At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty (Part I of South Dakota Law Review Trilogy)

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At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty

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While it is routine to describe the current policy period in Indian affairs as meaningful self-determination,¹ this description is rapidly unraveling and has been for some time. This unraveling suggests the need for reassessment and reconsideration in light of over a century of shifting federal policy, which has often occurred without motive or fanfare.² Such reassessment reveals the emergence of a new paradigm of tribal sovereignty, which is rooted in a significant shift in the Indian law jurisprudence of the Supreme Court, as well as a corresponding change in the current use of sovereignty by tribes in the exercise of their powers of self-governance. Applications of the core analytical and policy concerns of this new model are corroding the essential elements of the historical powers of tribal self-governance.

This new era marks the transition from a largely defensive use of sovereignty to resist state and federal encroachment against tribal authority to a more assertive, offensive use of sovereignty in the context of nation-building and affirmative tribal governance. Identifying this shift is important from an evolving political and legal perspective, but more significantly, it is critical for the new questions it raises relative to the Supreme Court’s Indian law jurisprudence, and the challenges it poses to key dimensions of tribal authority including tribal values, tribal institutional structure, and tribal legal process.

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² See, e.g., DAVID GETCHES, ET AL., FEDERAL INDIAN LAW 216-257 (5th Ed., Thomson-West). This is, of course, the federal, not tribal, conception of tribal sovereignty and self-governance.
² Id. at 140-237.
Every new model finds its core within the shell of the old, especially when the old is viewed from a different perspective. This is particularly true when this perspective tracks the fracture of the old through splintering change and its ultimate crystallization into a new paradigm. This emerging paradigm possesses not only strong predictive value, but is also insightful in illuminating the new challenges and shifting contours of contemporary tribal sovereignty at the crossroads. This essay reflects an initial attempt to spark both recognition and dialogue about what is down at the crossroads.

I. The Fracture of the Old Paradigm of Meaningful Self-Determination

If one takes the conventional model of meaningful self-determination and applies it to most Supreme Court decisions since 1980, it does not hold up very well. In a long list of cases, beginning with Oliphant v. Suquamish Indian Tribe\textsuperscript{3} and running through Nevada v. Hicks,\textsuperscript{4} the meaning self-determination was routinely set aside in favor of such anti-self-determination doctrines as "implied divestiture"\textsuperscript{5} and "inconsistent with their (dependent) status."\textsuperscript{6} Yet in many earlier pivotal cases such as Williams v. Lee\textsuperscript{7} and McClanahan v. Arizona Tax Commission,\textsuperscript{8} meaningful self-determination and a robust tribal sovereignty appeared central to the Court’s analytical framework. Revisiting these cases from the split perspective of "defensive" versus "offensive" tribal sovereignty is instructive.

In the well-known case of Williams v. Lee,\textsuperscript{9} the Court held that a state court has no jurisdiction over a lawsuit brought by a non-Indian store owner against a Navajo

\textsuperscript{3} 435 U.S. 191 (1978).
\textsuperscript{4} 533 U.S. 353 (2001).
\textsuperscript{6} Oliphant, 435 U.S. at 208.
\textsuperscript{7} 358 U.S. 217 (1959).
\textsuperscript{8} 411 U.S. 164 (1973).
\textsuperscript{9} Williams, 358 U.S. at 223.
tribal member for an alleged bad debt contracted on the Navajo Reservation. The Court formulated its well-known infringement test and relied heavily on the heft of *Worcester v. Georgia*¹⁰ and the Treaty of 1868 with the Navajos. Specifically, the Court stated:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves ... The cases in this Court have consistently guarded the authority of Indian governments on their reservations. Congress recognized this authority in the Navajo in the Treaty of 1868 and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."¹¹

Fourteen years later in 1973, the Court extended its Williams holding to the case of *McClanahan v. Arizona State Tax Comm’n*. In *McClanahan*, the Court struck down Arizona’s attempt to enforce its state income tax provision against a Navajo tribal member living and working on the Navajo Reservation.¹² The Court rejected a narrow application of its infringement test, but rather extended its doctrinal reach “toward reliance on federal pre-emption.”¹³ Nevertheless, the Court rooted much of its analysis on the continuing (though not static) viability of *Worcester v. Georgia*¹⁴ and the Treaty of 1868 with the Navajo Nation.¹⁵

