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BITTLE V. BAHE: A DRUNKEN MISTAKE

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I. Introduction

Throughout the past two decades, the United States has seen Indian tribes become a major driving force in the nation's economy. Recent years have been marked by tribes aggressively creating new businesses in the areas of real estate, banking and finance, media and telecommunications, wholesale and retail trade, tourism, and most predominantly, gaming.[1] Today the gaming industry has exploded into a multi-billion-dollar business.[2] In 2002 alone, Indian tribes generated $14.8 billion in revenue from more than 330 gaming facilities in twenty-eight different states.[3] Thus it is clear that no other tribal venture has been more extensive and significant than tribal gaming. Although tribal gaming growth has certainly led to better self-sufficiency amongst tribes, it has arguably created a number of negative consequences.

Unsurprisingly, tribal growth has sparked legal conflict between tribal and non-tribal members. The gaming explosion alone has spawned a significant amount of litigation and regulatory controversy. State courts are now consistently faced with perhaps one of the most complex and ambiguous conflicts in American jurisprudence—the conflict between state and tribal jurisdiction. Yet the jurisdictional conflict between states and tribes is not a new phenomenon.

Disputes over federal, state, and tribal powers have plagued American courts since their creation. "From the first days of the Continental Congress and throughout the struggle for independence, the American government sought to address the causes for Indian resentment and centralize Indian affairs."[4] To address these concerns, the Continental Congress determined that "'securing and preserving the friendship of the Indian Nations, appear[ed] to be a subject of the utmost moment to these colonies,' and appointed northern, southern, and middle departments of Indian affairs to 'treat with the

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1. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1279-80 (Nell Jessup Newton et al. eds., Michie 2005) [hereinafter COHEN].

2. *Id.* at 858 (citing NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 6-1 (1999)).

3. *Id.* (citing NAT'L INDIAN GAMING COMM'N, TRIBAL DATA (2003)).

4. *Id.* at 20.

Indians . . . to preserve peace and friendship.'"[5] Subsequently, Chief Justice John Marshall observed in 1831 that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . [it is] marked by peculiar and cardinal distinctions which exist no where else."[6]

Marshall ultimately introduced the idea that tribes are "distinct, independent political communities"[7]—entities "qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."[8] At its core, Marshall's recognition of tribal sovereignty acknowledged inherent tribal power free from state authority. In short, Marshall recognized a tribe's common-law immunity from suit against all but the federal government. Marshall's decision effectively granted tribes the right to govern themselves as sovereign nations, thereby limiting the right of the states to exert power over them.

The doctrine of sovereign immunity has since evolved and has now received outward recognition by the Supreme Court, as well as many other courts across the United States.[9] Despite the fact that tribal sovereignty and tribal immunity are well-accepted legal precedents, their parameters continue to be tested in state courts. One example of such a challenge arose before the Supreme Court of Oklahoma in the case of *Bittle v. Bahe*.[10]

The dispute in *Bittle* arose out of an automobile accident occurring on April 30, 2004. Shatona Bittle was driving westbound on Oklahoma Highway 9 when a motor vehicle driven in the eastbound lane crossed the center line and collided with her head-on.[11] The driver of the vehicle, Bahe, was alleged to have visited the Thunderbird Casino, a casino owned and operated by the Absentee Shawnee Tribe of Oklahoma, prior to the collision.[12] As a result of the collision, Bittle filed suit in state district court contending that the Absentee Shawnee Tribe and its casino illegally served Bahe while he was

5. *Id.* (citing 2 J. CONTINENTAL CONG. 175, 183 (1775)).

6. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

7. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

8. COHEN, *supra* note 1, at 205 (citing United States v. Wheeler, 435 U.S. 313, 323-24 (1978)).

9. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756-57 (1998) (explaining that the idea of tribal immunity was first mentioned in *Turner v. United States*, 248 U.S. 354, 358 (1919), although it was not made explicit until 1940 in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).

10. 192 P.3d 810 (Okla. 2008).

11. *Id.* at 813.

12. *Id.*

obviously intoxicated and thus should have been held liable for all personal injuries sustained by Bittle in the accident.[13]

Oklahoma recognizes dram-shop liability[14] in an attempt "to place a hand of restraint on those authorized to sell and serve intoxicating liquors."[15] Therefore, Oklahoma law gives "parties injured by an intoxicated person a right of action against the persons who sold and served" the intoxicants.[16] The district court noted, however, that neither the Oklahoma Statutes nor the common law provided an individual with a private cause of action against a federally recognized Indian tribe.[17] The district court further concluded that suit against such a tribe is barred by the doctrine of sovereign immunity.[18] The court found that the tribe had not waived sovereign immunity and therefore could not be held liable.[19]

On appeal, the Oklahoma Court of Civil Appeals affirmed the lower court's ruling, finding that the tribe could not be haled into state court for a private cause of action under state dram-shop law.[20] Further, the court of civil appeals found that 18 U.S.C. § 1161[21] did not clearly and expressly authorize such a suit against an Indian tribe for an alleged violation of a state's alcoholic-beverage laws.[22] The court of civil appeals concluded that any tribal agreement to comply with state alcoholic beverage laws through state liquor licensing did not clearly and expressly waive tribal immunity and thus did not give the State civil adjudicatory jurisdiction.[23]

In an opinion written by Justice Steven Taylor, the Oklahoma Supreme Court vacated the opinion of the court of civil appeals and reversed the district

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13. *Id.*
14. 37 OKLA. STAT. § 537 (Supp. 2007).
15. 45 AM. JUR. 2D *Intoxicating Liquors* § 459 (2009).
16. *Id.*
17. *Bittle*, 192 P.3d at 813.
18. *Id.* at 813-14.
19. *Id.*
20. *Id.* at 814.
21. This section reads in full:

> The provisions of 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 (2006).
22. *Bittle*, 192 P.3d at 814.
23. *Id.*

court's dismissal.[24] The majority acknowledged that as a matter of federal law an Indian tribe is subject to suit only where Congress has authorized such suit or where a tribe has expressly and clearly waived its immunity.[25] Following the acknowledgment, the court nevertheless concluded that 18 U.S.C. § 1161 congressionally authorized the State of Oklahoma to adjudicate private-party dram-shop claims against Indian tribes.[26] The Oklahoma Supreme Court reasoned that the language "laws of the state" found in § 1161 is comprehensive and thus gives the State broad adjudicatory power over alcohol-related disputes involving Indians.[27] The Oklahoma Supreme Court looked to the U.S. Supreme Court case of *Rice v. Rehner*[28] as authority to support its decision. The Oklahoma Supreme Court ultimately expanded *Rehner* to grant states civil *adjudicatory* power, despite the fact that *Rehner* only provided states with civil *regulatory* power in tribal alcohol matters.[29]

The Oklahoma Supreme Court further reasoned that the Absentee Shawnee Tribe waived sovereign immunity by applying for, and accepting, an Oklahoma State Liquor License.[30] In its opinion, the Oklahoma Supreme Court held that such a license binds the holder to the Oklahoma Beverage Control Act, thereby allowing for the enforcement of that statute.[31] In a previous opinion the court had articulated that section 537(A)(2) extends the right to an individual to pursue a private cause of action against a commercial vendor who illegally furnishes alcohol to an obviously intoxicated person.[32] Thus, the Absentee Shawnee Tribe could be held liable by the terms of the Oklahoma State Liquor License.

