LAWS PASSED AT THAT SESSION 2023 (1873).

86. Donald R. McCoy, *The Special Indian Agency in Alaska 1873-1874: Its Origins and Operation*, 25 PAC. HIST. REV. 355, 360 (Nov. 1956). Delano also requested that Congress provide for the appointment of an Indian Agent at \$3,000 a year, to enforce this proposed legislation and perform other duties. Although Congress did not fund this, Delano appointed an agent nonetheless, until told he lacked authority to do so. *Id.*

87. *Seveloff* was decided on December 10, 1872. The corrective legislation

and 22 of the 1834 Act applicable to Alaska.

[S]ection one of an act entitled ‘An act to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes,’ approved July twenty-seventh, eighteen hundred and sixty-eight, be so amended as to read as follows: ‘That the laws of the United States relating to customs, commerce, and navigation, and sections twenty and twenty-one of “An act to regulate trade and intercourse with Indian tribes and to preserve peace on the frontiers,” approved June thirtieth, eighteen hundred and thirty-four, be, and the same are hereby, extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto.’⁸⁸

This was the “*Seveloff fix*,” and with the enactment of this undramatic and perhaps overly punctilious language, the federal Indian liquor laws were extended throughout Alaska.

This enactment sparked a lively discussion within the executive branch agencies as to whether Alaska had been made Indian country for all purposes or only for purposes of the FILL, as detailed in the following section. This distinction would determine whether other important provisions of the 1834 Act would apply within Alaska. The discussion resonates currently, as the courts eventually concluded that Congress had intended to recognize Alaska as Indian country only for liquor law purposes and not for general purposes. Giving effect to that Congressional intent today points the way for harmonizing the conclusion that Alaska Native Villages occupy Indian country solely for purposes of Indian liquor laws with the conclusion in *Venetie* that for the most part they do not occupy Indian country for general purposes.

D. 1873-1876: Campbell’s Suits

In response to questions posed by the Secretary of War, U.S.

was passed on March 3, 1873. No arrests for liquor law violations had been made during that interval, although George Austin, arrested for “disposing of liquor to Indians” on December 6, 1872, was not released until January 20, 1873. *Military Arrests 1871–1876*, *supra* note 68, at 3.

88. Act of Mar. 3, 1873, ch. 227, 17 Stat. 530.

Attorney General Williams issued opinions on the new law.⁸⁹ In his first opinion, Williams responded to the question “what is Indian country” by analogizing the 1873 *Seveloff* fix to the 1850 Act concerning Oregon and similar 1851 legislation concerning New Mexico and Utah, seemingly saying that within such territories “Indian country” would encompass all reservations and all Indian lands to which title had not been extinguished.⁹⁰ War Secretary Belknap sent a more Alaska-specific inquiry in November 1873, asking whether the term “Indian country” embraced the Territory of Alaska, and also whether the War Department had authority to exercise control over the introduction of spirituous liquors into that Territory.⁹¹ Williams responded “My opinion, therefore, is that, as to this matter, Alaska is to be regarded as ‘Indian country,’ and that no spirituous liquors or wines can be introduced into that Territory without an order by the War Department for that purpose.”⁹² With the Treasury Department’s cooperation,⁹³ the War Department issued orders implementing enforcement of sections 20 and 21, on May

89. As Oregon Chief Justice twenty years earlier, Williams had written one of the *Tom* decisions.

90. He said:

I think it unquestionable, both as regards the region west of the Mississippi originally included within the limits of the Indian country by the act of 1834, and as regards the region formerly included within the Territories just mentioned, that all Indian reservations occupied by Indian tribes, and also all other districts so occupied to which the Indian title has not been extinguished, are Indian country within the meaning of the intercourse-laws, and remain (to a greater or less extent, according as they lie within a State or a Territory) subject to the provisions thereof.

14 Op. Att’y. Gen. 290, at 6 (1873). He refrained from addressing questions about the status of lands that had been opened up for white settlement due to a pending United States Supreme Court case, planning to update the Secretary of War after that case was decided. However, an annotation to the opinion notes that the United States Supreme Court dismissed the case. *Id.*

91. *Id.* at 327.

92. *Id.* In June 1874, the Attorney General responded to another question from the Secretary of War, indicating that the Department of War had authority to permit the introduction of spirituous liquors or wines into Alaska, even when those were not for the use of officers or troops of the United States. Introduction of Spirituous Liquors or Wines in Alaska, 14 Op. Att’y. Gen. 401, 401 (1874). The Attorney General reasoned that the 1864 amendment gave the War Department broader discretion for allowing the importation. *Id.* at 401-02 (“It shall be a sufficient defense to any charge of introducing or attempting to introduce liquor to the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department.”).

93. Letter from the Secretary of the Treasury, in answer to, a Senate resolution of Mar. 15, 1876, transmitting the report of a special agent on the Territory of Alaska and the collection of the customs revenue therein, S. EXEC. DOC. NO. 44-37, at 9-10 (1st Sess. 1876).

16, 1874.⁹⁴

Captain Joseph Campbell took command of Sitka post on August 17, 1874, and found five prisoners who had been arrested for Indian liquor law violations in June 1874.⁹⁵ En route to his post, Campbell had been briefed by Brevet Major-General Jefferson Davis, who was commanding the Department of Columbia (Portland, Oregon) at the time.⁹⁶ Davis warned Campbell against sending the prisoners to the Oregon courts because the Oregon courts and U.S. courts in Oregon would deny jurisdiction.⁹⁷ Campbell expressed frustration that he was ordered to “proceed against” the detainees but not told how to do so, aside from Davis’ instructions not to send them for court proceedings.⁹⁸ Relying on the 69th article of war,⁹⁹ Campbell continued to hold the detainees. Two of the five men took ill and died in the post hospital.¹⁰⁰ Campbell finally received authorization to release the remaining men on a type of military-fixed bail, “a measure I recommended myself, not seeing any other prospect of getting rid of the custody of these people.”¹⁰¹

Nonetheless, Campbell continued to try to enforce the law as best he could, and (notwithstanding Davis’s directive) eventually started sending the new arrestees to Oregon for court proceedings. Campbell discovered that despite the Treasury Department’s promise to cooperate, its Wrangell deputy customs agent John Carr was part of the

94. War Dep’t, Adjutant-Gens. Office, Gen. Orders No. 40 (May 16, 1874), included in WAR JURISDICTION, *supra* note 65, at 15–16.

95. Letter from Capt. Joseph Campbell, Headquarters, Sitka, Alaska, to Assistant Adjutant-Gen., Headquarters Dep’t of the Columbia (Jan. 20, 1876), *quoted in* Military Arrests 1871–1876, *supra* note 68, at 2–3.

96. Davis had been transferred from Alaska to New York in 1871. DONALD CRAIG MITCHELL, SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND 1867–1959 51–52 (1997). In April of 1873, he was given command of the Department of the Columbia within the Division of the Pacific, in which position he presumably had his discussion with Captain Campbell. *Id.* In 1874, Davis was transferred again, to Omaha. *Id.*

97. Letter from Capt. Joseph Campbell, Headquarters, Sitka, Alaska, to Assistant Adjutant-Gen., Headquarters Dep’t of the Columbia (Jan. 20, 1876), *quoted in* Military Arrests 1871–1876, *supra* note 68, at 3. The basis for Davis’s directive is unclear. It is possible that Davis was thinking of Judge Deady’s rulings in *Seveloff*, perhaps unaware that the statute had been amended, perhaps just distrustful of the Oregon courts.

98. *Id.*

99. Any officer who presumes, without proper authority, to release any person committed to his charge, or suffers any person so committed to escape, shall be punished as a court-martial may direct. *Articles of War*, SONS OF UNION VETERANS OF THE CIVIL WAR, <http://suvcw.org/education/documents/articles.htm> (last visited Feb. 15, 2015) (discussing Art. 81).

100. Military Arrests 1871–1876, *supra* note 68, at 2–3.

101. *Id.* at 3.

problem, having accepted a one hundred dollar bribe from Wrangell resident W. P. Wilson for allowing a lot of liquors from the bonded warehouse at Fort Wrangell to be taken to Wilson's house.¹⁰² Captain Campbell dispatched Lieutenant Dyer to Wrangell to arrest Carr and gather witness statements.¹⁰³ Carr was arrested in September, and he arrived in Sitka in October. Unfortunately, Dyer failed to send the witness statements by the same boat with the arrestees.¹⁰⁴ Campbell was unable to get the witness statements in time for the October boat to Portland, and was unwilling to send Carr and the other detainees to Portland without the witness statements, as this "would be equivalent to liberating them."¹⁰⁵ Instead, Campbell elected to keep Carr in custody. Carr, unwilling to wait, had his attorneys file for habeas corpus. This brought the matter in front of Judge Deady, who ordered Carr be brought to Portland in December.¹⁰⁶

Carr's argument was that section 23 of the 1834 Act, allowing the military to make arrests for violations of the Act, was not one of the sections extended to Alaska. Judge Deady disagreed:¹⁰⁷

Section 1 of the Alaska act of July 27, 1868 (15 Stat. 240), having been amended by the act of March 3, 1873 (17 Stat. 530), so as to extend over the territory of Alaska, sections 20 and 21 of the intercourse act of 1834, said territory, so far as the introduction and disposition of spirituous liquors is concerned, became what is known as 'Indian Country;' and the military force of the United States may be employed by the president for the arrest of persons found therein violating either of said sections. To accomplish this result it was not necessary for congress to extend section 23 of the intercourse act by name over Alaska. By force of its own terms that section applies to any territory of the United States declared by congress, either in terms or effect, to be 'Indian Country'—that is, a country in which the intercourse between the whites and Indians is regulated and restrained by special acts of congress. So soon, then, as Alaska was made 'Indian Country,' so far as the introduction and use of spirituous liquors is concerned, section 23 of the act which authorizes the employment of military force became applicable

102. See *In re Carr*, 5 F.Cas. 115, 116 (C.C. D. Or. 1875). See also note 125, *infra*.

103. Letter from Captain Joseph B. Campbell, Headquarters, Sitka, Alaska, to Assistant Adjutant-Gen., Headquarters Dep't of the Columbia (Jan. 20, 1876), included in *Military Arrests 1871-1876*, *supra* note 68, at 3.

104. *Id.*

105. *Id.*

106. *In Re Carr*, 5 F.Cas. at 115.

107. See *id.* at 115-16.

to it, and in force therein.¹⁰⁸

Judge Deady gave more credence to Carr's second argument, that section 23 only allowed military detentions for five days, within which civil authorities had to remove the defendant for trial. Carr had languished for about ninety days, and thus was entitled to be discharged.¹⁰⁹ However, Judge Deady took note of the witness affidavit that Lieutenant Dyer and Captain Campbell finally managed to retrieve from Wrangell, and ruled that Carr should be committed to answer the charge for violating section 20, with bail set at \$2500.¹¹⁰ This made the successful habeas ruling something of a Pyrrhic victory for Carr. He should not have been held in custody, but still had to face the charge.

That five-day limit was a major problem; there were no civil authorities to whom custody could be transferred reachable within five days of Sitka.¹¹¹ Immediately after the *Carr* decision, Campbell's new commanding officer General Howard requested through the War Department that Congress amend section 23's five-day limit.¹¹² This apparently was unsuccessful,¹¹³ but General Howard thereafter proposed an easier non-legislative solution. If Captain Campbell were to be appointed as the Indian agent for Alaska, then he would be able to take action as to liquor law violations independently of his military authority, circumventing the five-day limit as that applied only to military arrests.¹¹⁴ General Howard telegraphed the Division Headquarters in San Francisco on March 9, 1875: "According to instructions of General Halleck [September 6, 1867], commandant in Alaska is ex officio agent for Indian affairs. Please ask that this authority be sanctioned by Secretary of Interior. This will protect commandant

108. *Id.*

109. *Id.* at 116.

110. *Id.*

111. *See id.* (citing to a prior, apparently unpublished decision in which Deady had held a defendant liable for false imprisonment when the defendant had arrested the plaintiff under section 23 and detained him more than five days before removal, "because he had no sufficient means wherewith to do otherwise, . . .").

112. Letter from the Sec'y of War communicating copy of a telegram from the commanding general of the military Dep't of the Pac., in relation to the length of time of retention of military prisoners, under section 23, Act of Jan. 30, 1834, S. DOC. NO. 43-15 (2d Sess. 1877) ("Please ask for legislation extending the time so as to give reasonable time to bring prisoners to Portland and deliver to United States marshal. This action necessary to enable United States to execute requirements of sections 20 and 21.").