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¹⁰ 31 U.S. 515 (1832), *id.* at 218-221:

> Rendering one of his most courageous and eloquent opinions, Chief Justice Marshall held that Georgia’s assertion of power was invalid. “The Cherokee Nation . . . is a distinct community, occupying its own territory within which the laws of Georgia can have no force, and where the citizens of Georgia have no right to enter, but with the assertion of the Cherokees themselves, or in conformity with treaties and with Acts of Congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.”

*Id.* at 219.

¹¹ *Id.* at 223 (citations omitted).

¹² *McClanahan*, 411 U.S. at 181.

¹³ *Id.* at 172.

¹⁴ *Id.* at 168-172.

¹⁵ *Id.* at 174-176. *See also* Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965) in which the Court struck down a state gross proceeds tax asserted against a federally licensed
The federal preemption doctrine has proved further dispositive in more recent cases such as California v. Cabazon Band of Mission Indians, which rejected the application of state gaming laws on the Reservation, and Minnesota v. Mille Lacs Band of Chippewa Indians, which held state hunting, fishing and gathering laws inapplicable in the face of an express (off reservation) treaty right. The Court also upheld the shield of tribal sovereign immunity against the off reservation assertion of state jurisdiction in Kiowa Tribe of Oklahoma v. Manufacturing Technology, Inc.

All of these cases seemed to exude a confident brio with regard to meaningful self-determination. Yet there was also a darker and increasingly predominant line of cases that appeared to subvert the very notion of meaningful self-determination. This line of cases begins with Oliphant and Montana v. United States and runs through Nevada v. Hicks, and the recently decided case of Plains Commerce Bank v. Long Family Land and Cattle Company. All of these cases, taken together, have fashioned an expanding anti-self-determination regime.

How so? With little jurisprudential fanfare and without express constitutional or congressional authority, the Court changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians. In Oliphant, the Court held that tribes had no criminal jurisdiction over non-Indians. The non-Indian trader doing business on the Navajo Reservation. The Court cited both Worcester v. Georgia and the Treaty of 1868 to support its analysis. Id. at 686-688.

18 523 U.S. 759 (1998). But see also C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001) in which the Court held that a tribe’s express agreement to an arbitration clause in a contract with a non-Indian commercial entity constituted a waiver of sovereign immunity.
21 128 S.Ct. 2709 (2008). This case is discussed in more detail infra at pp. 18-23.
Court revisited the grist of its previous decisions and began to reshape their heft. The role of treaties and the Cherokee Nation cases were taken down a peg or two.

The Treaty of Point Elliot, which by the Court’s own admission was silent on the issue of criminal jurisdiction, could nevertheless, with “the addition of historical perspective, cast substantial doubt upon the existence of such jurisdiction.”

Worcester v. Georgia was cited not for its endorsement of tribal sovereignty, but rather for its recognition of tribal dependence on the federal government. This dependence meant that tribes “are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers ‘inconsistent with their status’.” The Court had begun to eviscerate its previous analytical approach and its reliance on treaties and the Cherokee Nation cases and to replace it with a more free floating, policy-oriented approach of judicial preference.

Montana v. United States continued this anti-self-determination trend as to matters of civil jurisdiction. In Montana, the Court held that the Crow Tribe could not regulate the hunting and fishing of non-Indians on fee land within the Reservation. As in Oliphant, the relevant treaties, here the Fort Laramie Treaties of 1851 and 1868, were brushed aside with the observation that “If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot

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22 Oliphant, 435 U.S. at 206-207. The Court also dodged the canons of construction:
In interpreting Indian treaties and statutes, “(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 174 (1973), see Kansas Indians, 5 Wa., 737, 760 (1866); United States v. Nice, 241 U.S. 591, 599 (1916). But treaty and statutory provisions which are not clear on their face may “be clear from the surrounding circumstances and legislative history.” Cf. Decoteau v. District County Court, 420 U.S. 425, 444 (1975).
Id. at 208.
23 31 U.S. 515, 555 (1832). Id. at 207.
24 Oliphant, 435 U.S. at 208 (emphasis in the original).
25 450 U.S. at 566.
apply to lands held in fee by non-Indians."^{26} Neither Cherokee Nation nor Worcester were cited or discussed.