In its decision, the Oklahoma Supreme Court failed critically to examine the contours of tribal sovereign immunity. Further, the court failed to follow roughly eighty years of legal precedent set before it. The court's decision to hold the Absentee Shawnee Tribe liable under state dram-shop law does nothing but alter the doctrine of tribal immunity to the court's liking.

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24. *Id.*
25. *Id.* at 819-20.
26. *Id.* at 823.
27. *Id.*
28. 463 U.S. 713 (1983).
29. *Bittle*, 192 P.3d at 823.
30. *Id.* at 826.
31. *Id.* The terms of the Oklahoma Beverage Control Act prohibit a person from selling, delivering, or knowingly furnishing alcohol to an intoxicated person. 37 OKLA. STAT. § 537(A)(2) (Supp. 2002).
32. Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300, 304 (Okla. 1986).

This note explores how the Oklahoma Supreme Court erred in *Bittle v. Bahe*, raising implications beyond the narrow realm of tribal sovereign immunity. Part II discusses tribal sovereign immunity as it has been recognized within the United States court system and the importance of upholding its boundaries. Parts III and IV explore the Oklahoma Supreme Court's improper reliance on *Rice v. Rehner* and its finding that 18 U.S.C. § 1161 authorized the state's assertion of jurisdiction. Part V argues that the Absentee Shawnee Tribe of Oklahoma did not clearly and expressly waive sovereign immunity by applying for, and accepting, an Oklahoma State Liquor License. Finally, Part VI discusses the potential impact of *Bittle* and explores issues not discussed by the Oklahoma Supreme Court in providing the state with implied jurisdiction.

II. Tribal Sovereignty

Sovereignty is a word with many interpretations, and it has often been used loosely when discussed in the Indian context. In its most basic form, the term refers to the inherent right or power to govern oneself free from external forces. And although a tribal nation's "sovereignty does not depend on its recognition from others, a [tribe]'s ability to *exercise* sovereign rights within [a larger] arena may be directly affected by such recognition or lack of it."[33]

Today the United States recognizes the sovereignty of many tribal nations.[34] This recognition, however, has been "tenuous and ever-shifting."[35] A host of court opinions, treaties, and legislation all speak to the status of tribal nations and the powers held by them. Contemporary understandings of sovereignty often reference autonomy, independence, self-governance, and freedom from external interferences.[36] Yet the meaning of sovereignty is not fixed. "Rather, the arenas in which it is expressed shape its conceptions, definitions, and applications."[37] Thus, history plays a vital role in the examination of sovereignty and the immunity inherent in it.

When the United States was first settled by European colonists, tribes were sovereign by nature. Tribes did not depend on any outside source of power to legitimize their actions, nor did they rely on any external government's aid in conducting their own affairs. "The forms of political order included multi-

33. 2 ENCYCLOPEDIA OF UNITED STATES INDIAN POLICY AND LAW 725 (Paul Finkelman & Tim Alan Garrison eds., 2009) [hereinafter ENCYCLOPEDIA].

34. *Id.* at 726.

35. *Id.*

36. *Id.* at 724.

37. *Id.* at 725.

tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans."[38] Yet as more and more colonists flooded the country, asserting their dominion over the territories once held by native peoples, tribal sovereignty began to shrink. The legal status of tribes quickly grew clouded, and uncertainties were left to the Supreme Court to resolve.

The Court first acknowledged the independence of tribes in *Worcester v. Georgia*.[39] It was there that Chief Justice Marshall described the tribes as "distinct, independent political communities, retaining their original natural rights."[40] The decision acknowledged that the rights granted to tribes to govern their members and territories flowed from a preexisting sovereignty that was limited, but not abolished, by the tribes' inclusion within the territorial bounds of the United States.[41] Marshall's decision in *Worcester* formally recognized tribal nations as sovereign states, but the doctrine of sovereign immunity would continue to evolve for the next 150 years.

A. Sovereign Immunity

Following the Revolutionary War, the United States continued to abide by many of the principles established in English common law, including the idea of sovereign immunity. But tribal nations would not truly obtain such immunity until 1919. "Although scholars have identified earlier cases that allude to tribal sovereign immunity, many sources, including the Court itself, point to *Turner v. United States and the Creek Nation of Indians* (1919)."[42] In *Turner* the Supreme Court recognized that immunity was an inherent part of sovereignty and could possibly be used as a defense from suit in tort litigation.[43]

Following *Turner*, courts began to question the circumstances in which the doctrine would be recognized. This led to little formal acknowledgment throughout the United States. Yet the Supreme Court solidified tribal sovereign immunity in 1940 in the case of *United States v. United States Fidelity & Guaranty Co.*[44] The Supreme Court held that as a matter of federal

38. COHEN, *supra* note 1, at 204.
39. 31 U.S. (6 Pet.) 515 (1832).
40. *Id.* at 559.
41. *Id.*
42. ENCYCLOPEDIA, *supra* note 33, at 723.
43. Turner v. United States, 248 U.S. 354, 357-58 (1919).
44. 309 U.S. 506 (1940). In *Fidelity & Guaranty* the United States sought (on its own behalf and on behalf of the Choctaw and Chickasaw Nations) to set aside a Missouri state-court ruling issuing a credit against the Indian tribes based on coal-mining leases made by the United

law an Indian tribe could only be subject to a state court's ruling when Congress had explicitly authorized such suit.[45]

Although *Turner* and *Fidelity & Guaranty* set the groundwork for sovereign immunity status in the United States, courts have continued to shape the contours of immunity. Since 1940 the doctrine has continuously been modified by subsequent legislation and court decisions. Congress has recognized the doctrine in various forms,[46] and the Supreme Court continues to issue opinions that profile tribal sovereign status.[47] Because of the legislative and judicial support of the doctrine, sovereign immunity has been continuously extended to tribes by lower courts with few exceptions and little opposition.

B. Tribal/Government Relations

Because tribes are considered sovereign under law, this makes them very unusual legal entities in our system of jurisprudence. A tribe needs no authority from the federal government to govern itself.[48] Rather, a tribe is its own source of power. Therefore, the proper inquiry is not whether authority has been granted to permit a tribe to act in a certain manner, but rather whether any limitation has been placed on the tribe to prevent it from acting within the realm of tribal sovereignty.[49]

Nevertheless, tribal sovereign immunity is not absolute. Like all governing powers within the United States, tribes remain held in check by the federal

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States on the tribes' behalf. *Id.* at 510-11. The Court found that a sovereign should not be subject to cross-claims away from its own forum just because a debtor is unavailable within its own jurisdiction. *Id.* at 512-13.

45. *Id.* at 512.

46. *See* 16 U.S.C. § 3378 (2006) (disclaiming effect of environmental statute on any recognized rights of tribal immunity); 25 U.S.C. § 450f(c)(3) (2006) (authorizing waiver of tribal immunity in insurance policies); 25 U.S.C. § 476(f) (2006) (prohibiting new regulations that diminish tribal immunities in place); 25 U.S.C. § 490 (2006) (authorization to waive immunity for a loan); 25 U.S.C. § 3746 (2006) (agricultural land management); 30 U.S.C. § 1733 (2006) (providing that a tribe must waive defense of sovereign immunity for wrongful disclosure of confidential information).

47. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Id.* at 56. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58; *see also* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).

48. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).

49. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852-53 (1985).

government. Chief Justice Marshall articulated this federal dominance when he detailed the disabilities arising in the context of tribal sovereignty. In *Cherokee Nation v. Georgia*, Marshall described the tribal-government relationship as "that of a ward to his guardian."[50] Tribes were thence to be considered as domestic dependents, relying on the United States to watch over them.[51] This statement of the law was created by Marshall as an extra-constitutional power. Despite the fact that it does not appear in the text of the Constitution, the language has widely been considered the defining source of tribal power within the United States ever since.[52]

Originally the Supreme Court placed only two restrictions on tribes as a result of their domestic dependent status: tribes could not freely alienate their lands, and they could not make treaties with foreign powers.[53] These limitations remained the only two restrictions on tribal power for almost 150 years. Then, in the 1978 case of *Oliphant v. Suquamish Tribe*, the Supreme Court found that tribal criminal jurisdiction over non-Indians inherently conflicted with a tribe's domestic dependent status.[54]

Following the Court's decision in *Oliphant*, the door was open for other inherent limitations to be placed on tribal power. Of those cases limiting tribal power, most notable is the case of *Montana v. United States*.[55] *Montana* expressed a "general proposition" that an Indian tribe could not use its inherent sovereign powers to regulate the activities of nonmembers on Indian land.[56] But the court then announced two exceptions to this general rule.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has

50. 30 U.S. (5 Pet.) 1, 17 (1831).

51. *Id.*

52. *See* COHEN, *supra* note 1, at 122 (discussing the sources of and justifications for the canons of construction in Indian law).

53. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

54. 435 U.S. 191, 207-09 (1978).

55. 450 U.S. 544 (1981).

56. *Id.* at 565.

> some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[57]

Despite *Montana*'s limitation on tribal authority, tribes still retained broad authority in Indian Country, limited only when no significant tribal interest was at stake. Subsequent decisions by the Supreme Court, however, presented a narrower understanding of *Montana* and its two exceptions. For example, in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[58] the Court held that the Yakima Nation did not possess inherent authority to impose zoning restrictions over nonmember-owned lands in an area where half the acreage was owned in fee by nonmembers.[59] The Court in *Brendale* stated that although *Montana* recognized a tribe's ability to retain inherent power to exercise civil authority, that ability was not absolute and did not encompass *all* conduct affecting the political and economic welfare of the tribe.[60] Later, in *Atkinson Trading Co. v. Shirley*,[61] the Court reasoned that the Navajo Nation had failed to justify its authority to impose a tax on hotel guests under either of *Montana*'s exceptions, and that the tax was presumptively invalid based upon "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[62]

Since *Montana*, it seems clear that the Supreme Court has certainly been more inclined to deflate a tribe's inherent power to govern. Yet tribal sovereignty continues to act as a shield against states imposing their laws in Indian Country. Present legal jurisprudence provides only two instances in which a tribe may be haled into state courts. An Indian tribe may be subject to suit where Congress has "unequivocally" authorized the suit or where the tribe has "clearly" waived its sovereign-immunity status.[63] The Supreme Court has clearly defined the relationship between modern tribal sovereignty and state power. Unless a tribe has expressed an unequivocal waiver of immunity or Congress has clearly and unmistakably preempted tribal sovereignty, state

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57. *Id.* at 565-66.
58. 492 U.S. 408 (1989) (plurality opinion).
59. *Id.* at 428 (plurality opinion).
60. *Id.* at 428-29 (plurality opinion).
61. 532 U.S. 645 (2001).
62. *Id.* at 654.
63. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *see also* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

courts will have no power to subject an Indian tribe to suit in their court systems.[64]

Bittle does not involve whether the tribe can utilize an inherent tribal power, so there is not a question of whether the federal government has taken such power away. Rather, the question is whether a state may assert its power over a tribe and its agency. For this to occur, the State of Oklahoma must have been given that power by the United States government, or else it must be proven that the tribe expressed a clear waiver of immunity to private civil suits in state court. Neither happened in the present case.

Finally, as with federal and state immunity, courts are often asked to assess whether tribal entities share in the tribe's immunity from suit. The Supreme Court has yet to develop a clear bright-line test to determine whether tribal businesses or agencies share in a tribe's sovereign immunity.[65] Yet some courts have found that if the entity serves as an "arm" of the tribe, tribal sovereign immunity generally extends to the various agencies of the tribe.[66] "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[67] This is recognized in part because the United States places heavy emphasis in encouraging tribal economic development.[68]

Furthermore, tribes use such entities to carry out daily governmental and business operations. Tribal casinos play a major role in tribal economic development. They are often set up by government compacts between tribes and states.[69] Tribes run and oversee most casino operations. And the casino receives most of its funding from tribal government. Given the case law and policies involved, the tribe as well as its agent—in this case, Thunderbird Casino—may shield itself from state power under the doctrine of sovereign immunity.

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64. *Kiowa Tribe*, 523 U.S. at 760.

65. *See* Gavle v. Little Six, Inc., 555 N.W.2d 284, 293 (Minn. 1996).

66. Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006) (stating that tribal casino, as arm of tribe, had sovereign immunity in suit by employee); *see also* Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986); Wilson v. Turtle Mountain Band of Chippewa Indians, 459 F. Supp. 366, 368-69 (D.N.D. 1978).

67. *Kiowa Tribe*, 523 U.S. at 760.

68. *Id.* at 757 ("We retained the doctrine [of tribal sovereign immunity] . . . on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency.").

69. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 48-50 (1996). This is because certain types of gaming are prohibited without the presence of such a compact under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (2006). *Seminole Tribe*, 517 U.S. at 48-49.

III. The First Drink: Rice v. Rehner

Questions of state power in relation to Indian tribes are to be treated as issues of preemption. This means that the federal government has chosen to govern the area of federal Indian law completely and therefore precludes states from enacting their own laws concerning the same area. The preemption analysis in Indian law is unlike all other modern preemption analyses, however.[70] Preemption usually occurs in one of two ways: either Congress enacts a law that explicitly removes state or local authority, or a court determines through judicial examination that the federal government intended that state law be preempted.[71]

On the other hand, preemption of state power in Indian law does not require an express congressional statement or preemptive intent to invalidate state law.[72] Rather, the Indian sovereignty doctrine provides a "backdrop" of sovereignty against which all other law must be read.[73] Furthermore, the Supreme Court has held that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests."[74] Yet although the usual absence of state power to regulate tribal action in Indian Country is clearly emphasized,[75] a few small cracks have begun to appear in the barrier that precludes state power. One of these exceptional circumstances comes out of *Rice v. Rehner*.[76]

Rehner features the most extreme application of the preemption doctrine to limit tribal immunity. In this case tribes were held, rather surprisingly, to have lost any preemptive power to regulate liquor sales on their reservations as a consequence of their domestic dependent status.[77] The issue in *Rehner* was whether the State of California could require a tribal member to obtain a state liquor license even when the liquor store was operated within reservation lands.[78] Under federal law, such sales were made legal if they were in conformity with the laws of the state.[79] The Supreme Court ultimately held

70. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).
71. *Id.*
72. Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690 (1965).
73. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).
74. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).
75. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 381 (1976).
76. 463 U.S. 713 (1983).
77. *Id.* at 722.
78. *Id.* at 715.
79. 18 U.S.C. § 1161 (2006).

that extensive federal regulation for more than a century, with no tradition of tribal authority over liquor sales, preempted the tribe from any ability to exclude the operation of state law.[80]

The holding in *Rehner* is surprising. The Supreme Court used an analysis that completely contradicted its usual preemption doctrine. As shown above, extensive federal regulation combined with the backdrop of tribal immunity usually preempts the *state* from exercising jurisdiction. But in reasoning unlikely to be repeated, the *tribe* itself was held to be preempted by the exercise of federal regulation. Moreover, the unusual preemption analysis in *Rehner* is not the only surprising facet of the decision. The opinion goes even further to hold that tribes lost their *inherent* power to regulate liquor as a consequence of their domestic dependent status.[81]

The expansive approach to preemption in *Rehner* remains an exception, and it has not been regarded as a significant expansion of the usual rule that *states* are preempted from asserting their power over matters concerning tribal sovereignty. Arguments can therefore be made regarding the Supreme Court's analysis in *Rehner*. But *Rehner* is not completely without merit. In *Rehner*, the Supreme Court recognized the traditional backdrop of tribal sovereignty. The Court stated that "[w]hen we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that State laws shall apply.'"[82]

The Supreme Court went on to say that "[i]f . . . we do not find such a tradition . . . our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."[83] The Court ultimately concluded that "tradition simply [had] not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians."[84] Rather, tradition displayed a complete prohibition of alcohol in Indian Country.[85]

Indeed, Congress had "imposed complete prohibition" in Indian Country by 1832,[86] lasting until Congress enacted 18 U.S.C. § 1161. Therefore, the

80. *Rehner*, 463 U.S. at 724-25.

81. *Id.* at 726.

82. *Id.* at 719-20 (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 171 (1973)).

83. *Id.* at 720.

84. *Id.* at 722.

85. *Id.*

86. *Id.*

Supreme Court's conclusion that § 1161 supported the application of state alcohol *regulation* can be understood, although reasonable minds can certainly differ on the issue. Yet it is absurd that the Oklahoma Supreme Court would attempt to *adjudicate* a case by relying on a holding that only permits a state to *regulate*. This is especially true when neither Congress nor the Supreme Court has expressly provided for such an action.

Looking at *Bittle* with the traditional view that states are prohibited from asserting power over sovereign tribes, it is clear that the State of Oklahoma would not have jurisdiction to adjudicate the present dram-shop dispute. But the Oklahoma Supreme Court did not use the traditional preemption analysis. Instead it employed the non-traditional preemption approach used in *Rehner*.

The preemption analysis utilized in *Rehner* is an unusual one. It offered less weight to the backdrop of tribal immunity when history revealed federal regulation regarding the subject matter in question. Therefore, in order for the court to accord less weight to tribal sovereignty and succeed, it must have shown that the federal government historically regulated the area of private civil actions. This should have forced the Oklahoma Supreme Court into a fact-specific inquiry rather than extending the reasoning in *Rehner*. *Rehner* involved whether Indian tribes had traditionally *regulated* the business of alcohol within reservation lands. Therefore, the holding in *Rehner* must be limited to a state's ability to regulate alcohol transactions. Yet the court in *Bittle* extended the holding in *Rehner* to encompass the adjudication of civil tort liability. This was wrong.

There is a distinct difference between civil *regulatory* jurisdiction and civil *adjudicatory* jurisdiction. "There is a difference between the right to demand compliance with state law and the [private] means available to enforce them."[87] A state's power to regulate certain tribal activity and the ability of a private individual to bring a lawsuit against a tribe in state court cannot be made coextensive. Specifically, although sovereign immunity may not be asserted to bar the former, it certainly may be asserted to bar the latter. As such, the appropriate inquiry should have been whether Indian tribes have traditionally been held liable in state courts for private civil tort actions—the answer to which is clearly no. Therefore, unlike in *Rehner*, the backdrop of sovereign immunity must be applied in further analyzing whether the tribe waived its immunity or Congress abrogated it.

As shown above, inherent in the doctrine of sovereign immunity is the notion that sovereign nations cannot be haled into state court unless such

87. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 755 (1998).

immunity has been expressly waived by the tribe or such immunity has been expressly taken away.[88] Yet the Oklahoma Supreme Court never addressed this question. Instead, it reasoned that the claim arose from an accident occurring on a state highway and therefore occurred outside the reservation and within the traditional jurisdiction of the State. Although this is true, the court wrongfully focused its attention on the place of injury rather than on the party to the suit. Tradition certainly favors state jurisdiction in such circumstances when the parties are individuals. But tradition has never acknowledged a state's ability to bring a sovereign tribe into state court.[89]

Rehner cannot rationally be interpreted to give adjudicatory power to the State of Oklahoma. Rather, proper weight should have been given to the backdrop of tribal sovereign immunity in further analyzing whether the tribe waived its immunity or whether Congress had taken the immunity away.

IV. Order Up Another Round: 18 U.S.C. § 1161

Tribal sovereign immunity is a matter of federal law.[90] Although Congress can certainly alter its parameters, the Supreme Court has held that it can do so only "through explicit legislation."[91] "Explicit legislation" requires answering whether Congress has by unequivocal expression of intent taken away a tribe's sovereign immunity. This test is strict, and it should be interpreted with close scrutiny.

The preemption doctrine has certainly made it quite difficult to draw a bright line in determining when a state may assume jurisdiction in Indian Country. Yet this does not change the fact that the Supreme Court still presumes that states are preempted from asserting their jurisdiction over tribes. The primary impact of preemption has been in areas of taxation and regulation,

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88. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

89. *Kiowa Tribe*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); *see also Citizen Band Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986); Wilson v. Turtle Mountain Band of Chippewa Indians, 459 F. Supp. 366, 368-69 (D.N.D. 1978) (stating that sovereignty will be upheld whether conduct occurs on or off the reservation).

90. *Kiowa Tribe*, 523 U.S. at 759.

91. *Id.*

rather than adjudication.[92] This is because the Supreme Court has been extraordinarily protective of civil adjudicatory jurisdiction over tribes and their entities. For example, in *Iowa Mutual Insurance Co. v. LaPlante*, the Supreme Court stated: "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[93]

Furthermore, following Congress's amendment of Public Law 280[94] in 1968, Congress has never intended to provide states with the authority to assume civil adjudicatory jurisdiction without tribal consent.[95] In light of this, 18 U.S.C. § 1161 cannot be interpreted to hold the opposite. The court in *Bittle* reasoned that the Oklahoma dram-shop law could be included within the language "laws of the state" found within § 1161. This argument appears valid on its face, yet with a detailed consideration, it is completely inconsistent with the legal precedent set before it.