113. The five-day limit remained in the statute. Revised Statutes § 2151.

114. "[N]o person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before the removal." Act of June 30, 1834, 4 Stat. 729, § 23 (1834) *quoted in In Re Carr*, 5 F.Cas. at 116.

against civil suits.”¹¹⁵ After extensive discussion among the Attorney General and the Departments of War and Interior about the permissibility of the arrangement, Interior finally agreed not to object, Secretary of War Belknap made the appointment official, and Captain Campbell became the Indian agent in Alaska on May 21.¹¹⁶

Captain Campbell now had a strong hand, but he proceeded to overplay it. Perhaps due to his new-found status as Indian agent, or perhaps due to the *Carr* decision (ruling that section 23 arrest authority was impliedly encompassed in the 1873 extension of sections 20 and 21 to Alaska), Campbell became convinced that Alaska was now Indian country for more purposes than just the federal Indian liquor laws. In July 1875, he issued General Order 96, announcing enforcement of several other Indian country provisions in addition to sections 20 and 21.¹¹⁷

Reaction was swift and generally unfavorable. Fifteen days after its issuance, the Portland Board of Trade wrote to War Secretary Belknap requesting that Order 96 be withdrawn as against the interest of trade and commerce with Oregon.¹¹⁸ About a month after the new rules, Sitka Customs House Collector M.P. Berry penned a report outlining the problems Campbell’s new rules imposed.¹¹⁹ In October, Indian Affairs Commissioner Smith, who had supported General Howard’s original request for Campbell’s Indian agent status, concluded that Alaska was Indian country only for purposes of sections 20 and 21, and that Captain Campbell had overstepped his authority.¹²⁰ In November, the Judge Advocate General’s office reached a similar conclusion.¹²¹

Campbell’s commanding officer Gen. Howard countermanded a portion of Order 96 and instructed Campbell not to enforce the licensing requirement for traders already doing business in Alaska, limiting its enforcement to new traders.¹²² Howard allowed enforcement of the remainder of Order 96, although he noted that he would be sending it to the War Department and the Indian Bureau for review.¹²³

Campbell vigorously defended his actions in November 1875. He explained that the Natives had learned from American soldiers how to

115. Telegram from Howard to Division Headquarters (Mar. 9, 1875), included in WAR JURISDICTION, *supra* note 65, at 33.

116. *Id.* at 33–38.

117. *Id.* at 39–40.

118. *Id.* at 38.

119. *Id.* at 29.

120. *Id.* at 44–45.

121. *Id.* at 47–48.

122. *Id.* at 42.

123. *Id.*

construct and operate stills to create their own “hoochinoo”, and the restrictions he imposed on importing sugar and molasses (relying on his general Indian country authority) were intended to thwart these operations.¹²⁴ Regarding the complaints from customs officials, he noted that Carr and others had participated in the liquor trade, and those customs officials not actively violating the law were lax about enforcing it.¹²⁵

Campbell’s position that Alaska was full Indian country was bolstered by an opinion rendered by the Assistant Adjutant to General Howard in December:

I do not comprehend that fine, metaphysical vague reasoning which regards Alaska as Indian country in one case, but *perhaps* not in another case. If one desires to introduce liquor, it *is* Indian country; if he does not it *is not* Indian country, or doubtful. This method of reasoning calls to mind the interview between Hamlet and Polonius. Yonder cloud has the shape of a camel, weasel, or whale, depending on the medium through which it is seen. Alaska is Indian country, or not, according to the stand-point from which it is viewed. My opinion is that Alaska is Indian country, or that it is not Indian country. If it is Indian country for one purpose it is Indian country for all.¹²⁶

124. *Id.* at 30–31. Many shared Campbell’s molasses anxiety. For example, years later, the Chilkat Chief Chartrich conveyed a request that the sale of molasses in large quantities by Juneau traders to his tribe be stopped to cut off the supply from which hoochinoo was being made. Governor Swineford replied:

I regret being compelled to say that the law places no restriction upon the sale of sugar and molasses to the natives, and that I am powerless in the premises. All I can do, at the most, is to prefer a request to the Juneau traders that they desist from making such trades, and leave them to heed the request or not, as they may see fit.

Letter from Gov. A.P. Swineford to Lieutenant-Commander J.S. Newell (June 1, 1887), in ALASKA BOUNDARY TRIBUNAL, VOL. II, 338, 388 (1903).

125. WAR JURISDICTION, *supra* note 65, at 32 (“[T]he impression made upon me as to the zeal of the customs officials for the suppression of illegal trade is not very favorable. I was obliged to arrest the deputy collector, Carr, at Wrangel, last year, for violation of liquor-law and malfeasance in office in regard to the custody of seized property, and since then all kinds of rascality are being found out against him. The deputy collector, McKnight, at this place, encouraged violation of the law by purchasing liquor he knew was illegally sold. The customs officials are directed by the Hon. Secretary of the Treasury to assist the military in the execution of the non-intercourse laws, but they never, or rarely, actually do anything.”).

126. *Id.* at 54. However, while asserting that “[t]he legality of [the orders issued by] Captain Campbell, . . . in my judgment cannot be questioned,” and that “I do not think [Captain Campbell] has exceeded his authority,” the Adjutant further opined that Campbell’s orders were “injudicious and unwise,”

While the debate simmered within and among the agencies of the Executive Branch, the howls from the outraged Portland Board of Trade reached the halls of Congress. In December 1875, Senator Sargent of California introduced a bill to repeal the *Seveloff* fix,¹²⁷ notwithstanding the opposition of the War Department.¹²⁸

The debate within the military reached the desk of General Schofield, Commander of the Division of the Pacific. Schofield expressed his view that Campbell's restrictions on trade within Alaska were "evil," but referred the matter to the Secretary of the Department of War, recommending that Congress be encouraged to provide a government for the territory suited to its condition.¹²⁹ Secretary Belknap had his adjutant prepare a brief appending the various opinions, complaints and correspondence, which he passed along to Congress in February 1876.¹³⁰

But Congress took no action. Senator Sargent's bill to repeal the *Seveloff* fix (SB 87), which if enacted would have mooted the question of whether Captain Campbell had overstepped his authority by removing that authority completely, was reported back with a negative recommendation in May 1876, and further action postponed indefinitely.¹³¹ The *Seveloff* Fix had survived the first (and to date, the only) Congressional proposal to repeal it.

Ultimately, it was Judge Deady who issued the definitive pronouncement on Captain Campbell's authority and the "full vs. FILL" Indian country question. In 1876, he decided *Waters v. Campbell*, a civil case brought against Campbell for false imprisonment¹³²

Hugh Waters had been arrested for violations of the liquor laws about three weeks after Carr's arrest, and may have been one of Carr's associates.¹³³ Waters was brought from Wrangell to Sitka, held in Sitka for about two months, and then sent to Portland for trial, where the U.S. Commissioner discharged him about four days after his arrival.¹³⁴ Waters subsequently sued Captain Campbell for false imprisonment. Campbell's demurrer argued that Waters' complaint failed to state a cause of action; the complaint identified Waters as a "trader," from

and he should be instructed to revoke them. *Id.* at 54–55.

127. 4 CONG. REC. 200 (1875).

128. WAR JURISDICTION, *supra* note 65, at 21.

129. *Id.* at 33, 56.

130. *Id.* at 1.

131. 4 CONG. REC. 3043 (1876).

132. 29 F. Cas. 411 (C.C. D. Or. 1876) (No. 17,264) (*Waters I*).

133. Waters was arrested October 24, 1874 according to Military Arrests, *supra* note 68, at 4. One of the opinions refers to Waters' complaint alleging he was arrested September 18. *Waters v. Campbell*, 29 F. Cas. 412 (C.C.D.Or. 1877) (No. 17,265) (*Waters II*). Carr was a witness for Waters, *id.* at 412.

134. *Waters II*, 29 F. Cas. at 412.

which Campbell argued the court should infer that Waters was trading with Indians, and since Waters failed to allege that he had a license to trade with Indians as required by § 2 of the 1834 Act, Captain Campbell was therefore authorized to arrest and detain him even crediting all the factual recitations in the complaint.

Judge Deady sided with Waters: “Alaska is not ‘Indian country’ in the technical sense of that term any further than [C]ongress has made it so.”¹³⁵ With the 1873 amendment having extended §§ 20 and 21 of the 1834 Act to Alaska,

said territory, so far as the introduction and disposition of spirituous liquors is concerned, was thereby made ‘Indian country.’ [But] Subject to this restriction, the country seems to be open to occupation and trade, even with Indians. The provisions of the [I]ntercourse [A]ct of 1834 (§ 2129 et seq. of the Revised Statutes) which prohibit trading with the Indians in the Indian country, except under a license from a superintendent or agent of Indian affairs, are local in their character; and not having been specially extended over Alaska, as §§ 20 and 21 aforesaid were, are, therefore, not in force there.¹³⁶

Thus, the facts alleged in the complaint did not establish that Campbell had the authority to arrest Waters, and Waters’ civil case could proceed.¹³⁷

Judge Deady’s opinion settled the debate. Alaska’s Native Villages were within Indian country for purposes of the FILL, but not Indian country for other purposes. Assuming the *Seveloff* fix has not been repealed, his opinion gave Alaska Native Villages a claim to occupying Indian country for liquor law purposes, but by itself does not provide “full” Indian country status for purposes beyond that.

E. 1876: Indian Country Disappears But Judge Deady Salvages the *Seveloff* Fix

By the time *Waters v. Campbell* was decided, the “Revised Statutes”

135. *Waters I*, 29 F. Cas. at 411.

136. *Id.* at 411-12.

137. Campbell had authority to arrest Waters for violating section 20 or 21. But Waters’ arrest in the fall of 1874 predated Campbell’s May 1875 status as Indian agent, so was still subject to the five-day limit, thus shaving off only five of the 113 days Waters was detained. *Waters II*, 29 F. Cas. at 412. A jury eventually awarded Waters \$3,500 against Captain Campbell, but this was reduced to \$2,000 upon Campbell’s motion for new trial, heard by Supreme Court Justice Field and Judge Deady. *Id.* at 415.

were in place. As noted above, this was the juncture at which the 1834 definition of Indian country disappeared.¹³⁸

A second wrinkle peculiar to Alaska was omission of the “*Seveloff* fix.” Section 1954 of the Revised Statutes contained § 1 of the 1868 Alaska Act as it had originally been enacted (extending the “laws of the United States relating to customs, commerce and navigation” to Alaska), but did not include the 1873 amendment explicitly extending to Alaska §§ 20 and 21 of the 1834 Non-Intercourse Act. As such, it might seem that it too, like the general definition of Indian country, was effectively repealed by § 5966 of the Revised Statutes.¹³⁹

However, there was a proviso clause to the repealer, which Judge Deady analyzed in *Waters I*. He concluded that the omission of the *Seveloff* fix from the Revised Statutes had not repealed it:

There is even some question whether said §§ 20 and 21 are in force there [in Alaska] since the enactment of the Revised Statutes. Chapter 3 of title 23 aforesaid, of the Revised Statutes, does not contain § 1 of Alaska act, as amended by the general appropriation act aforesaid, of March 3, 1873, but only as originally enacted, and therefore the provisions extending §§ 20 and 21 of the Indian intercourse act over Alaska are not contained in the Revised Statutes. . . . By the first clause of this section [5966], the general appropriation act of March 3, 1873, including the clause extending §§ 20 and 21 aforesaid over Alaska, is repealed, because a portion of the same is embraced in § 1954 ‘of said revision.’ But the proviso to the section excepts from the operation of this clause ‘any provision of a private, local or temporary character’ contained in such appropriation act. The provision extending §§ 20 and 21 of the Indian intercourse act over Alaska is local in its character, and therefore not repealed by this repealing clause.’¹⁴⁰

Thus, notwithstanding the exclusion of this provision from the Revised Statutes, the 1873 extension to Alaska of sections 20 and 21 of the 1834 Act (by this point, §§ 2139, 2140 and 2141 of the Revised Statutes) was still good law and still applied to Alaska. The *Seveloff* fix had survived its omission from the Revised Statutes.

138. See *supra* text and notes 33–37.

139. See *supra* note 36.

140. *Waters I*, 29 F. Cas. at 412.

F. 1882: *In Pari Materia* Versus Repeal by Implication, Round One

In his 1882 decision in *United States v. Stephens*,¹⁴¹ Judge Deady considered how the 1873 *Seveloff* fix should fit together with § 4 of the original 1868 Alaska Act, which had given the president the power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and distilled spirits within the territory of Alaska.¹⁴² In so doing, he addressed an important question: when a new alcohol law was enacted without explanation of how it was to fit alongside existing alcohol laws, should the subsequent law be read *in pari materia* with the prior law, or be read to impliedly repeal the prior law?

Judge Deady reasoned, “[p]robably the better conclusion is that the acts should be construed as *in pari materia*, and both have effect so far as possible.”¹⁴³ Concluding that such a harmonized reading was possible, he adopted that construction.¹⁴⁴

G. 1884: The Alaska District Organic Act and Alaska’s First Prohibition

In 1884, Congress enacted the Alaska District Organic Act, “[a]n act providing for a civil government for Alaska.”¹⁴⁵ This Act (1) created the position of Governor, (2) established a district court with a judge, four commissioners, a court clerk, a district attorney, and a marshal, and (3) made Alaska a land district.¹⁴⁶ It incorporated by reference the laws of the State of Oregon, “so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.”¹⁴⁷

Concerning liquor, § 14 of the 1884 Act specified that the provisions in the Revised Statutes concerning Alaska were to remain in effect, and further:

[T]he importation, manufacture and sale of intoxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited under the penalties which are provided in [§ 1955] of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United

141. 12 F. 52 (C.C. D. Or. 1882).

142. Act of July 27, 1868, ch. 273, §4, 15 Stat. 240 (1868).

143. *Stephens*, 12 F. at 54.

144. *Id.*

145. Act of May 17, 1884, ch. 53, 23 Stat. 24 [hereinafter Alaska District Organic Act].

146. *Id.*

147. *Id.* § 7.