The Court did not fashion an absolute black letter rule against tribal civil jurisdiction over non-Indians as it did against tribal criminal jurisdiction over non-Indians in Oliphant. Instead, it created its well-known proviso,^{27} but was otherwise steadfast to its new way of thinking:

But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation.^{28}

Without notice or adequate explanation, Montana effectively reversed the historical presumption (absent a treaty provision or federal statute to the contrary) in favor of tribal jurisdiction over non-Indians to a (rebuttable) presumption against tribal jurisdiction over non-Indians on fee land. Montana subsequently became recognized by the Court as the “pathmarking case” on the subject.^{29} In fact, in Nevada v. Hicks,

\footnote{Id. at 559.}
\footnote{The proviso provides:
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. Williams v. Lee, supra at 223; Morris v. Hitchcock, 194 U.S. 384; Buster v. Wright, 135 F. 947, 950 (CAS); see Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-54. 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 some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court, 424 U.S. 382, 386; Williams v. Lee, supra, at 220; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264, 273.
Id. at 565-566.}
\footnote{Id. at 584 (emphasis added).}
the Court extended the presumption against tribal civil jurisdiction over non-Indians on fee land to cover all land within the Reservation.  

In *Hicks*, the Court held that tribal courts do not have civil jurisdiction over a lawsuit brought against state officials for actions allegedly taken on trust land and beyond the scope of their authority. There was no pertinent treaty or constitutional discussion. *Worcester* was further confined to the margins of contemporary Indian law: “Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago,’ that the Court departed from Chief Justice Marshall’s view that ‘the laws of (a state) can have no force’ within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561 (1832).”

All of this is well-known within the field of Indian law scholarship and several scholars, including myself, have described this swath of Indian law jurisprudence in various ways, including subjectivism, common law colonialism, and judicial plenary power. While all of these explanations possess a certain persuasive and descriptive

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30 *Id.* at 360.
31 *Id.* at 364. The Court also held that tribal courts were not courts of general jurisdiction and thus had no jurisdiction over federal cause of action as provided in 42 U.S.C., § 1983. *Id.* at 367-368.
32 *Id.* at 361 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)).

Professor Getches detects increasing “subjectivism” in Supreme Court Indian law jurisprudence premised on judicial considerations of “what the current state of affairs ought to be” and he wisely counsels against this trend: The foundation principles of Indian law demand resistance to the temptation of judicial activism. A return to foundation principles, furthermore, would spare tribes the subjective judgments of courts by requiring congressional action, with the scrutiny of the political process and the tribes’ full participation, before modifying their rights as sovereigns. Indian rights do not depend on sympathy for the plight or historical mistreatment of Native Americans. Self-determination for tribes is rooted in ancient laws and treaties, and is protected against incursions except those that Congress deliberately allows. Well-meaning judicial attempts to balance and accommodate interests of Indians and non-Indians not only are
power, none of them rise to the level of a paradigm with predictive force, except for
the dismal observation that tribes always lose before the bar of the Supreme Court
when non-Indians are involved. Justice Scalia acknowledged this very point in Hicks:
“we have never held that a tribal court had jurisdiction over a nonmember
defendant.”

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inconsistent with the limited role of courts, as sanctioned by the foundation
principles of Indian law, buy tar inevitable culturally charged.

Getches, supra at 1654-55.

Professor Frickey discerns a seismic self-aggrandizing shift in the role of the
Supreme Court in Indian law:

In the final analysis, in federal Indian law the Court has given the Congress much
more legislative power than the text of the Constitution suggests, then
bootstrapped that into a judicially enforceable power to clean up those areas of
Indian affairs that Congress has not yet addressed. In establishing the plenary
power of Congress over Indian affairs, the Court performed the perhaps
disappointing, but nonetheless unsurprising, role of the “court of the conqueror”
reflected in Johnson v. McIntosh – it deferred to established patterns and
practices designed to centralize the colonial power in the political branches. In
aggrandizing to itself a judicially enforceable “dormant” aspect of this power,
however, the Court has become an actor imposing its own set of colonial values,
not merely an agent of congressional choices. This second step seems
remarkable, even given the realities of a colonial society. The Court has
transformed itself from the court of the conqueror into the court as the conqueror.
(Footnotes omitted.)