The Oklahoma Supreme Court failed to consider the proper rules of statutory construction in interpreting a statute where Indians are a party to a suit. The standard principles of statutory construction do not have their usual force in cases involving Indian law. Due to the "unique trust relationship between the United States and the Indians,"[96] "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[97] As a general rule, "[a]mbiguities in federal law have been construed generously [in favor of tribes] in order to comport with . . . the federal policy of encouraging" tribal economic development and independence.[98] The rule "reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency."[99]

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92. *See Citizen Band Potawatomi*, 498 U.S. 505; Rice v. Rehner, 463 U.S. 713 (1983); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977).

93. 480 U.S. 9, 15 (1987).

94. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360(a) (2006).

95. Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164, 1172 (8th Cir. 1990).

96. Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

97. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

98. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

99. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting).

The canons of construction, which mandate statutory interpretations in favor of tribes, will apply only when the federal statute in question is ambiguous.[100] A statute will be "ambiguous" and thus should be interpreted in favor of the tribe if it is "capable of being understood in two or more possible senses or ways."[101] It is clear from the case law present in the *Bittle* action that ambiguity surrounds § 1161. The Oklahoma Court of Civil Appeals concluded that § 1161 did not clearly grant states the power to adjudicate civil tort claims against sovereign tribes.[102] Yet the Oklahoma Supreme Court reasoned that it did. Furthermore, three other courts throughout the United States confronted with the exact issue presented in *Bittle* found that § 1161 did not clearly give the state such civil adjudicatory power.[103]

Moreover, the terms relied on by the Oklahoma Supreme Court found in § 1161 cannot be construed as limitless. If Indian tribes were subject to every "law of the state" regarding alcohol transactions, then tribes would be subject to every private dram-shop dispute in which they were involved. This includes those dram-shop disputes where the injury results from an accident occurring on tribal lands. The court relied heavily on the location of the accident as support for its ruling. If the accident had occurred in the casino parking lot, however, it is undisputed that the state would have no jurisdiction.[104] The court directly contradicts established interpretations of applicable Indian law by holding § 1161 applicable in one instance where it is clearly inapplicable in another.

When enacting § 1161, Congress had full knowledge of present Indian law and the Supreme Court's long-standing Indian-law canons of construction.[105] Congress made no mention of giving to the states civil adjudicatory power in § 1161 despite its knowledge that federal Indian statutes would be interpreted

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100. Chickasaw Nation v. United States, 534 U.S. 84, 99 (2001); *see also Catawba*, 476 U.S. at 520 (Blackmun, J., dissenting); *Blackfeet Tribe*, 471 U.S. at 766.

101. *Chickasaw Nation*, 534 U.S. at 90 (citation omitted); United States v. White Plume, 447 F.3d 1067, 1074 (8th Cir. 2006).

102. Bittle v. Bahe, 192 P.3d 810, 814 (Okla. 2008).

103. Filer v. Tohono O'odham Nation Gaming Enter., 129 P.3d 78, 85 (Ariz. Ct. App. 2006); Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843, 850 (Tex. App. 1997); Foxworthy v. Puyallup Tribe of Indians Ass'n, 169 P.3d 53, 56 (Wash. Ct. App. 2007).

104. *See generally* Williams v. Lee, 358 U.S. 217 (1959) (holding that states are without jurisdiction when a non-Indian plaintiff brings suit against an Indian defendant where the action arose in Indian Country).

105. *See* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . .").

in favor of tribes. If Congress intended to grant such rights, it would have expressly defined such parameters when enacting § 1161.

Finally, although courts are directed to interpret ambiguities in favor of Indian tribes, their constructions must be reasonable and in accord with legislative intent and purpose.[106] Statutory provisions that are unclear on their face, as is the case with § 1161, may be made clear from the surrounding circumstances and legislative history.[107]

It is clear that by 1953, federal laws curtailing liquor transactions within Indian Country were viewed as discriminatory.[108] Congress therefore introduced a bill (later enacted into law as § 1161) that was intended only to "terminate Federal discriminations against the Indians of Arizona."[109] In a hearing on the original bill, Representative John J. Rhodes, Jr. of Arizona stated that the bill's sole purpose was to eliminate federal alcohol prohibition on Indian lands because it had a detrimental effect on tribes and was discriminatory by nature.[110] This illustrates that § 1161 was passed primarily for the benefit of Indians and was intended only to regulate alcohol sales. The bill was later revised to include all states, not just Arizona. In making these revisions, Bureau of Indian Affairs Commissioner Dillon S. Meyer stated that "[w]e certainly do not intend to revise State laws regarding Indians or anyone else . . . ."[111] Rather, the intention of the bill was not to interfere with existing law. Therefore, Congress had no intention of changing the law allowing tribes the right to assert sovereign immunity.

The court in *Bittle* extrapolates from *Rehner* the notion that § 1161 was intended to remove all discrimination, but that Indians still had to comply with state law in every regard. The court went on to infer that Congress intended to waive tribal sovereign immunity to private tort actions based on state dram-shop violations. But, unlike the circumstances in *Rehner*, the court in *Bittle* provided no legislative history supporting this conclusion. "Central to [*Rehner*'s] holding was the long-standing lack of tribal control over alcohol, which had always been subject to regulation by some non-tribal government

106. United States v. Howard, 8 F. Supp. 617, 619 (N.D. Okla. 1934).

107. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

108. Rice v. Rehner, 463 U.S. 713, 726 (1983).

109. *See id.* at 726-27 (citing *Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong. (Mar. 18, 1953) [hereinafter *Hearings*]). The Court in *Rehner* notes that the subcommittee hearings were not officially published. *Id.* at 727 n.12.

110. *Id.* at 727.

111. *Id.* (quoting *Hearings*).

entity . . . ."[112] Congressional intent behind § 1161 was also ample to support state regulation of alcohol. Yet there is no analogous legislative history or intent to support subjecting tribes to private dram-shop causes of action. *Rehner* clearly demands compliance with state law, but neither it nor § 1161 addresses private rights of action to enforce state law against an Indian tribe. This is undoubtedly because there is an inherent difference between a state's regulation of alcohol and an individual's ability to collect monetary damages arising out of an alcohol-related accident.[113] The Supreme Court's waiver of sovereign immunity for the former in *Rehner* does not waive sovereign immunity for the latter.[114]

The legislative history surrounding § 1161 never references tribal sovereign immunity. Moreover, it does not provide a waiver of such immunity for dram-shop-related litigation. The Oklahoma Supreme Court's reasoning simply does not follow the United States Supreme Court's precedent in interpreting § 1161 in favor of the tribe. Furthermore, the court's analysis in *Bittle* is unreasonable in light of the congressional intent in enacting § 1161. Such reasoning in no way comports with the "present federal policy favor[ing] the strengthening of tribal self-government."[115]

The *Bittle* decision further ignores the "presumption that a statute is not intended to make a radical change in Indian affairs" unless such a purpose is made explicitly clear by Congress.[116] "[W]here the statutes and their legislative histories fail to clearly establish such an intent, the Court *may not* supply one by judicial interpretation."[117] Giving a state the power to force an Indian tribe into state court and hold them liable under state law is certainly a radical change in Indian affairs. The State of Oklahoma has never had the power to adjudicate such disputes, nor has an Indian tribe ever been liable for damages under a state law to which they did not personally consent.