States shall make such regulations as are necessary to carry out the provisions of this section.¹⁴⁸

Thus, from 1884 to 1899, in statute, Alaska was completely dry, except for “medicinal, mechanical or scientific” purposes. Importation, manufacture, and sale to Natives and non-Natives alike were equally proscribed.

In practice, however, sales to Natives and sales to non-Natives were not treated equally. Sales to Natives were prosecuted; sales to non-Natives were largely ignored.¹⁴⁹ Alaska’s third governor Lyman Knapp noted in his October 1889 annual report that there had been thirteen indictments for furnishing intoxicating liquors to Indians,¹⁵⁰ but:

It is noticeable that in the list of offenses for which prosecutions were brought there is none for violations of the laws prohibiting the sale and manufacture of intoxicating liquors to others than Indians, while it is a notorious fact that it is furnished, without restraint or concealment, in all the towns where there are white residents. Inquiries as to the reason elicited the reply that prosecution would be of no avail—that no jury in Alaska would convict for furnishing intoxicating

148. *Id.* § 14. On February 26, 1885 President Arthur made such a regulation, ordering that no liquor could be landed in Alaska without a permit from customs, to be issued only upon evidence that the liquor was to be used solely for medicinal, mechanical, and scientific purposes, and further that no manufacturing or sales could occur except under a license issued by the Governor with those same restrictions. Treasury Circular No. 30, approved by President Arthur (Feb. 26, 1885), *quoted in* *United States v. Nelson*, 29 F. 202, 206–207 (D. Alaska 1886).

149. In 1885, Alaska’s second governor Alfred Swineford noted:

If any serious effort has been to enforce the provisions of section 14 of the organic act, which prohibits the importation, manufacture, and sale of intoxicating liquors, the result of such effort is not discernable in the total or even partial absence of places where such liquors are openly sold.

ALFRED SWINEFORD, REPORT OF THE GOVERNOR OF ALASKA TO THE SECRETARY OF THE INTERIOR 14–15 (1885). He expressed little optimism:

The law in that regard is practically inoperative, and I do not believe that, with our extensive coast line, the utmost vigilance of the customs official can prevent liquors from finding their way in the Territory . . . but, though positive in the opinion that a stringent license system would be much preferable, I shall, nevertheless, do all in my power to enforce the law as I find it.

Id.

150. LYMAN KNAPP, REPORT OF THE GOVERNOR OF ALASKA FOR THE FISCAL YEAR 1889 23 (1889).

liquor to white people.”¹⁵¹

The following year Knapp bluntly stated: “The law prohibiting the manufacture of intoxicating liquors in the Territory is a dead letter, except in its application to the Indians.”¹⁵²

In the subsequent year, the District Attorney wrote an appendix to the Governor’s Report, to explain why he should not be blamed for this state of affairs:

There are now, and for many years have been, within the Territory, two or three breweries manufacturing and selling beer for other purposes than those [medicinal, mechanical or scientific] prescribed by the statutes. There are also many persons openly engaged in selling intoxicating liquors contrary to law. These facts I have laid before each grand jury, advising them that it was their sworn duty to indict all such persons. Yet in every instance they not only have refused to indict, but have refused to hear any testimony on the subject whatever. Some of these grand juries have been composed of the best representative citizens of the Territory, yet the sentiment is so universally against the enforcement of the present liquor laws that no indictment can be had and no conviction secured except where the liquor has been sold or given to a Native. In the latter cases the sentiment of all the better classes of citizens is in favor of a rigid enforcement of the law.¹⁵³

151. *Id.* at 25.

152. LYMAN KNAPP, REPORT OF THE GOVERNOR OF ALASKA FOR THE FISCAL YEAR 1890 6 (1890).

153. LYMAN KNAPP, REPORT OF THE GOVERNOR OF ALASKA FOR THE FISCAL YEAR 1891 43 (1891). Governor Knapp, although not disputing that the task was daunting, did criticize the district attorney for not trying a little harder. Noting in the 1892 report that the federal district court and the commissioners’ courts had tried sixty-one defendants charged with selling liquor to Indians, and no defendants had been charged with selling liquor to non-Indians, the governor was disinclined to believe that jurors would be so irresponsible “if an honest and vigorous effort were made, if prosecutions were brought and pushed to issue with the thoroughness which ought to characterize the actions of men intrusted [sic] with the responsibilities of office.” LYMAN KNAPP, REPORT OF THE GOVERNOR OF ALASKA FOR THE FISCAL YEAR 1892 15–16 (1892). Gov. Knapp was not alone in his disappointment with the efforts of the district attorney; examiner Allan H. Dougall wrote to the Attorney General, “[t]here is no excuse why [the district attorney] allowed this iniquitous traffic to grow so and to gain such a foothold at Chilcat [sic] as it now has.” However, Dougall also acknowledged “[t]here is no use of relying upon finding indictments against [the bootleg dealers] before an Alaska grand jury.” Apparently Dougall’s suggestion was that the district attorney keep bringing lesser charges against them, in the hopes of “exhausting their ability to give bond.” Letter from Examiner Dougall to the Attorney General (July 25, 1892), included in ALASKA BOUNDARY TRIBUNAL, VOL. II 413

There were many reasons for the failure of the 1884 prohibition law.¹⁵⁴ Certainly Alaska's huge coastline, remote communities, and scarce enforcement resources played a role, as did tensions between the various officials of the civil government—the customs agents (given responsibility for preventing importation and reporting to the Secretary of the Treasury), the district attorney (responsible for prosecuting violators, reporting to the Attorney General), and the governor (given overall responsibility but little authority, reporting to the Secretary of the Interior). The major theme of this era was the fact that the Territory's white citizens were unwilling to enforce any alcohol bans as to themselves, while willing to enforce the ban on sales to Natives. Alaska was *de jure* completely dry, but *de facto* adhering to the Indian liquor laws.

Congress itself reinforced this in some respects, by treating Alaska as liquor law Indian country during this era. Starting in 1887, for example, Congress appropriated money for the hiring of Indian police “to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations, and within the Territory of Alaska.”¹⁵⁵

By 1899, Congress was ready to call Alaska's first prohibition to an end. But in the meantime, dicta in some court opinions raised the issue of whether the 1884 Act should have been read to have repealed the *Seveloff* fix.

H. 1886-1892: *In Pari Materia* Versus Repeal by Implication, Round Two

Did the liquor provision of the 1884 District Organic Act repeal the 1873 *Seveloff* fix? It certainly did not do so explicitly. Indeed, the *Seveloff* fix continued to play a key role in several post-1884 cases, each reiterating the *Waters v. Campbell* reasoning that the 1873 enactment demonstrated that Alaska was not full-fledged Indian country, but Indian country only for purposes of the FILL.¹⁵⁶

(1903).

154. See generally LARRY ARTHUR SPARKS, THE FAILURE OF PROHIBITION IN ALASKA: 1884-1900 (1974), available at <http://www.skepticalthayne.com/prohibition.pdf>.

155. 24 Stat. 463-64 (1867). Similar appropriations were continued as late as 1918, 47 Stat. 677.

156. See, e.g., *United States v. Nelson*, 29 F. 202, 203 (D. Alaska 1886) (noting that the court had previously held that Alaska was considered Indian country only in section 1955 of the Act of July, 1868, sections 20 and 21 of the Intercourse Act of 1834, and section 14 of the Act of May, 1884); *Kie v. United States*, 27 F. 351, 352-53 (C.C. D. Or. 1886) (“Alaska is not to be considered ‘Indian country,’

In 1886, however, the opinion in *United States v. Nelson* raised the possibility that § 14 of the Alaska District Organic Act may have *impliedly* repealed the *Seveloff* fix.¹⁵⁷ Nelson was prosecuted for violating the liquor law prohibition in § 14 of the 1884 Act. The opponents of the 1884 Act made his defense something of a test case, as he argued that § 14 was unconstitutional, and violated the fundamental principles of free government because “Congress, in its peculiar relation to Alaska, and with the restricted power it possesses in regard thereto, has no constitutional right to enact a prohibitory liquor law for this territory.”¹⁵⁸

Most of Alaska District Court Judge Dawson’s opinion in *Nelson* refuted that premise with a lengthy discussion of Congressional authority over newly acquired territory, concluding that the defendants could be convicted and punished under § 14 of the 1886 enactment.¹⁵⁹

Judge Dawson briefly discussed fitting together the three existing liquor laws (which he enumerated as section 4 of the 1868 Alaska Act, section 1 of the 1868 Act as amended by the 1873 *Seveloff* fix, and section 14 of the 1884 District Organic Act).¹⁶⁰ Portions of this discussion reflect an assumption that the later act should repeal its predecessors,¹⁶¹ but other portions reflect a preference for reading the statutes *in pari materia*.¹⁶² Ultimately, since the arguments before him did not concern

only so far as concerns the introduction and disposition of spirituous liquors therein.”); *In re Sah Quah*, 31 F. 327, 328 (D. Alaska 1886) (“Only as to the prohibited commerce mentioned in the sections referred to, can Alaska be regarded as Indian country.”).

157. *Nelson*, 29 F. at 206.

158. *Id.* at 203. Governor Swineford mentioned the *Nelson* case, albeit not by name, in his 1885 report, noting that several indictments for liquor trafficking had been brought, and the defendants all combined to focus their efforts on one test case (*Nelson*) in which it was argued that the law was void and unenforceable. The district court had overruled the demurrer, and the defendant had taken the case up on writ of error to the Circuit Court for the District of Oregon, where the matter remained at the time Swineford wrote his report. Notwithstanding the trial court’s decision, “[i]n the meantime there is no diminution in the quantity of liquors being smuggled into the Territory, nor in the number of places where it is openly sold.” ALFRED SWINEFORD, REPORT OF THE GOVERNOR OF ALASKA TO THE SECRETARY OF THE INTERIOR 46 (1886). Governor Swineford advocated for the repeal of section 14, to be replaced by a strictly regulated licensing system. *Id.*

159. *See generally Nelson*, 29 F. at 202-06.

160. *Nelson*, 29 F. at 206.

161. *Id.* (“[W]e may reasonably conclude that section 14 of the act of May, 1884, was intended to cover the whole of the subject embraced in sections 20 and 21 of the intercourse laws of 1834, as extended to and made applicable to Alaska.”).

162. *Id.* at 206-07 (“It should be borne in mind that the various acts of congress in relation to the subject now under consideration are *in pari materia*, all relating to the same subject-matter, and are to be taken and examined together, in order to ascertain the legislative intent”).

the legislation from 1868 or 1873, any pronouncements on those laws were no more than dicta.¹⁶³

Nelson went up on writ of error to the Circuit Court before Judge Deady, who upheld Judge Dawson's conclusion as to Congressional authority. Judge Deady also wrote that, as § 14 covered the whole ground, the most reasonable conclusion would be that it superseded prior liquor laws.¹⁶⁴ He also wrote, however, that "no particular question was made on the argument as to the scope and effect of the act,"¹⁶⁵ thereby explicitly acknowledging what can only be inferred from Judge Dawson's opinion, that this was not an issue before the court.

*United States v. Warwick*¹⁶⁶ repeated this dicta, although it was no more necessary to a ruling in that case than it had been in *Nelson*. Warwick had been indicted for selling liquor to two Natives, under Oregon Code § 669 (which the prosecutor presumably felt applied in Alaska through § 7 of the 1884 Act). The defendant's argument was that § 669 had no application in Alaska since § 14 of the Organic Act fully covered the subject.¹⁶⁷ Judge Truitt essentially ruled that the indictment was valid because, either way, there was an enforceable law prohibiting the defendants' actions. He did note that Judge Deady stated that the 1884 Act had repealed prior alcohol laws "at least as to the portions in conflict or subject fully covered by the later law."¹⁶⁸ But he nonetheless

163. Judge Dawson elsewhere expressed caution about reading too much into the 1884 Act:

It is lamentably true that the act of Congress of May 17, 1884, known as the 'Organic Act,' establishing a civil government for Alaska, is unsurpassed for uncertainty. The context and the whole body of the act indicate a want of that consideration which should always characterize an act of Congress establishing a civil government for the people inhabiting newly acquired territory. In the annals of American legislation, this act stands glaringly and conspicuously forth as a stupendous piece of stupidity. It is, indeed, difficult for the court to sift from its incongruous and ambiguous provisions anything that is tangible to the common sense of mankind in relation to this question.

Myers v. Swineford, 1 Alaska 10, 12 (D. Alaska 1888). Indeed, about two weeks after *Nelson*, in a separate case unreported except in the local newspaper, Judge Dawson originally indicated he was inclined to rule that the provisions in the 1868 Act authorizing the President to prohibit arms and ammunition had been impliedly repealed by § 14 of the 1884 Act (as he had stated in dicta in *Nelson*, 29 F. at 206), but after taking the matter under advisement overnight, concluded that his original impression was incorrect and there was no implied repeal. The Alaskan (Sitka), Vol I, No. 47, Saturday Sep. 25, 1886, p.2.

164. *Nelson v. United States*, 30 F. 112, 116 (C.C. D. Or. 1887).

165. *Id.*

166. 51 F. 280 (D. Alaska 1892).

167. *Id.* at 280.

168. *Id.* at 281. The 1884 Act had no provision corresponding to the passage in FILL giving the authority to (or imposing a duty on) an Indian or federal

held the indictment valid: even if the defense argument about the inapplicability of § 669 was accepted, the sale of liquor was still illegal under the 1884 Act, regardless of whether the vendee was a white man or an Indian,” and the language in the indictment that the buyers were Indian women would be taken as descriptive, or surplusage.¹⁶⁹ As in *Nelson* itself, there was no issue or argument in *Warwick* over whether a prosecution might have been brought under the 1873 Act, so any pronouncements on that question were dicta.¹⁷⁰

Had the issue been presented to the court, presumably whichever side argued for an *in pari materia* interpretation would have pointed out the rule disfavoring repeal by implication, which was as well-established a canon of construction in that era as it is today.¹⁷¹

Still, those passages from *Nelson* and *Warwick*, even as dicta, might have left the *Seveloff* fix in something of a limbo. As discussed in the next section, the liquor prohibition in § 14 of the Organic Act was repealed before the turn of the century. In fact, of the three statutes Judge Dawson listed in his *Nelson* opinion, two were explicitly repealed, leaving the *Seveloff* fix as the sole survivor.

I. 1899: The Explicit Repeal of the Implied Repealer, the End of the First Prohibition, and the Era of the High License

These repeals were a small part of a much larger effort to provide Alaska with its own criminal and civil codes. Up to now, Oregon’s laws had largely applied through the one-sentence invocation in the 1884 Act.¹⁷² The new criminal code (enacted in 1899) and the new civil code (1900) were largely derived from the existing Oregon codes, but would now be Alaska’s own.¹⁷³ The repeal of the liquor prohibition in § 14 of

official to destroy liquor, so even if there had been an implied repeal of some provisions of the earlier law, that particular component was neither in conflict with nor fully covered by the later law.

169. *Id.*

170. See also *In re Moore*, 66 F. 947, 952 (D. Alaska 1895).

171. “A repeal by implication is not favored. The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the Legislature together.” *McCool v. Smith*, 66 U.S. 459, 470-71 (1862) (citations omitted).

It is well settled that repeals by implication are not to be favored; and where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both.

United States v. Healey, 160 U.S. 136, 147 (1895).

172. Alaska District Organic Act, ch. 53, §7, 23 Stat. 24, 25-26. See *supra* text accompanying note 147.

173. See generally F. Brown, *The Sources of the Alaska and Oregon Codes, Part II*,

the 1884 Act, effectively ending race-neutral prohibition in Alaska, was one of the most hotly debated aspects of the bills creating the new codes.¹⁷⁴

In the end, the 1899 enactment explicitly repealed Section 1955 of the Revised Statutes (derived from § 4 of the 1868 Act) and the liquor prohibition in § 14 of the 1884 Act.¹⁷⁵ Under *Nelson's in pari materia* reading, then, Congress, by repealing the formerly pre-eminent § 14 of the 1884 Act, as well § 4 of the 1868 Act, left the 1873 *Seveloff* fix in place as the last statute standing. Even assuming *arguendo* that § 14 of the 1884 Act had by implication repealed the *Seveloff* fix, the repeal effectively reinstated it. At common law, the repeal of a statute which had repealed a prior statute reinstated the prior statute.¹⁷⁶

The common law was applicable to Alaska as of 1899 on two counts. First, Congress as part of the 1884 Act had incorporated the general laws of the State of Oregon to be the laws of the District of

2 UCLA-ALASKA L. REV. 87 (1973).

174. *See id.* at 93, 96, 101-02.

175. "Section nineteen hundred and fifty-five of the Revised Statutes of the United States, and all that part of section fourteen of 'An Act providing a civil government for Alaska,' approved May seventeenth, eighteen hundred and eighty-four, after the word 'provided,' is hereby repealed." Act of Mar. 3, 1899, ch. 429, § 142, 30 Stat. 1253, 1274 [hereafter "Carter Code"]. Recall that section 14 of the 1884 Act had read,

That the provisions of chapter 3, tit. 23, of the Revised Statutes of the United States, relating to the unorganized territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of intoxicating liquors in said district, except for medicinal, mechanical, and scientific purposes, is hereby prohibited, under the penalties which are provided in section 1955 of the Revised Statutes for the wrongful importation of distilled spirits. And the president of the United States shall make such regulations as are necessary to carry out the provisions of this section.

Alaska District Organic Act § 14. Although there are two appearances of the word "provided," the intent of the legislation was clearly to eliminate the former broad prohibition on liquor acquisition by all ethnicities, so the deletion was to follow the first "provided." *See Brown, supra* note 173, at 93, 101.

176. "Under the common law rules of interpretation, the repeal of a repealing statute revives the original enactment where such repeal is accomplished by express provision." 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:32 (7th ed.). Most states have statutorily reversed that rule: "[t]he majority of the jurisdictions in the United States have enacted general interpretive provisions to the effect that the repeal of a repealing statute does not revive the original statute." *Id.* Alaska eventually did so, but not until 1955. SLA First Extraordinary Session 1955, ch. 4. This added to what was then ACLA 1949 § 19-1-1, the sentence "When any act repealing a former act, section, or provision shall be itself repealed, such repeal shall not be construed to revive such former act, section, or provision unless it shall be expressly so provided." This subsequently became ALASKA STAT. § 01.010.100(c) (2012).

Alaska,¹⁷⁷ and Oregon had accepted the common law as far back as 1844.¹⁷⁸ Second, Congress itself, in the same 1899 legislation which repealed § 1955 of the Revised Statutes and the liquor provisions of § 14 of the 1884 organic act, explicitly made the common law applicable in Alaska.¹⁷⁹

Thus, whatever the tension imposed on the *Seveloff* Fix by § 14 of the 1884 Act, the 1899 legislation resolved that. The *Seveloff* Fix had survived the 1884 District Organic Act.

Beyond that, Congress simultaneously included in the new code an Alaska version of an Oregon statute prohibiting sales of alcohol to Natives.

Section 142 of what became known as Alaska's "Carter Code,"¹⁸⁰ made it a crime, punishable by two to six months incarceration or a fine of \$100 to \$500, to "sell, barter or give to any Indian or half-breed who lives and associates with Indians any firearms or ammunition therefore whatever, or any spirituous, malt, or vinous liquor," without the authority of the United States or some authorized officer thereof.¹⁸¹ This was imported from the Laws of Oregon, which had had some version of this prohibition since 1843, and which had had this specific provision since 1864 when it was enacted as part of Oregon's "Deady Code."¹⁸²

177. Alaska District Organic Act § 7.

178. Brown, *supra* note 173, at 98–99 n.51.

179. *Id.* at 97–100. As Brown relates, the criminal provision was enacted in 1899, and a parallel provision receiving the common law was included in the civil code enactment Congress adopted the following year. Act of June 6, 1900, ch. 786, § 367, 31 Stat. 321. The two reception provisions (with minor amendments) remained in Alaska's codes until statehood. ACLA 1949 §§ 2-1-2, 65-1-3 (1949, Supp. 1959). Following statehood, they were combined into a unitary reception statute, still found at ALASKA STAT. § 01.10.010 (2012).

180. Named for Montana Senator Thomas H. Carter, who played a significant role in getting the criminal and civil codes drafted and enacted. See Brown, *supra* note 173, at 92, 94–95, 102–103.

181. Carter Code, ch. 429, § 142, 30 Stat. 1253, 1274.

182. A prohibition on the sale of liquor to Indians was enacted by Oregon's "provisional" legislature in 1843, based on the parallel provision of the Iowa Code as of 1838–39, part of what became known as Oregon's "Little Blue Book," and also enacted by Oregon's territorial legislature in 1849, based on the revised laws of Iowa of 1843, part of what became known as Oregon's "Big Blue Book." See L. Harris, *History of the Oregon Code*, 1 ORE. L. REV. 129, 136, 187 (1922); A. Beardsley, *Code Making in Early Oregon*, 23 ORE. L. REV. 22, 33 (1943).

A comprehensive recodification was undertaken by Matthew Deady and enacted by the legislature in 1864 (Laws Oregon, Oct. 19, 1864). Harris, *supra*, at 200–215; Beardsley, *supra*, at 49–55. This included an updated prohibition on selling liquor to Indians, in the Deady Code of 1864 at § 654. Subsequent compilations became known as the "Deady and [Lafayette] Lane" Laws of 1872 (in which the Indian prohibition was in § 669); and Hill's Annotated Laws of Oregon of 1887, and second edition of 1892 (in both of which the Indian prohibition was in § 1891). See Harris, *supra*, at 207; Beardsley, *supra*, at 53–54.

The final sentence of Carter Criminal Code § 142 repealed the full-scale prohibition provision of § 7 the 1884 Alaska District Organic Act,¹⁸³ thereby loosening the alcohol regime in Alaska for sales to non-Indians. This liberalization was the one of most controversial provisions in the bill, as the growing prohibitionist movement saw this change as a step in the wrong direction.¹⁸⁴

Opponents argued that repealing R.S. 1955 and § 14 of the 1884 Act provision would, aside from the ban on conveyance to Indians, leave alcohol within Alaska completely unregulated.¹⁸⁵ A compromise “high license” provision was proposed, setting substantial license fees for alcohol businesses, and including a “local option” provision.¹⁸⁶ The compromise was eventually agreed to¹⁸⁷ and the bill passed.¹⁸⁸

This 1899 compromise, while repealing § 14 of the 1884 enactment’s outright ban, maintained a general rule that alcohol was not to be permitted in the district,¹⁸⁹ but also created a cumbersome exception under which alcohol would be allowed within certain local-option-type enclaves.¹⁹⁰ A license for liquor required the applicant to show:

to the satisfaction of the court that a majority of the white male and female residents over the age of eighteen years other than Indians within two miles of the place where intoxicating liquor is to be manufactured, bartered, sold and exchanged . . . have, in good faith, consented to the manufacture, barter, sale and

183. Carter Code § 142.

184. See Brown, *supra* note 173, at 93, 96, 101–102.

185. Rep. Moody commented:

In other words, except in the sale of intoxicating liquors to Indians, there is established, absolutely, freedom in the sale of liquor in the Territory of Alaska . . . I do not believe that there is any place where intoxicating liquors are sold without the restriction of public legislation of any kind. If it may be found, it certainly can not be found in any one of the States of the union, or in any one of the Territories of the Union.

32 CONG. REC. 383 (1899) (statement of Rep. Moody).

186. 32 CONG. REC. 586 (1899) (offered by Mr. Warner as an amendment to a pending amendment, ruled out of order); 32 CONG. REC. 587 (1899) (re-offered by Mr. Warner as a direct amendment to the bill).

187. 32 CONG. REC. 594 (1899).

188. 32 CONG. REC. 597 (1899); see Brown, *supra* note 173, at 93, 101.

189. “That no person, corporation, or company shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods in said District of Alaska any intoxicating liquors, except as hereinafter provided.” Carter Code Criminal, ch. 429, § 462, 30 Stat. 1253–1343, 1337 (1899).

190. See *id.* § 464 (limiting the distribution of liquor licenses to areas where the majority of whites over the age of eighteen within two miles of the distribution point have agreed to the manufacture, sale, exchange, etc. of liquor).

exchange . . . of the same.¹⁹¹

Licensees were not allowed to provide liquor “to any minor, Indian, or intoxicated person, or to a habitual drunkard.”¹⁹²

One question to be addressed at this juncture is whether Carter Code § 142 was intended to supersede the extension of the general federal Indian liquor laws under the *Seveloff* fix.¹⁹³ Certainly § 142, which explicitly repealed the liquor provisions of § 7 of the 1884 Act and repealed § 1955 of the Revised Statutes, did not contain any parallel repeal of the 1873 *Seveloff* Fix. But there is another point indicating that the *Seveloff* Fix and the Carter Code were intended to function *in pari materia*.

As noted above, § 142, like most of the Carter Code, was derived from the Oregon Code of the time.¹⁹⁴ Congress’s intent in 1899 was not just to copy the text of Oregon’s statutes, but also to incorporate pre-1899 court rulings from Oregon interpreting those statutes.¹⁹⁵ Alaska’s territorial court rulings recognized and adopted this incorporation of Oregon case law interpreting the parallel Oregon statutes,¹⁹⁶ as did the

191. *Id.*

192. *Id.* § 466.

193. No court held or implied that the Carter Code provision repealed the *Seveloff* Fix, explicitly or implicitly. Years later, however, a 1937 opinion by Acting Solicitor Kirgis took the view that Carter Code § 142 (which by 1937 had become § 4963 of Compiled Laws of Alaska 1933) reflected an assumption that other FILL (specifically 25 U.S.C. § 241) were inapplicable in Alaska. The Protection of Indians and other Natives of Alaska from Liquor Traffic, 56 I.D. 137 (1937). That Solicitor’s Opinion was later overturned (*see* Liquor Problems in ‘Indian Country’ in Alaska, Op. Sol. Gen. of Dep’t of the Interior, M-36712 (Sept. 26, 1967)), so may not be of any continuing consequence. *See infra* notes 235–241.

194. *See supra* text accompanying notes 173–74.

195. This came up at several points in the debate:

Mr. Maddox: Do I understand the gentlemen to say that if we adopt this section of the bill we also adopt the construction given to it by the supreme court of that State?

Mr. Warner: My understanding is that when you adopt a statute of a State which has been passed upon by the supreme court of that State, you thereby adopt such construction.