The court in *Bittle* takes a great leap of jurisprudence to find that 18 U.S.C. § 1161 and *Rehner* are dispositive of the issue concerning sovereign immunity as it relates to private dram-shop actions. Three other appellate courts have

112. Foxworthy v. Puyallup Tribe of Indians Ass'n, 169 P.3d 53, 57 (Wash. Ct. App. 2007).

113. Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843, 854 (Tex. App. 1997).

114. *Id.*

115. Logan v. Andrus, 457 F. Supp. 1318, 1324 (N.D. Okla. 1978) (citing Bryan v. Itasca County, 426 U.S. 373 (1976)).

116. *Id.* at 1325; *see also Bryan*, 426 U.S. at 390; United States v. Nice, 241 U.S. 591, 599 (1916); United States v. Celestine, 215 U.S. 278, 290 (1909).

117. *Logan*, 457 F. Supp. at 1325 (quoting Harjo v. Kleppe, 420 F. Supp. 1110, 1142 (D.D.C. 1976), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978)) (emphasis added).

been confronted with the precise issue faced in *Bittle*.[118] All three courts unanimously concluded that *Rehner* and its interpretation of § 1161 could not be extended in cases of private dram-shop actions.[119] The courts agreed that a tribe's sovereign immunity extends to its commercial and governmental activities both on and off the reservation and provides a defense to suits filed in state court. The Oklahoma Supreme Court remains the only court to hold that § 1161 granted states the power to adjudicate such disputes.

V. A Few Too Many: Waiver of Sovereign Immunity

The federal government has taken significant steps in recent years to encourage tribal economic development. It has been a goal of the federal government to reduce the dependency status of tribes and assist Indians in breaking free from a long history of economic depression.[120] Tribes, however, have only recently begun to take advantage of these economic incentives. Accordingly, such encouragement authorizes Indian tribes to waive their sovereign immunity for purposes that it sees as fit.[121] Such waivers are usually utilized to entice outside businesses onto reservation lands. Thus, other than the explicit congressional grant of jurisdiction discussed in the previous section, the only other method by which a state may obtain jurisdiction over an Indian tribe is the waiver of sovereign immunity by the tribe itself.

The United States Supreme Court has clearly stated that a tribe's waiver of sovereign immunity may not be implied, but must be unequivocally expressed.[122] The extent to which a clause constitutes a waiver of the tribe's sovereign immunity, if at all, turns on the exact terms of that clause.[123] Thus, in a contract to which an Indian tribe is a party, explicit language broadly disclaiming immunity constitutes a waiver of tribal sovereignty,[124] and "language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, usually will not achieve that end."[125]

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118. Filer v. Tohono O'odham Nation Gaming Enter., 129 P.3d 78 (Ariz. Ct. App. 2006); *Holguin*, 954 S.W.2d 843; Foxworthy v. Puyallup Tribe of Indians Ass'n, 169 P.3d 53, 56 (Wash. Ct. App. 2007).

119. *Filer*, 129 P.3d at 85; *Holguin*, 954 S.W.2d at 850; *Foxworthy*, 169 P.3d at 56.

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

121. 25 U.S.C. §§ 476-477 (2006).

122. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

123. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 30 (1st Cir. 2000).

124. *Id.*

125. *Id.* at 31.

It has been argued, as the Oklahoma Supreme Court attempts to do in *Bittle*, that a waiver of immunity may be inferred from certain tribal commercial activities. This argument is based on the premise that tribes were not intended to be "'super citizens' . . . free from all but self-imposed regulations."[126] Yet federal and state courts have consistently refused to acknowledge such arguments, both because of the explicit waiver requirement set out by the United States Supreme Court and because of the goals of the United States in fostering tribal economic and political development.[127]

It is clearly set out in the facts of *Bittle* and in the Oklahoma Supreme Court's reasoning that there was never a clear, express waiver of sovereign immunity on the part of the tribe sufficient to render the tribe subject to suit. There is nothing in the Oklahoma Beverage Control Act [128] that states the tribe consented to any kind of suit in state court for private civil tort claims simply by virtue of accepting a state liquor license. Therefore, under the laws of the United States, the tribe did not waive immunity as a result of its agreement to be bound by the provisions of the Oklahoma Beverage Control Act.

Yet the court in *Bittle* reasoned that when a tribe agrees to be bound by the Oklahoma Beverage Control Act, it waives sovereign immunity. This reasoning flies in the face of United States Supreme Court jurisprudence. In *Santa Clara Pueblo v. Martinez*, the Supreme Court held that waivers of sovereign immunity by Indian tribes "must be unequivocally expressed."[129] The Oklahoma Beverage Control Act is simply a statutory scheme to regulate alcoholic beverages within the state of Oklahoma. Nowhere in the Act is there explicit, unequivocal language stating that Indian tribes waive their sovereign immunity by complying with the terms and provisions of the Act.

It is true that courts often recognize a tribe's express waiver through treaties, compacts, or other express agreements. Therefore, the Oklahoma Supreme Court should have looked to the Indian Gaming Regulatory Act.[130] This Act provides that compacts may, and in some cases must, be entered into between Indian tribes and the State prior to a tribe's commencement of gaming operations.[131] The Act states that compacts may include provisions relating to "the application of the criminal and civil laws and regulations of the Indian tribe or the State . . . [and] the allocation of criminal and civil jurisdiction

126. Bittle v. Bahe, 192 P.3d 810, 819 (Okla. 2008).
127. Morton v. Mancari, 417 U.S. 535, 541-42 (1974).
128. 37 OKLA. STAT. §§ 501-599 (2001).
129. 436 U.S. 49, 58 (1978) (quoting United States v. King, 395 U.S. 1, 4 (1969)).
130. 25 U.S.C. §§ 2701-2721 (2006).
131. *Id.* § 2710(d)(1)(C).

between the State and the Indian tribe" necessary to enforce such laws, regulations, remedies, and other matters concerning gaming operations.[132]

As a matter of fact, gaming compacts entered into between Indian tribes and the State of Oklahoma include provisions and remedies for tort claims that arise out of incidents occurring at gaming facilities. It is interesting to note, however, that the gaming compact was never mentioned or relied upon by the majority in the *Bittle* decision. This is likely due to the fact that the court felt no need to consult the gaming compact because it was able to find an implicit waiver of sovereign immunity under the Oklahoma Beverage Control Act. But even if the Oklahoma Supreme Court had consulted the gaming compact, it would have been unable to find any explicit waiver of tribal sovereign immunity regarding *off-reservation* tort claims.

Gaming compacts between the State of Oklahoma and Indian tribes (including the Absentee Shawnee Tribe) are directed by the provisions of the Model Tribal Gaming Compact.[133] In turning to the specific provisions of the Model Tribal Gaming Compact, it is clear that the State would not have jurisdiction concerning Bittle's dram-shop claims against the tribe. This is because the Absentee Shawnee Tribe did not waive immunity with respect to dram-shop actions.