32 CONG. REC. 422 (1899). “I will say to the gentleman from Arizona that this bill is in substance simply a codification of the laws of Oregon; and along with those laws will go the construction which the courts of Oregon have for many years applied to these statutes.” 32 CONG. REC. 388 (1899) (remarks of Rep. Gibson), *quoted in* Brown, *supra* note 173, at 95–96. *See also id.* at 100–01 (“Members of Congress knew whose law they chose for Alaska, and anticipated that older case law from the pre-adoption jurisdictions would follow the statutes to Alaska.”).

196. *See Bordenelli v. United States*, 233 F.2d 120, 124 (9th Cir. 1956) (“A salient circumstance is the fact that the laws of the State of Oregon have been adopted as the pattern for the laws of Alaska since the organization of the

Alaska Supreme Court after statehood.¹⁹⁷

Thus, the question of whether Carter Code § 142 meant that the general federal Indian liquor laws no longer extended to Alaska is best assessed by examining whether § 142's ancestral Oregon provision meant that the general FILL no longer extended to Oregon (recalling that the *Tom* ruling established that the 1850 Oregon Act had extended those liquor laws to Oregon).

But the Oregon case law instead reflected the opposite view, that both the Oregon statute and the FILL were in effect. In 1855, Chief Justice Williams of the Oregon Territorial Supreme Court had decided that both the federal Indian liquor laws from 1834 and the Territorial Indian liquor law from 1854 were in effect in Oregon.¹⁹⁸ Reciprocally, Oregon's federal courts continued to hear prosecutions under the general federal Indian liquor laws after 1864 (when the Deady Code enacted the Oregon Territorial provision in § 654) and before 1899 (when Congress cloned Carter Code § 142 from Deady Code § 654); and still further, Federal District Court Judge Matthew Deady heard these cases.¹⁹⁹ Deady had reason to know what was in the Oregon Territorial Code, not only from his tenure on the Oregon Territorial Supreme Court, but also because he had been largely responsible for the contents of the 1864 Oregon Code, for good reason called the "Deady Code."²⁰⁰ All these rulings indicate that the Oregon courts and federal courts regarded the general federal Indian liquor laws as applicable in Oregon notwithstanding the parallel application of Deady Code § 654 (and later Hill's Annotated code § 1891).²⁰¹ Congress's intent that the Carter Code §142, derived from that provision, be interpreted consistently with

territory. It seems plausible then that Congress, in providing for regulation of the liquor traffic and licensing in accordance with the tradition, envisaged a control system like that of Oregon").

197. See *Fairbanks v. Schaible*, 375 P.2d 201, 207 (Alaska 1962) ("[A] statute adopted from another state, which has been construed by that state's highest court, is presumed to be adopted with the construction thus placed upon it.").

198. *Territory v. Coleman*, 1 Or. 191, 192 (Or. 1855).

199. *United States v. Shaw-Mux*, 27 F. Cas. 1049, 1049 (D. Or. 1873) (No. 16,268); *United States v. Winslow*, 28 F. Cas. 737, 737 (D. Or. 1875) (No. 16,742).

200. *Harris*, *supra* note 182, at 215 ("To Matthew P. Deady more than to any other single person is due the credit for the writing of all that body of laws which was enacted in 1862 and in 1864, and for nearly sixty years has served the people of the great commonwealth of Oregon."); *Beardsley*, *supra* note 182, at 52 ("In the preparation of the two Deady codes, Judge Deady was nominally assisted by others, but their efforts were addressed to the legislature, while he did the actual work of preparation, much of it without even the assistance of an amanuensis.").

201. See, e.g., *Coleman*, 1 Or. at 191; *Shaw-Mux*, 27 F. Cas. at 1049; *Winslow*, 28 F. Cas. at 737.

Oregon case law would mean that § 142 did *not* reflect any assumption that the federal Indian liquor laws were inapplicable in Alaska.

Although there were some differences between Carter Code § 142 and the *Seveloff* fix legislation,²⁰² Carter Code § 142 was essentially a “federal Indian liquor law” in its own right. It was a congressionally-enacted statute prohibiting the sale of liquor to Natives and, although contained in a Code that consisted mainly of laws passed pursuant to Congressional authority over Territories under Article IV, § 3 of the Constitution,²⁰³ § 142 itself drew on congressional authority under the Indian Commerce Clause. In that sense, even if Carter Code § 142 had completely supplanted the *Seveloff* fix, it still would have maintained Alaska’s status as Indian country solely for purposes of prohibiting liquor transactions with Indians.

In 1909, Congress amended Carter Code § 142 to increase the possible sentence to two years, limit its scope to liquor by removing firearms, and define “Indian” to exclude citizens of the United States.²⁰⁴ (“Indian” now included “the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States.”²⁰⁵) These changes brought the Carter Code into closer alignment with the other federal Indian liquor laws.

Thus, as of the first decade of the twentieth century, the *Seveloff* Fix was still unrepealed, and sale of alcohol to Natives in Alaska was still illegal. Shortly afterwards, an Alaska Territorial Legislature was congressionally authorized and, although its authority over alcohol was quite limited, it began to play a role in the changing alcohol landscape.

202. RS 2139 (one of the successor provisions to sections 20 and 21 of the 1834 Trade and Intercourse Act), applicable to Alaska through the *Seveloff* fix, had a longer incarceration period (up to two years) and smaller fine (up to \$300) than those in § 142 of the Carter Code (incarceration of up to six months, fine of up to \$500). Carter Code Criminal, ch. 429, § 142, 30 Stat. 1253, 1274 (1899). Also, Carter Code § 142 encompassed firearms, which the *Seveloff* Fix did not, and the *Seveloff* Fix called on individual Indians to seize and destroy liquor, which the Carter Code § 142 did not.

203. U.S. Const., art. IV, § 3 (“The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.”).

204. Act of Feb. 6, 1909, ch. 80, § 9, 35 Stat. 603.

205. *Id.*; see *In re Heff*, 197 U.S. 488, 509 (1905) (legalizing the sale of liquor to an Indian who had attained United States citizenship through receiving a patent to an Indian allotment). Although the United States Supreme Court in 1915 overruled *Heff* and held that granting citizenship did not abrogate tribal relations and did not take Indians out of the working of the general federal Indian liquor laws, *United States v. Nice*, 241 U.S. 591, 598 (1915), Congress in 1924 mooted any remaining distinctions between citizens and non-citizens by conferring citizenship on all Indians. Snyder Act of 1924, ch. 233, 43 Stat. 253.

J. 1912: From District to Territory

In the 1912 Alaska Territorial Organic Act Congress granted Alaska its own legislature, with somewhat circumscribed authority, to meet in sixty-day sessions every two years.²⁰⁶ Congress limited the newly created legislature's authority, excluding alcohol from the scope of that authority: "nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide."²⁰⁷

Notwithstanding Congress's reservation of that power to itself, Alaska's Second Territorial Legislature in 1915 enacted an amendment to what had been §142 of the Carter Code, and was at that point found in § 2022 of the 1913 Compiled Laws of Alaska (1913 CLA).

The Territorial Legislature sought to overrule a 1913 Ninth Circuit decision. *Lott v. United States*²⁰⁸ raised the question of whether an Indian attempting to purchase alcohol should be subject to indictment and punishable as an accomplice for soliciting, inciting, or abetting the seller to violate Carter Code § 142.²⁰⁹ The prosecution argued for this result, relying on the fact that Congress in 1909 had effectively changed a violation of Carter Code § 142 from a misdemeanor to a felony²¹⁰ and, coupling that with the 1899 enactment adopting the common law of England for Alaska,²¹¹ invoked the common-law rule that abettors of felonies could be prosecuted.²¹² But the Ninth Circuit rejected this argument, analogizing § 142 to other federal Indian liquor laws and citing the "universal ruling of the courts that under laws prohibiting the sale of intoxicating liquors the purchaser committed no offense," and holding that Congress would have had to express this intent explicitly to achieve that result.²¹³

In response to *Lott*, the Territorial Legislature's 1915 enactment amended § 2022 by adding a provision criminalizing an Indian for "wrongfully and willfully solicit[ing], incit[ing] or induc[ing] any person to furnish him or her with [alcohol]," punishable by the same sanctions.²¹⁴ Simultaneously, the legislation removed the reference to

206. Territorial Organic Act, ch. 387, 37 Stat. 512 (1912).

207. *Id.* § 9.

208. 205 F. 28 (9th Cir. 1913).

209. *Id.* at 31.

210. See *supra* text accompanying note 204.

211. Carter Code Criminal, ch. 429, § 218, 30 Stat. 1253, 1285 (1899). See *supra* text accompanying note 189; see also Brown, *supra* note 173, at 97-99.

212. *Lott*, 205 F. at 31.

213. *Id.* 31-32.

214. 1915 Alaska Sessions Laws ch. 51

“half-blood,”²¹⁵ removed the definition of “Indian,”²¹⁶ and downgraded the crime back from a felony to a misdemeanor.²¹⁷

However, these amendments, as laws regarding how spirituous liquors were to be sold, likely exceeded the scope of authority Congress had delegated to the Territorial Legislature.²¹⁸

Thus, after 1915, the status of § 2022 of the 1913 CLA, formerly Carter Code § 142, may have been questionable. It is unclear whether prosecutions should have been brought under § 2022 as last amended by Congress in 1909, or under the new § 2022 as amended by the Territorial Legislature in 1915. Most defendants presumably preferred the latter, as the penalties after the 1915 legislation were less severe; but Alaska Natives who might be prosecuted for attempting to buy alcohol presumably preferred the former, under which their actions did not constitute a crime.

These issues were left unresolved, as Alaska led the rest of the country into prohibition, and new laws joined the overlapping layers of alcohol regulation in Alaska.

K. 1917: The “Bone Dry” Law and Alaska’s Second Prohibition

After losing the battle over the Carter Code in 1899, the temperance forces regrouped. The 1915 Alaska Territorial legislature put a referendum before the voters on whether Alaska should ask Congress to make it a dry territory.²¹⁹ A large margin approved this measure.²²⁰ In response, Congress in 1917 enacted “An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska.”²²¹

Later in 1917, Congress voted to put the Eighteenth Amendment

215. *Id.*

216. *Id.* This definition had excluded citizens, so the intent was to encompass citizen and non-citizen Indians.

217. *Id.* A first offense was punishable by a fine of between \$120 and \$500, or incarceration for 60 to 250 days. Subsequent offenses incurred fines of between \$240 to \$1000, and incarceration for four months to one year. (Prior to the amendment, the fine was \$100 to \$500, and the incarceration term up to two years.)

218. *See supra* text accompanying note 207.

219. 1915 Alaska Sessions Laws, ch. 7.

220. Alaska Natives were not yet citizens, but at least some apparently voted in this election. *See* EVANGELINE ATWOOD, FRONTIER POLITICS: ALASKA’S JAMES WICKERSHAM 310 (1979). Also voting were Alaska’s women residents and, although they only made up about 20% of the vote, their concerted campaigning on the issue helped pass the initiative with a majority of 62%. *See* M. Ehrlander, *The Paradox of Alaska’s 1916 Alcohol Referendum: A Dry Vote within a Frontier Alcohol Culture*, 102 PAC. NW. Q. 29, 39 (2011).

221. Act of Feb. 14, 1917, ch. 53, 39 Stat. 903.

before the States for ratification (following Alaska's lead by placing the amendment before each state's voters, rather than each state's legislature). After ratification in December 1918, the United States followed Alaska into legally enforced temperance as Congress passed the National Prohibition Act (the "Volstead Act").

Alaska thus faced an "implied repeal" question in some respects parallel to those considered above for the *Seveloff* fix. Alaskans now had two separate statutes criminalizing their possession of alcohol: Alaska's 1917 Bone Dry law and the 1919 national Volstead Act.²²² As the Volstead Act had lesser penalties, criminal defendants charged under the harsher Bone Dry law argued that it had been repealed by the Volstead Act.

L. 1921: *In Pari Materia* Versus Repeal by Implication, Round Three

The 1921 *Abbate v. United States*²²³ case reached the issue of whether the Volstead Act repealed the Bone Dry law. The Volstead Act actually had an explicit repealer clause,²²⁴ to the extent of inconsistencies with prior laws. The Ninth Circuit rejected that repealer argument, holding that both statutes were in effect in Alaska.²²⁵

Further, the opinion indicated that the Bone Dry Law was in accordance with the congressional history of treating Alaska as Indian country for purposes of the federal Indian liquor laws:

Congress enacted the Bone Dry Law for Alaska, and 20 months later it enacted the National Prohibition Act. In enacting the latter Congress was adopting legislation for the whole United States to carry out the provisions of the Eighteenth Amendment. In enacting the Bone Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by legislation enacted on July 27, 1868, for the prevention of the importation and sale of intoxicating liquors in Alaska, the

222. Additionally, two statutes criminalized the conveyance of liquor to Alaska Natives: § 2022 of the 1913 CLA, and R.S. 2139 as extended to Alaska in 1873. JOINT COMM. ON TERRITORIES OF THE SENATE & HOUSE OF REPRESENTATIVES, COMPILED LAWS OF THE TERRITORY OF ALASKA, S. DOC. NO. 62-1093, at 677-78 (1913).

223. 270 F. 735 (9th Cir. 1921).

224. "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as an addition to existing laws." National Prohibition Act, Pub. L. No. 66-66, § 35, 41 Stat. 317, quoted in *Abbate*, 270 F. at 735.

225. *Abbate*, 270 F. at 737.

population of which was largely composed of Indians, and it was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917. That act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offense, than do the provisions of the National Prohibition Act.²²⁶

Abbate thus established the paramountcy of reading overlapping liquor laws *in pari materia* with each other rather than determining which provisions had impliedly repealed which earlier provisions. *Abbate* did not mention the 1873 *Seveloff* fix, but it is impossible to read *Abbate* and conclude that the District Organic Act, the Carter Code, the Bone Dry Law, or the Volstead Act would have repealed the *Seveloff* fix.

The *Abbate* opinion remained the controlling authority on the simultaneous enforceability question in Alaska.²²⁷ However, the references to “Indian country” in the opinion prompted concerns echoing the *Waters v. Campbell* debate over whether Alaska was full-fledged Indian country. Territorial District Court Judge Ritchie in a 1923 case rejected this interpretation:

It was suggested in the argument by counsel for the defendant in this case that the statement just quoted [“In enacting the Bone Dry Law. . . Congress was pursuing its policy of prohibition in Indian country”] amounted to a dictum that all Alaska is Indian country. I do not think Judge Gilbert intended to say that, nor is his statement susceptible of that construction when the entire paragraph is read.²²⁸

226. *Id.* at 736.

227. Subsequent decisions made it clear that defendants might be prosecuted under one statute or the other, but the same incident could not be prosecuted under both. *United States v. Ashworth*, 7 Alaska 64, 70 (D. Alaska 1923). Also, the Volstead Act’s heightened protections for issuance of warrants to search private dwellings prevailed over the more general warrant standards of the Alaska Bone Dry law. *United States v. Berkeness*, 16 F.2d 115, 116 (9th Cir. 1926).

228. *United States v. Olsen*, 6 Alaska 571, 573 (D. Alaska 1923). The opinion impliedly recognizes that Indian country for liquor law purposes is not the same as Indian country for general purposes; Judge Ritchie explained that the *Abbate* court had correctly noted that the population of Alaska was largely Indian, and that Congress had been pursuing its policy of prohibition in Indian country, but this did not equate to a holding that Alaska generally was Indian country. *Id.* at 573. (But simultaneously he recognized that there were areas of full Indian country within Alaska. “The territory is not Indian country, aside from Indian reservations and lands owned by Indians, because they actually live upon them.” *Id.* at 573–74.)

The Ninth Circuit subsequently refused to overrule *Abbate*, when invited to do so on the basis that *Abbate* had wrongly concluded that Congress had been

The relevant conclusions from this Bone Dry era are: (1) neither the advent of prohibition nor its end repealed the *Seveloff* Fix; and (2) overlapping liquor laws should be read as coexisting, with no implied repeal judicially pronounced unless the two laws were impossible to reconcile.

Alaska's "second prohibition" ended in 1934.²²⁹ In 1933, Congress passed the Blaine Act to repeal the Eighteenth Amendment and voided the Volstead Act. In 1934, Congress repealed the Alaska Bone Dry Law.²³⁰

M. 1934-1941: Post-Prohibition

What had been § 142 of the Carter Code, and later § 2022 of the 1913 Compiled Laws of Alaska, had now become § 4963 of the 1933 Compiled Laws of Alaska. Its text remained the same as it had been following the 1915 Territorial Legislature's amendment. It was a misdemeanor for any person, without the authority of the United States, to convey to any Indian any alcohol, and it was a misdemeanor for any Indian to "wrongfully and willfully solicit, incite or induce any person to furnish him or her with" the same.²³¹

Beyond the narrow context of the federal Indian liquor laws, the federal government was clarifying its policies as to Alaska Natives, bringing their legal status closer to that of American Indians. After 1931, the Alaskan responsibilities of the Office of Education were transferred to the Bureau of Indian Affairs.²³² The Interior Department issued an opinion in 1932 concluding that "no distinction has been or can be made between the Indians and other Natives of Alaska so far as the laws and relations of the United States are concerned."²³³ The 1936 Alaska Indian Reorganization Act was passed to give Alaska Native Communities those opportunities that tribes in the lower 48 states had been afforded

pursuing its policy of prohibition in Indian country. "This may or may not have been the purpose and reason for the enactment, but the law was at least enacted to supply some local need, real or apparent, and the result is the same." *Stanworth v. United States*, 45 F.2d 158, 159 (9th Cir. 1930).

229. Act of Apr. 13, 1934, ch. 119, 48 Stat. 583.

230. In repealing the Alaska Bone Dry Act, Congress extended the authority of the Alaska Territorial Legislature under the 1912 Territorial Act to encompass alcohol. Pub. L. No. 73-158, § 2, 48 Stat. 583 (1934). It explicitly ratified a 1933 Territorial enactment (Territorial Enactment from 1933, SLA 1933, ch. 109) creating a board of liquor control. *Id.* § 3. It repealed sections 462 to 478 of the 1899 Carter Code, *id.* § 4, which had contained the "high license" provisions. But this did not mean that the Territory's authority over liquor issues was unlimited.

231. Alaska Comp. Laws Ann. § 4963 (1933).

232. Sec'y of the Interior's Order No. 494, Mar. 14, 1931.

233. Status of Alaska Natives, 53 L.D. 593, 605 (1932).

under the 1934 Indian Reorganization Act.²³⁴

This was also the period during which Acting Solicitor Kirgis opined that § 4963 of the 1933 CLA²³⁵ reflected an assumption that 25 U.S.C. 241²³⁶ was not applicable in Alaska. This opinion was eventually overruled,²³⁷ and as noted above, Kirgis's analysis failed to take into account the interpretation of the Oregon predecessors to § 4963.²³⁸ But there was yet another flaw in Kirgis's analysis, in that the opinion stated, "No reported decision has been found dealing with the application of Section 241, Title 25, United States Code, to the Territory of Alaska."²³⁹ However, there was reported case authority on that question: the *Seveloff* case itself, and the subsequent *United States v. Carr* and *Waters v. Campbell* decisions, though one would have to know that what was housed in 25 U.S.C. § 241 as of 1937 had previously been section 20 of the 1834 Act.²⁴⁰ The reasons Interior decided eventually to abandon Kirgis's opinion were based on other factors,²⁴¹ but abandonment was the proper course.

N. 1948: The New Indian Country Definitions

The new 1948 definition of "Indian Country" in 18 U.S.C. § 1151

234. DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, 384-87 (3d ed. 2012).

235. Alaska Comp. Laws Ann. § 4963 (1933). Section 4963 was the successor to Carter Code § 142.

236. Part of the federal Indian liquor laws, a successor provision to section 20 of the 1834 Act.

237. See *The Protection of Indians and other Natives of Alaska from Liquor Traffic*, *supra* note 193.

238. See *supra* text accompanying notes 193-99.

239. *The Protection of Indians and other Natives of Alaska from Liquor Traffic*, *supra* note 193.

240. In fairness to Acting Solicitor Kirgis, legal research on Indian law issues was quite difficult in 1937. "By the 1930s there was thus a fully developed federal Indian law, including treaties, statutes, cases, and administrative decisions. Yet, given the multiplicity of sources and their complexity, it was not easily accessible . . ." DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX M. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 166 (2007). Felix Cohen himself, writing in 1941 before the Kirgis opinion had been overruled, treated Kirgis's opinion as setting out Interior's view, but did not regard that view as limiting the potential for Alaska Tribes to enact their own liquor control ordinances. He suggested that, rather than relying on federal enforcement, tribes consider controlling the liquor traffic in organized Indian communities by adopting measures for liquor control independent of the Territorial law. See *Re the Intoxicating Liquor Traffic Among Natives in Alaska*, Op. Sol. Gen. of Dep't of the Interior, M-31324 (Aug. 14, 1941), available at http://thorpe.ou.edu/sol_opinions/p1051-1075.html.

241. See *Liquor Problems in 'Indian Country' in Alaska*, Op. Sol. Gen. of Dep't of the Interior, M-36712 (Sept. 26, 1967).

became the cornerstone to determining whether and where “full-fledged” Indian country existed in Alaska and throughout the United States. Of the three types of “Indian country” included in the definition, reservations and allotments clearly were present in Alaska as of 1948.²⁴²

The first consideration of the implications of the new statutory definition for Alaska arose in the alcohol context. In December 1948, Solicitor Mastin G. White, while not explicitly overruling the Kirgis opinion, noted that it had predated the 1948 statute defining Indian country, and opined that the federal Indian liquor laws were applicable to any federal reservations, including those in Alaska, and to non-reservation dependent Indian communities in Alaska as well.²⁴³ At the time when Solicitor White was writing, Congress had not explicated in the new code that “Indian country” for purposes of the federal Indian liquor laws might have a different scope than the general definition (as above, this occurred in 1949),²⁴⁴ so Solicitor White had no occasion to consider that possibility. Still, the opinion is significant because it recognized that there was no actual legal barrier to application of the federal Indian liquor laws in Alaska, and implicitly acknowledged that alcohol control issues in Alaska’s Native communities were as crucial as for lower 48 tribes.

A later Solicitor’s opinion notes that, following Solicitor White’s letter, consideration was given by the Bureau of Indian Affairs to enforcement of the federal Indian liquor laws in Alaska, but the BIA lacked sufficient personnel to do so.²⁴⁵

O. 1953: A Questionable End for Carter Code § 142

In 1953, the same year that Congress changed the federal Indian liquor laws into a delegation of authority to states and tribes,²⁴⁶ Alaska’s Territorial Legislature revamped its liquor laws, in several respects. Most significantly, it repealed ACLA 1949 sec. 65-3-7, which had been the successor to § 142 of the 1899 Carter Code.²⁴⁷ To the extent that the

242. CASE & VOLUCK, *supra* note 234, at 81-112 (reservations), 113-164 (allotments).

243. See Liquor Problems in ‘Indian Country’ in Alaska, Op. Sol. Gen. of Dep’t of the Interior, M-36712 (Sept. 26, 1967), at 3 (quoting BIA Files 50082-1945-126).

244. Act of May 24, 1949, ch. 139, § 28, 63 Stat. 94 (codified as amended at 18 U.S.C. § 1156 (2012)). See *supra* text accompanying notes 11-12.

245. See Liquor Problems in ‘Indian Country’ in Alaska, Op. Sol. Gen. of Dep’t of the Interior, M-36712 (Sept. 26, 1967), at 3 (quoting BIA Files 50082-1945-126).

246. See *supra* text accompanying notes 47-48.

247. 1953 Alaska Session Laws ch. 42. ACLA 1949 sec. 65-3-7 had been the

the *Seveloff* fix was eclipsed by the first prohibition, by the Carter Code, or by the second prohibition, all those enactments had now been explicitly repealed.

The bill to effect that repeal (House Bill 102) was one of a quartet of bills introduced to make significant changes to Alaska's liquor laws.

The closely related House Bill 101, "An Act prescribing criminal penalties for drunkenness and for selling or giving intoxicating liquor to common drunkards," indicates that its purpose was to replace the to-be-repealed Indian-specific provision of ACLA § 65-13-7 with a race-neutral prohibition on providing liquor to "common drunkards" of any extraction. By contrast with House Bill 102, which passed with virtually no debate,²⁴⁸ House Bill 101 was debated on the House Floor, where the term "common drunkard" was replaced by "habitual drunkard," then an amendment was offered to replace that with "alcoholic," then an amendment to the amendment suggesting "chronic alcoholic," whereupon the bill was re-referred back to a committee for further consideration, ultimately not getting a House Floor vote.²⁴⁹

House Bills 100 and 103, both of which did pass, were broader, eliminating Alaska's Territorial Liquor Control Board and delegating much of its prior authority to the Territory's municipalities, and many of its prior duties to the District Courts.²⁵⁰ Later cases found this to fall outside the Territorial Legislature's congressionally-delegated authority.²⁵¹ The legislature in 1957 re-established the Territorial Liquor Control Board and re-enacted most of those repealed laws, with some amendments.²⁵²

Although repeal of § 65-3-7 also might have exceeded the Territorial Legislature's authority based on that same reasoning, there was no challenge to that repeal, or attempts to re-enact that statute. Assuming the validity of that repeal, the *Seveloff* Fix had effectively outlasted the Carter Code.

successor to Alaska Comp. Laws Ann. § 4963 (1933) of the 1933 Compiled Laws of Alaska, in turn the successor to section 2022 of the 1913 Compiled Laws of Alaska, in turn the successor to section 142 of the 1899 Carter Code.

248. Alaska Territorial Leg., H. Journal, at 348, 405-06, 412-13, 743, 757, 763, 867 (Alaska 1953) (hereafter 1953 Alaska House Journal).

249. 1953 Alaska House Journal at 348, 377, 605-06, 638.

250. 1953 Alaska Session Laws chapters 43 (H.B. 103), 131 (H.B. 100).

251. See *Bordenelli v. United States*, 233 F.2d 120, 124 (9th Cir. 1956); *Woo v. City of Anchorage*, 154 F. Supp. 944, 947 (D. Alaska 1957).

252. 1957 Alaska Sess. Laws ch. 131.