Part 6 of the Model Tribal Gaming Compact provides specific limited consent to suit for tort actions. Within this section, the tribe acknowledges that *patrons of the gaming facility* should be "afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the [gaming] enterprise arising out of incidents occurring at a facility."[134] But the Compact then goes on to say that the tribe consents to suit on a "limited basis," and no other consent to suit with respect to tort claims or any other claims against the tribe may be made.[135] The tribe's consent to tort claims thus extends only to *patrons* who actually claim to have been injured at the facility.[136] Moreover, the Compact defines a "patron" as "any person who is on the premises of a gaming facility, for the purpose of playing covered games authorized by this Compact."[137] According to the terms of the Compact, Bittle was not a patron at the tribe's casino on the night

132. *Id.* § 2710(d)(3)(C)(i)-(ii).
133. 3A OKLA. STAT. § 281 (Supp. 2004).
134. *Id.* § 281 at pt. 6(A).
135. *Id.* § 281 at pt. 6(A)(2).
136. *Id.* § 281 at pt. 6(C)(1).
137. *Id.* § 281 at pt. 3(20).

of the accident. Therefore, the tribe did not consent to her dram-shop claim, and such claim is still barred by the tribe's sovereign immunity.

If the Compact's inherent purpose is to provide a remedy to those injured as a result of improper conduct within the casino, then the Oklahoma Legislature should amend the Model Tribal Gaming Compact expressly to include dram-shop claims or those claims made by non-patron third parties. In such cases the tribe would then consent to suit in courts of competent jurisdiction, and future plaintiffs would not be left without a remedy. As the Compact currently exists, however, no waiver of tribal sovereign immunity to such claims can legitimately be argued.

VI. The Hangover: Pitfalls of the Bittle *Decision*

The court in *Bittle* established that the State of Oklahoma has the power to adjudicate dram-shop disputes between non-Indian citizens and sovereign tribes. As discussed above, this is certainly a leap in jurisprudence. Even if the tribe's immunity status is eliminated, however, a state court still may not have proper jurisdiction to adjudicate the dram-shop dispute. First, the cause of action may be held to have arisen in Indian Country, thus giving the tribe exclusive jurisdiction. Furthermore, because in a dram-shop action the alleged breach and subsequent injury often occur in different jurisdictions, choice-of-law considerations must be made.

As discussed in Part I, dram-shop statutes are designed to place a degree of limits on those authorized to sell and serve intoxicating beverages. The fundamental purpose of dram-shop liability is to provide a remedy to those injured by the illegal sale of intoxicating beverages.[138] Thus, a determination of whether a duty has been breached in a dram-shop action depends upon whether an alcohol vendor excessively served a patron. The negligent conduct can occur only within the vendor's facility. It follows that the negligent action under dram-shop laws—the breach of one's duty not to serve excessive amounts of alcohol to a patron—could have occurred only inside the casino and on tribal lands.

Because the conduct in question clearly occurred on tribal lands, the next question must then be whether states have the power to adjudicate private civil claims arising in Indian Country. The United States Supreme Court has held that state courts have absolutely no jurisdiction over claims between non-Indians and Indians (or a tribe without immunity) when the cause of action

138. *See generally* Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300 (Okla. 1986).

arises in Indian Country.[139] Such claims are to remain within the *exclusive* jurisdiction of the tribe.[140] In fact, in the civil law context, Congress has never enacted general nationwide legislation to provide a federal or state forum for disputes between Indians and non-Indians arising in Indian Country.[141]

The Supreme Court's clearest articulation of jurisdiction in Indian Country came in *Williams v. Lee*, a civil case that involved a non-Indian plaintiff suing an Indian defendant for the purchase price of goods sold to the Indians on the Navajo reservation.[142] The Supreme Court held that state courts have no jurisdiction over such actions.[143] Justice Hugo Black's opinion for the majority laid heavy emphasis upon *Worcester v. Georgia* and Chief Justice John Marshall's proposition that state law had no force in Indian country. Justice Black then added: "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."[144]

Although *Williams* remains the seminal case on tribal civil adjudicatory jurisdiction, the United States has taken some measures to limit its application. In 1953, the United States Congress enacted Public Law 280.[145] With its enactment, the law delegated criminal and civil jurisdiction over Indian lands to five states.[146] Thus, in California, Minnesota, Nebraska, Oregon, and Wisconsin, tribal adjudicatory jurisdiction over Indian-owned lands became severely limited. In addition, Public Law 280 presented the remaining states with the opportunity to assume the same civil and criminal jurisdiction over tribal lands.[147] Of the remaining states, only ten chose to accept jurisdiction in some fashion over tribal lands.[148]

Congress amended Public Law 280 in 1968. The amendment effectively abolished a state's unilateral ability to adopt criminal and civil jurisdiction over Indian lands.[149] The 1968 revisions now require a state to obtain tribal

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139. Williams v. Lee, 358 U.S. 217, 223 (1959).
140. *Id.*
141. Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855 n.17 (1985).
142. 358 U.S. 217 (1959).
143. *Id.* at 223.
144. *Id.* at 219.
145. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360(a) (2006).
146. COHEN, *supra* note 1, at 544.
147. *Id.*
148. *Id.*
149. 25 U.S.C. § 1326 (2006) ("State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable

consent by a majority vote in a special election in order to assume such jurisdiction.[150] Since that time, no state—including Oklahoma—has ever assumed jurisdiction pursuant to Public Law 280.[151] Therefore, absent Public Law 280, Oklahoma state courts lack jurisdiction to hear actions against Indians arising on tribal lands.

It is clear that Oklahoma was not one of the original five states given jurisdiction under Public Law 280.[152] Furthermore, Oklahoma "has demonstrated neither that it acquired jurisdiction prior to the 1968 requirement of tribal consent, nor that the Tribes have consented to the State's assumption of jurisdiction."[153] Lastly, the Oklahoma Supreme Court recognizes that "tribal consent alone, even if present, would not be enough to clothe the State with jurisdiction over Indian Country."[154] In discussing this point, the Oklahoma Supreme Court properly stated:

> Whether a state has under the current version of [Public Law] 280 validly asserted concurrent jurisdiction must be demonstrated by the means used in effecting a transfer of jurisdiction. Although a disclaimer state—such as Oklahoma—need not amend its constitution, the U.S. Supreme Court, in a post-1968 opinion, stated that it must still ". . . take positive action before [Public Law] 280 jurisdiction can become effective."[155]

Therefore, following the precedent in *Williams*, and in the absence of Public Law 280, Oklahoma does not have any civil adjudicatory power to settle disputes that arise in Indian Country and involve an Indian defendant. This is true despite the unusual circumstances surrounding *Bittle*. Dram-shop actions, unlike most tort actions where breach and injury occur simultaneously, involve a breach and subsequent injury that may take place in separate locations. Due to the action's unique nature, many courts have undertaken a choice-of-law

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in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.").

150. *Id.*

151. COHEN, *supra* note 1, at 545.

152. State *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77, 86 (Okla. 1985).

153. *Id.* at 88.