P. 1957-1960: Full Indian Country and Full Statehood

The 1948 statutory definition of “Indian country” had ramifications for Alaska beyond the federal Indian liquor laws, and developments in the late 1950s took the discussion in that direction. The debates over the next several decades focused on the existence *vel non* of “full” Indian country in Alaska, rather than FILL Indian country. A 1957 case held that the Tyonek reservation was “Indian country” within the meaning of the 1948 definition, and the Territory could not prosecute a criminal case for statutory rape within the reservation, because Congress had not conferred authority upon the Territory to do so within “Indian country.”²⁵³ Congress responded by extending P.L. 280²⁵⁴ to Alaska in 1958,²⁵⁵ adding the Territory of Alaska as a sixth mandatory P.L. 280 jurisdiction, in accord with the generally assimilationist polices of that era. This ensured that the Territory had complete criminal and civil jurisdiction within whatever areas of full “Indian country” might eventually be found to exist within the Territory. For our purposes the relevant point is that the extension of P.L. 280 to Alaska did not purport to repeal the *Seveloff* fix.

Alaska’s Statehood Act was signed into law July 7, 1958²⁵⁶ and, following approval by Alaska’s voters on August 26, 1958, President Eisenhower signed the official declaration on January 3, 1959. Whatever limits Congress had formerly imposed on the Territorial Legislature’s authority over alcohol were left behind. But the Statehood Act did not repeal the *Seveloff* fix, and Statehood in and of itself did not affect the application of the federal Indian liquor laws. Any full-fledged “Indian country” then in Alaska was subject to the provisos in the Alaska Statehood Act § 4,²⁵⁷ and arguably the same was true of any “liquor law

253. *In re McCord*, 151 F. Supp. 132, 135 (D. Alaska 1957).

254. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 589 (codified at 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2000)). This “PL 280” authority was mandatory in five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) and optional for other states. The optional provision was made contingent on tribal consent in 1968. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 7 (codified at 25 U.S.C. § 1031 (2012)).

255. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1984)) (adding the Territory of Alaska to the five “mandatory” PL 280 states).

256. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (codified at 48 U.S.C. § 21 (2012)).

257. *Id.* § 4. (“[S]aid State and its people do agree and declare that they forever disclaim all right and title to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives . . .”).

only” Indian country. Alaska’s attainment of statehood did not terminate congressional authority to declare (in the past or in the future) parcels of land as “Indian country” within the new State.²⁵⁸ Statehood neither enlarged nor diminished any Indian country, either “full-fledged” or “liquor only.”

Q. 1967-1968: the Federal Indian Liquor Laws Re-Recognized in Alaska

In 1967, the Associate Solicitor for Indian Affairs issued an opinion reconsidering the 1937 Kirgis opinion noted above, and definitively concluded that “the Indian liquor laws, 18 U.S.C. §§ 1154 et seq., are applicable to ‘Indian country’ in Alaska.”²⁵⁹ The new opinion listed several reasons for rejecting the former Acting Solicitor’s opinion.²⁶⁰

Just as importantly, the opinion also noted that the 1953 restructuring of the federal liquor laws to delegate authority to tribes would apply in Alaska:

Thus, if an organized native group does not elect to permit liquor on its reserve or in its community, the Federal Indian liquor laws still apply. If it votes for the conditional suspension of such federal laws, acts in violation of either state or tribal law are likewise in violation of Federal law.²⁶¹

A follow-up memorandum in early 1968 addressed questions about whether formation of an Indian Reorganization Act (IRA) Council should be regarded as either necessary or sufficient to constitute a dependent Indian community. There were Alaska Native communities

258. “The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines.” *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876).

259. *Liquor Problems in ‘Indian Country’ in Alaska*, Op. Sol. Gen. of Dep’t of the Interior, M-36712 (Sept. 26, 1967).

260. *Id.* These included: (1) the 1899 “Carter Code” provision applied only to non-citizen Indian purchases, whereas all Alaska Natives became citizens in 1924; (2) the territorial law into which the “Carter Code” provision had evolved had been repealed; (3) the new “Indian country” definition had been enacted, and Solicitor White had concluded in 1948 that this new definition encompassed Gambell and Savoonga; and (4) the 1958 extension of P.L. 280 to Alaska recognized the existence of “Indian country” in Alaska.

261. *Id.* The opinion notes that the natives were “desirous of having the Federal exclusionary statutes enforced,” observes that the Law and Order branch of the BIA had informally indicated its concurrence with the application of the federal Indian liquor laws, and urges the Regional Solicitor to confer with the local United States Attorney’s office, observing that that lack of BIA enforcement personnel had been noted as a problem in 1948.

which wanted liquor banned but had not formed an IRA Council; and there were IRA organizations that had been formed in “mixed” communities. The supplemental opinion posited that Alaska Native communities should be able to exercise their alcohol authority without having to form IRA Councils. As to the mixed communities question, the opinion noted that at that point there were no IRA Councils seeking to exercise alcohol authority in mixed communities, and suggested that when such issues arose, they should be dealt with on a case-by-case basis based on pragmatic considerations, and local need should determine enforcement policy.²⁶²

The supplemental opinion also noted that the Arctic Slope Native Association had passed a resolution purporting to exercise some measure of alcohol jurisdiction. The opinion rejected the premise that ASNA could be a Native community for liquor law purposes; it was up to individual Native communities to determine their own course.²⁶³

These 1967 and 1968 opinions, although arising in the area of federal Indian liquor law enforcement, looked primarily to the 1948 statutory definition of “full-fledged” Indian country. Their authors would not have seen any need to discuss the possibility that Indian country for purposes of the federal Indian liquor laws might be any different than Indian country for general purposes, and they did not discuss it. No necessity of tying their conclusions to a “FILL” rather than full Indian country framework would arise for another thirty years. Nevertheless, the *Seveloff* Fix had now survived the Kirgis opinion.

R. 1971-1986: ANCSA and Post-ANCSA Tribal Liquor Ordinances

The Alaska Native Claims Settlement Act (ANCSA) did not purport to repeal the *Seveloff* fix.

ANCSA did revoke all existing reservations in Alaska except for Metlakatla. Still, discussions of the application of the federal Indian liquor laws in Alaska remained focused on “full” Indian country, although it shifted away from the now-terminated reservations and towards whether Native lands in Alaska constituted Indian country under the “allotment” or “dependent Indian community” legs of the general Indian country definition.

The Solicitor’s office considered post-ANCSA village alcohol control authority in an October 1980 memorandum concerning a

262. Liquor Control, Indian communities, Alaska, Op. Sol. Gen. of Dep’t of the Interior, M-36712 Supp. (Jan. 15, 1968).

263. *Id.*

proposed liquor ordinance from the Village of Allakaket.²⁶⁴ Much of the opinion concerns the view that, notwithstanding ANCSA's revocation of Alaska reservations outside Metlakatla, the phrase "dependent Indian communities" in the 18 U.S.C. § 1151 definition might still fit Alaska Native communities (a view which, under the interpretation of that phrase adopted in the subsequent *Venetie* opinion, we now know will not encompass ANCSA lands). The opinion additionally notes that allotments also fall within the general statutory definition of "Indian country," a view that has survived the *Venetie* decision, which itself noted that possibility.²⁶⁵ As to both allotments and dependent Indian communities, the opinion considers the question of whether an Alaska Native Village could have jurisdiction over alcohol outside a "reservation," as tribal authority over non-reservation lands is an "unresolved issue," but concludes that tribes can exercise delegated federal authority under 25 U.S.C. § 1161 as to non-reservation lands, for which the federal authority exists even though the authority of the tribe itself might be questionable absent federal delegation.

The opinion notes several problems with the particular Allakaket ordinance that had been submitted for Interior review. The ordinance purported to apply a criminal penalty to all persons violating it; the opinion notes the village would have to either limit the criminal penalties to Indians and Alaska Natives (over whom the tribe could exercise criminal jurisdiction) or change its enforcement to civil mechanisms. The ordinance conveyed the impression that the tribe itself would be enforcing the criminal penalties of 18 U.S.C. § 1154(a), which would need to be changed as only federal authorities could enforce that statute (noting that those federal authorities could of course prosecute non-Natives as well as Natives). Adequate due process safeguards should be set out in the ordinance itself because they would be required by the Indian Civil Rights Act, and because the alternative of having these rights set out in the tribal constitution was inapplicable to Allakaket which lacked a written constitution. The opinion ended by noting that resources to effect federal enforcement of the federal Indian liquor laws, having been a problem in the 1940s and 1960s, would presumably still be a problem in the 1980s, and should be discussed with the local U.S. Attorney's office.

There is no record that a revised ordinance for Allakaket was

264. Memorandum from Comm'r of Indian Affairs, Liquor Ordinance, Village of Allakaket, Alaska, to Associate Solicitor for the Division of Indian Affairs (Oct. 1, 1980).

265. *Venetie Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.2. (1998).

certified and published by the Department of the Interior. Subsequently, however, between 1983 and 1986, three Native villages (Chalkyitsik, Minto, and Northway) had their alcohol ordinances certified and published in the Federal Register by the Secretary of the Interior.²⁶⁶

Notably, the State of Alaska did not sue to challenge the ability of these tribes to have their Indian country recognized for purposes of their alcohol ordinances.

S. 1987-1998: *Venetie*, a Taxing Case

However, a tribe asking to have Indian country recognized for purposes of tribal taxation was a different matter. In 1987, the State of Alaska challenged tribes' ability to have their "full" Indian country status recognized for the purpose of imposing business taxes in *Alaska v. Native Village of Venetie Tribal Government*,²⁶⁷ in which the State eventually prevailed in 1998 before the United States Supreme Court.

This requires an assessment of whether the ruling and reasoning in *Venetie* are harmonizable with the premise that Congress could, and did, extend the federal Indian liquor laws to Alaska. For several reasons, the answer is yes.

In *Venetie*, the Court only interpreted the tripartite definition of full-fledged Indian country in 18 U.S.C. § 1151, not the alternate provision for liquor-law-only Indian country found in Title 18. There were no alcohol control issues before the Court in *Venetie*; the twelve-word introduction to 18 U.S.C. § 1151 referencing the differing definition of Indian country for liquor law purposes was so irrelevant to the Court's analysis that it was omitted from its quotation of that statute.²⁶⁸

Furthermore, the Court's observation that "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States"²⁶⁹ is true enough of full Indian country, but not of FILL Indian country, in which the States and Indian tribes both have authority to impose their own limits on alcohol possession and transactions. The Court simply was not contemplating the question of whether Alaska might contain Indian

266. See Village of Chalkyitsik, Alaska; Ordinance Prohibiting the Introduction, Possession, and Sale of Intoxicating Beverages, 48 Fed. Reg. 21,378, 21,378 (May 12, 1983); Native Village of Northway; Ordinance Providing for the Introduction, Possession and Sale of Intoxicating Beverages, 48 Fed. Reg. 30,195, 30,195 (June 30, 1983); Village of Minto Liquor Ordinance, 51 Fed. Reg. 28,779, 28,779 (Aug. 11, 1986).

267. 522 U.S. 520 (1998).

268. *Id.* at 526-27.

269. *Id.* at 527 n.1.

country for the limited purpose of the federal Indian liquor laws.

Interpreting the “dependent Indian communities” term in 18 U.S.C. § 1151 as a matter of first impression, the Court held that it referred to a “limited category” of Indian lands satisfying a “set-aside” requirement and a “superintendence” requirement.²⁷⁰ *Venetie*’s ANCSA lands did not meet the “set-aside” requirement because ANCSA lands might eventually be owned by non-Natives and could currently be used for non-Indian purposes.²⁷¹ They did not meet the “superintendence” requirement because *Venetie* had received title to the transferred land in fee simple.²⁷² In effect, the *Venetie* lands were not § 1151 Indian country because they were fee-patented lands in what might eventually be a non-Indian community. But “fee patented land in a non-Indian community” is exactly that category of land which, under 18 U.S.C. §§ 1154 and 1156, is federal Indian liquor law Indian country, if and only if there is a treaty or statute extending the liquor laws thereto. So it is entirely consistent with the Supreme Court’s characterization of ANCSA lands in *Venetie* to recognize that a statute extending the Indian liquor laws to any particular parcel of land needs to be given that effect, even if that land is fee-patented land in a non-Indian community, or fee-patented land in what may eventually become a non-Indian community.

Another passage in *Venetie* demonstrates the congruence of this article’s thesis with that holding. The Court explained that “The federal set-aside requirement also reflects the fact that because Congress has plenary power over Indian affairs . . . some explicit action by Congress . . . must be taken to create or to recognize Indian country.”²⁷³ The *Seveloff* fix, in creating FILL Indian country in Alaska, certainly demonstrated explicit action by Congress, and Congress’s plenary power over Indian affairs means that courts have to respect what Congress has legislated and has not repealed.

The concluding passage in *Venetie* emphasized that the “superintendence” which the Court would need to find in a “dependent Indian community” conflicted with a statute like ANCSA that was intended to promote self-determination and end paternalism.²⁷⁴ But, to

270. *Id.* at 527.

271. “Because Congress contemplated that non-Natives could own the former *Venetie* Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met.” *Id.* at 533.

272. *Id.* at 524. The Court, while acknowledging that the Pueblos of New Mexico were owned by those tribes in fee simple, characterized that title as “not fee simple title in the commonly understood sense of the term.” *Id.* at 528.

273. *Id.* at 531 n.6.

274. *Id.* at 534.

find FILL Indian country, the courts need not look for dependence or paternalism; they need only look for an explicit congressional enactment. The federal Indian liquor laws over sixty years ago left behind the dependence and paternalism that accompanied the original enactment of the federal Indian liquor laws, and converted them into a vehicle for promotion of tribal autonomy, by delegating authority to the tribes to craft their own alcohol laws: “[I]n enacting [18 U.S.C.] § 1161, Congress intended to recognize that Native Americans are not ‘weak and defenseless,’ and are capable of making personal decisions about alcohol consumption without special assistance from the Federal Government.”²⁷⁵ Thus, eighteen years before ANCSA’s passage in 1971, the federal Indian liquor laws had already discarded their prior “wardship” and “paternalism” aspects that the *Venetie* opinion found antithetical to ANCSA’s philosophy,²⁷⁶ and, by bestowing on tribes a federally-delegated authority to regulate liquor within their communities, promoted the very “self-determination” which was later to become ANCSA’s touchstone. There is thus no conflict between the policies the *Venetie* court found to be the underpinnings of ANCSA, and the conclusion that Alaska Native Villages should be entitled to exercise their federally-delegated authority over alcohol within their communities.

Finally, Justice Thomas’s observation that “[w]hether the concept of Indian country should be modified is a question entirely for Congress”²⁷⁷ underscores the fact that, if Congress has modified the concept of “Indian country” for purposes of the federal Indian liquor laws by extending those laws to any particular parcel of “fee patented land in a non-Indian community” through a statute so specifying, then finding that fee-patented land to be Indian country for that limited purpose would not only be compatible with the *Venetie* opinion, but in fact binding on the United States Supreme Court as well as the lower courts.

Nothing in the ruling or reasoning of the Court in *Venetie* should be read to be inconsistent with the hypothesis that Alaska Native Villages have a valid claim to occupy liquor-law-only FILL Indian country.

Before turning to the last section, it may be helpful to review. “Indian country,” which the federal Indian liquor law statutes require for tribes to exercise delegated federal authority to enact their own tribal alcohol ordinances, can be created by a federal law extending the Indian liquor laws to a particular piece of land. For Alaska Native Villages, the

275. See *Rice v. Rehner*, 463 U.S. 713, 734 (1983).

276. *Venetie*, 522 U.S. at 533, 534.

277. *Id.*

Seveloff fix legislation, enacted in 1873 and not subsequently repealed, should provide that prerequisite. It did not make the lands occupied by Alaska Native Villages “full” Indian country, so it does not require any reconsideration of the *Venetie* ruling; instead, it had the effect of making those lands a limited type of “Indian country” for purposes of the Indian liquor laws only. This may be of considerable benefit, not only to those Alaska Native Villages wishing to exercise their authority to prevent, through village ordinances and village enforcement, the myriad problems which alcohol abuse has visited on their children and families, but also to the State of Alaska which finds itself spending untold amounts to remedy the problems created thereby.

IV. TODAY: CONSIDERATIONS FOR COUNCILS

First and foremost, it is important to recognize that the existence of tribal authority over liquor does not equate to a diminution of state authority. Under the statutes enacted by Congress in 1953, liquor transactions have to comply with both state law and tribal ordinances, so the State continues to be able to enforce every aspect of state law. *Rice v. Rehner* forecloses any argument that a liquor dealer could try to “hide behind” a tribal ordinance as authorizing a liquor transaction notwithstanding a state law prohibiting that transaction. Tribal ordinances cannot exempt liquor transactions from state law (and vice versa).

Second, it would likely be a mistake for tribal authorities to rely too much on the possibility of federal criminal prosecutions as an enforcement mechanism. History amply demonstrates that the federal government is unwilling to provide the resources necessary to make this happen. The practical advice Felix Cohen offered in 1941²⁷⁸ remains true: tribes would be well-advised to fashion remedies that they can implement themselves. The statute allows federal prosecutions for violations of tribal ordinances only if those ordinances have been published in the Federal Register, and there is no guarantee that the Interior Department will be persuaded to publish. Even then, federal prosecution may be able to play a backup role, but not a primary one.

Third, tribal ordinances need to adhere to the Indian Civil Rights Act’s requirements.²⁷⁹ Due process requires notice and the opportunity for a hearing before a fair and impartial tribunal. Equal protection

278. See *Re the Intoxicating Liquor Traffic Among Natives in Alaska*, *supra* note 240.

279. 25 U.S.C. § 1302 (2012).

prohibits discrimination against particular groups.²⁸⁰ Tribes cannot “violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.”²⁸¹

Fourth, Alaska Native Villages arguably have the authority under section 20 of the 1834 Act “to take and destroy any ardent spirits or wine found in the Indian country.”²⁸² This was the tradition in many Alaska Native Villages for years.²⁸³ It may still be the simplest and most straightforward enforcement mechanism for Alaska’s Native Villages to use. Tribal searches and seizures, while not subject to the provisions of the Fourth Amendment of the U.S. Constitution, are, as noted above, subject to the parallel provisions of the Indian Civil Rights Act.²⁸⁴ But tribal courts could issue those warrants, and a tribal government exercising this authority would have the shield of its sovereign immunity to protect it from attacks on those enforcement actions.

Fifth, criminal prosecution may not be a realistic enforcement option for Alaska Native Villages to undertake on their own. Criminal proceedings trigger an additional panoply of procedures and rights under the Indian Civil Rights Act, which may make such proceedings overly cumbersome and cost-ineffective for the tribe.²⁸⁵ Absent Congressional authorization, it is black-letter law that tribes cannot

280. The equal protection clause would presumably allow the tribe to distinguish between its members and non-members, *see generally* Morton v. Mancari, 417 U.S. 535 (1974), but in this context, it would probably take the form of allowing certain remedies against members violating the ordinance that would not be available for imposition on non-members violating the ordinance.

281. 25 U.S.C. § 1302(a)(2), (a)(8).

282. 18 U.S.C. § 3113 (2012) (“Any . . . Indian may take and destroy any ardent spirits or wine found in the Indian country, except such as are kept or used for scientific, sacramental, medicinal, or mechanical purposes or such as may be introduced therein by the Department of the Army”).

283. *See* Pat Hanley, *Warrantless Searches for Alcohol by Native Alaskan Villages: A Permissible Exercise of Sovereign Rights or an Assault on Civil Liberties?*, 14 ALASKA L. REV. 471, 472 (1997) (“Several [Native American Villages] in southwestern Alaska have set up stations at the village airplane runway in order to search people and their luggage for alcohol before they are permitted to enter their village”); ICHS study, *supra* note 1, at 68–69 (“Characteristics of continuous law making and enforcement in these communities include some of the following: . . . Illegal search, seizure, and destruction of alcohol from private homes based on observed and reported possession and use . . . Some of the means used by these communities are legitimized by community consensus, but may be illegal because they violate the constitutional rights of residents.”).

284. 25 U.S.C. § 1302(a)(2).

285. *See* 25 U.S.C. § 1302(a)(3), (4), (6), (7), (10).

subject non-Natives to criminal prosecution,²⁸⁶ and in those instances where Congress authorizes tribal criminal proceedings against non-Natives, there tend to be more rigorous safeguards and costly prerequisites, perhaps unrealistic at present for many villages.²⁸⁷ Criminal jurisdiction is more likely to lead to jurisdictional challenges, including the possibility of a federal habeas corpus action.²⁸⁸ Criminal proceedings will probably be better left up to the discretion of state prosecutors for violation of state law and federal prosecutors under the federal Indian liquor laws. Civil remedies should be available with respect to non-tribal members, given the clear threat that alcohol presents to village health and welfare.²⁸⁹ Civil remedies may encompass several types of remedies that may prove efficacious, including forfeiture and/or destruction of alcohol, civil monetary penalties, imposition of security bonds or other conditions to insure future compliance, and civil exclusion remedies.

Sixth, tribal ordinances should be drafted to apply to well-defined and limited geographic areas in the vicinity of the village being protected. The federal Indian liquor laws were extended to Alaska “so far as the same may be applicable thereto,”²⁹⁰ indicating Congress intended there be some discretion, and some responsibility, to interpret the law with a rule of reason. Villages should be careful not to overstep their authority. Ordinances should protect the village area, and Councils in drafting their ordinances will necessarily make choices about defining that area, but they should be careful to tailor that scope to be no broader than reasonably necessary to achieve that purpose. Tribal attempts to regulate liquor sales in Anchorage or Fairbanks would exceed this limit of reasonableness.

Seventh, Councils should understand the similarities and distinctions between tribal ordinances and local option ordinances. Each will be independently enforceable. Villages need not choose one over the other; both may be in place in the same area, and then any liquor transaction will have to remain in compliance with both sets of rules. For some villages, if the local option ordinance is working well, there may be no need to assert tribal authority. Other villages have found the local option ordinances to be unsatisfactory for one reason or another.²⁹¹ But

286. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

287. *See* 25 U.S.C. § 1304 (2012).

288. *See* 25 U.S.C. § 1303 (2012).

289. The Supreme Court has noted that the distribution and use of intoxicants are clearly matters that affect the internal and social relations of tribal life. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

290. *See supra* text accompanying note 88.

291. The shortcomings most often mentioned about Alaska’s local option

the assertion of tribal authority need not entail rejecting the local option ordinance. The two should be able to work together, and perhaps any weak points in either can be ameliorated by the other.

CONCLUSION

The 1873 *Seveloff* fix extension of the Indian liquor laws to Alaska was not repealed by Congress—not by enactment of the Revised Statutes in 1876, or the District Organic Act in 1884, or by the Carter Code in 1899, or by the Territorial Organic Act in 1912, or by the Bone Dry Law in 1917, or by Assistant Commissioner Kirgis in 1937, or by the amendments to the federal criminal code in 1948 or 1949, or by the revision of the FILL in 1953, or the extension of P.L. 280 to Alaska in 1953, or by Statehood in 1959, or by ANCSA in 1971, or by the *Venetie* decision in 1998. Unless and until Congress chooses to repeal it, it can serve to provide Alaska Native Villages with a proper basis to exercise the same sort of federally-delegated authority to regulate alcohol in their immediate vicinities that their counterparts in the lower 48 have within their reservations, allotments, and dependent Indian communities. The federal, state and tribal governments should make use of the fact that every federally recognized tribe in Alaska occupies a community to which Congress extended the Indian liquor laws in 1873, giving each village sufficient basis to enact tribal alcohol ordinances pursuant to the federally-delegated authority Congress enacted in 1953.

ordinances include: some villages would like more flexibility than is afforded by the limited menu of possible provisions to be included in the ordinance under ALASKA STAT. § 04.11.491(b) (2012); some villages may wish to sanction “possession by consumption” as well as possession in a container, compare ALASKA STAT. § 04.11.501(d) (2012); some villages may wish to fashion their own sanctions more aligned with their own village traditions; some villages have concerns over the state penalties under the local option law, and/or wish to impose a sanction without the offender getting a state court criminal record; some villages want to implement timelier responses than state law enforcement is able to supply. (Interview with Tanana Chiefs Conference Tribal Government Specialist Lisa Jaeger, Mar. 14, 2015). In some areas, local option elections seem to swing back and forth with a frequency that generates significant confusion. See ICHS study, *supra* note 1, at 71.

None of this is to say that the local option ordinances are unhelpful. There are many Alaskan children and Alaskan families that have benefitted from the safer and healthier living environment in a community without alcohol. “Although growing evidence suggests that the local option law may reduce adverse effects of alcohol abuse in Alaska Native communities, its most important contribution may be to restore to these communities a limited form of self-government.” Matthew Berman & Teresa Hull, *Alcohol Control by Referendum in Northern Native Communities: the Alaska Local Option Law 1, 2*, U. OF ALASKA ANCHORAGE INST. OF SOC. AND ECON. RESEARCH, Aug. 2000, available at http://www.iser.uaa.alaska.edu/Publications/Alcohol_Arctic.pdf.

Justice Thomas's closing observation in the *Venetie* opinion that "[w]hether the concept of Indian country should be modified is a question entirely for Congress"²⁹² unconsciously echoed the observation made by Judge Matthew Deady over 100 years earlier that "[i]f congress should think it desirable that this or any other provision of the Indian intercourse act should be in force in Alaska, it can so provide, beyond doubt."²⁹³ Congress did so provide, and Judge Deady, to his credit, recognized that it had. Hopefully, contemporary courts will recognize the significance of this unrepealed provision as a legal foundation from which the State of Alaska and its resident Tribes can collaboratively exercise their shared delegated jurisdiction. A strong village enforcement stance against illegal alcohol importation could be a valuable ally with, and effective supplement to, strong state enforcement of state and local option laws. The State of Alaska, for all of its resistance to tribal self-rule policies in other contexts, has not attacked tribal efforts to regulate alcohol. That tradition is one that ought to be maintained.²⁹⁴

292. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998).

293. *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D. Or. 1872) (No. 16,252).

294. *See United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 198 (1876) ("Minnesota, instead of being injured, is benefited. An immense tract of valuable country formerly withheld from her civil jurisdiction is subjected to it, and her wealth and power greatly increased. . . . It would seem, apart from the question of power, that the price paid by the State bears no proportion to the substantial and enduring benefits conferred upon her; and we are happy to say, that her officers are not engaged in making this defence [sic].").