154. *Id.*

155. *Id.* (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 493 (1979)).

analysis to determine the proper applicable law when the plaintiff's injury occurs in a separate jurisdiction from that of the alleged breach.[156]

Under Oklahoma law, "the rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[157] Therefore, Oklahoma may not be able to assert state dram-shop law against the tribe if it can be found that the tribe has a more significant relationship to the occurrence in question. In assessing which jurisdiction has the "most significant relationship" to the occurrence, Oklahoma has adopted the Restatement (Second) of Conflict of Laws.[158] The Restatement lists four factors to be considered in making such an inquiry. The factors that are to be considered and evaluated are (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties arose.[159] Oklahoma further recognizes that none of the choice-of-law factors are controlling, but that the factors must be evaluated according to the type of case involved.[160]

Consequently, in the case of *Bittle*, it is uncertain whether the Absentee Shawnee Tribe or the State of Oklahoma has the more significant relationship to the occurrence and the parties. First, the site where the injury occurred, an Oklahoma highway, balances equally against the place where the alleged conduct giving rise to the accident (the excessive serving of alcohol) occurred: the casino in Indian Country. Also, the domicile or residence of the plaintiff, Oklahoma, counterbalances with the location of the defendants' business, Absentee Shawnee tribal land. The factors concerning the place where the relationship between the parties arose is irrelevant because no relationship existed prior to the accident. Thus, after close consideration of these factors, neither the Tribe nor the State seems to have the greater interest.

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156. *See, e.g.*, Bankord v. DeRock, 423 F. Supp. 602, 606 (N.D. Iowa 1976) (applying Iowa law when alcohol served in Iowa resulted in injury to Minnesota resident in Minnesota); Dunaway v. Fellous, 842 S.W.2d 166, 169 (Mo. Ct. App. 1992) (holding that, where drinking occurred in Missouri and accident occurred in Illinois, Missouri law applied); Thoring v. Bottonsek, 350 N.W.2d 586, 591 (N.D. 1984) (holding that North Dakota law had no effect when alcohol was sold in Montana but accident occurred in North Dakota).

157. Brickner v. Gooden, 525 P.2d 632, 637 (Okla. 1974).

158. *Id.*

159. *Id.*

160. *Id.*

The deciding factors in this case are the relevant policies and interests of the Tribe and the State. The importance of the tribal legal system to tribal sovereignty is well-recognized by the Supreme Court and Congress.[161] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[162] Thus, any state law attempting to question this sovereignty would inherently infringe upon it. The federal policy of promoting economic growth and the protection and promotion of tribal self-government could therefore require that the Oklahoma law not be applied.

Yet the state's interests in preserving its own laws and protecting the citizens of Oklahoma are not to be overlooked. Oklahoma has a real interest in ensuring that the laws applied inside its borders do not contravene its public policies. Furthermore, Oklahoma's interests would be severely impaired if its public policy were subordinated to that of a tribe. Oklahoma citizens could then no longer rely on the protections provided to them by the State simply because a patron became intoxicated on Indian lands rather than off of them. Certainty, predictability, and uniformity point neither to state nor tribal law. It remains possible, however, that Oklahoma dram-shop law may not be applied extraterritorially.

Moreover, in cases where ambiguity exists between federal and tribal courts, courts may adhere to the Indian Abstention Doctrine.[163] The Indian Abstention Doctrine deals with concurrent jurisdiction between tribal and federal courts.[164] The doctrine recognizes that, although jurisdiction may be concurrent, a federal court must abstain from assuming jurisdiction over disputes involving reservation affairs until parties have exhausted all available tribal-court remedies.[165] This means that a party must pursue its action in tribal court before a federal court will assume jurisdiction. The Supreme Court has listed three reasons to support this policy, acknowledging that exhaustion would (1) promote the congressional policy of strengthening tribal self-governance; (2) serve the orderly administration of justice; and (3) provide the

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

162. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

163. COHEN, *supra* note 1, at 630 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985)).

164. *Id.*

165. *Nat'l Farmers Union*, 471 U.S. at 856-57.

parties and the federal court involved with the benefit of the tribal court's expertise.[166]

Because the Indian Abstention Doctrine was originally created to resolve jurisdictional disputes between federal and tribal governments, it presently remains unclear whether the doctrine also applies to conflicts between state and tribal courts. Some state courts have applied the doctrine,[167] while other states have refused to apply it or have simply ignored it.[168] Certainly, the Supreme Court has provided some support for the exhaustion of tribal remedies when it comes to state courts. In *Iowa Mutual*, the Supreme Court indicated that exhaustion would apply to both state and federal courts when it used the phrase "any nontribal court."[169] Yet the Supreme Court has not provided any clear ruling on the matter. Therefore, it seems that a state court may apply the Indian Abstention Doctrine at its discretion.

It is thus recommended that, if the substantive law of the tribe is favored after conducting a choice-of-law analysis, state courts should dismiss the action in order to permit tribal courts to decide the matter. If the state's choice-of-law system points to the use of the forum state's law, however, the state court may accept jurisdiction. Finally, if the state's choice-of-law system results in ambiguities as to whether state or tribal law should be applied, the state should abstain and defer to the tribe. This follows the general government policy that ambiguities should be interpreted in favor of the tribe and that tribal self-government should be encouraged.

This system is not without problems. For example, the Absentee Shawnee Tribe currently does not recognize any form of dram-shop action. This poses a major problem. How does a state court defer to tribal law when no law exists? In such cases, some courts have previously found that where there is an absence of tribal law addressing the particular subject matter of a case, then the tribal court fails to exercise its sovereignty.[170] In such instances any tribal policies pressing for the use of tribal law and abstention are no longer valid. For example, the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* permitted suit in federal court when tribal remedies were

166. *Id.*

167. *See, e.g.*, Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. Ct. App. 1995); *In re* Marriage of Limpy, 636 P.2d 266 (Mont. 1981).

168. *See, e.g.*, Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994).

169. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

170. *See, e.g.*, Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980) ("There has to be a forum where the dispute can be settled.").

unavailable.[171] But although these arguments certainly have some validity, they contradict the very principles of the Indian Abstention Doctrine. The Indian Abstention Doctrine mandates that federal courts defer to tribal courts so they may determine their law and jurisdiction. Government policy presses for better courts within tribal governments. Yet if states fail to defer in cases of first impression, how then are tribal courts supposed to evolve? In cases of first impression, and when choice-of-law is unclear, it is suggested that state courts abstain, thus allowing tribes to determine the bounds of their own jurisdiction and law.

VII. Conclusion

Some legal scholars believe that public policy demands a widespread reconsideration of the doctrine of tribal sovereign immunity. Many in fact agree with the Oklahoma Supreme Court, claiming that such immunity improperly and unfairly conditions a plaintiff's ability to recover damages under otherwise-tortious circumstances. Yet these scholars, like the Oklahoma Supreme Court, rightfully remain in the minority.

The Oklahoma Supreme Court's ruling in *Bittle* effectively separates Oklahoma from the majority of state and federal case law that undeniably recognizes inherent tribal immunity. Courts across the country have deflated this immunity only reluctantly. Furthermore, modern and historical jurisprudence mandate that immunity be stripped only in the presence of clear federal legislation or an explicit waiver of tribal immunity. Yet the Oklahoma Supreme Court seemingly throws the legal precedents of the masses to the wind for the interest of one.

Fortunately, it is unlikely that the *Bittle* ruling will be expanded to encompass greater infringements on tribal sovereign immunity. Given the unusual scope of dram-shop liability, the ruling draws a bright line with respect to the specific tort in question and thus should not be extended. If attempted, however, the expansion would only inflate the present legal tragedy and mirage of justice found in the *Bittle* decision.

171. *Id.*