Frickey, supra at 68.

I have also identified this metastasis of plenary power:

The plenary power doctrine can now be seen as coming in two distinct vintages.
There is the classic doctrine of congressional plenary power as established in Lone
Wolf. Yet even if Congress has not acted – where one would normally
presuppose an unimpaired tribal sovereignty – the Court now recognized a
judicial plenary power to parse the limits of tribal court authority based on federal
common law. A federal common law that at least heretofore has not been
equated with any notion of implied divestiture of tribal authority.

Pommersheim, supra at 328 (citations omitted).

There is also a rich, new vein of Indian law scholarship discussing models of tribal
governance. See e.g., Angela Riley, Good (Native) Governance, 107 Col. L. Rev. 1049 (2007),
(Tribal) Sovereignty and Illiberalism, 95 Cal. L. Rev. 799 (2007); Bethany Berger, Liberalism and
Republicanism in Federal Indian Law, 38 Conn. L. Rev. 813 (2006); Kevin Washburn, Tribal Self-
Determination at the Crossroads, 38 Conn. L. Rev. 777 (2006); Sarah Krakoff, The Virtues and Vices
of Sovereignty, 38 Conn. L. Rev. 797 (2006); and Justin Richland, Arguing With Tradition: The
Language of Law In Hopi Tribal Court (U. Chi. Press, 2008).

34 Hicks, 533 U.S. at 358, n.2. Yet the Court did not make this observation a black-letter rule: “We
leave open the question of tribal court jurisdiction over nonmember defendants in general.” Id.
II. The Hidden Metaphor in *City of Sherrill v. Oneida Indian Nation* and the Emergence of a New Paradigm of Tribal Sovereignty

The Supreme Court, itself, has, indirectly spoken to this conundrum in the metaphoric entrails of its decision in *City of Sherrill v. Oneida Indian Nation.*

35 In that case, the Court in an eight to one decision held that the Oneida Indian Nation could not avoid local property taxes on fee land it purchased on the open market, despite its location within the original boundaries of the Reservation.

36 Justice Ginsburg, writing for the majority, noted that Oneida Indian Nation “cannot unilaterally revive its ancient sovereignty, in whole or in part, over the (land) parcels at issue” despite their location within the original boundaries of the Reservation. This was so because it would have the effect of “disrupting the governance of central New York’s counties and towns.” Justice Ginsburg observed rather harshly that the standards of federal Indian law “preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.”

37 Id. at 203.
38 Id. at 202.
39 Id. at 214.

Yet the key to the Court’s thinking is not what Justice Ginsburg said, but rather what Justice Stevens articulated in his dissent. Justice Stevens points out that the majority opinion completely misconstrues the case as one centering on the Tribe’s attempt to use its sovereignty “offensively” to assert authority over non-Indians and their property. Justice Stevens notes that it is much more accurate to recognize that the
Tribe is seeking to use its sovereignty “defensively” to prevent the state from ejecting the Tribe from its property for the failure to pay property taxes to the City.⁴⁰

Justice Stevens emphasizes that the “majority’s fear of opening a Pandora’s box of tribal powers is greatly exaggerated” and without merit.⁴¹ According to Justice Stevens, this nervousness and fear resulted in the Court distorting the very nature of the case before it and venturing into the issues of reservation diminishment and tribal tax immunity that are wholly reserved to Congress.⁴²

The metaphor that captures the core of the Court’s thinking is a well-worn sports metaphor. On the fields of sovereignty, tribes can only play defense, but not offense. And sometimes, as in the City of Sherrill case, “permissible” tribal defense can be converted by the Court into “impermissible” tribal offense. It hardly seems like a level playing field. Yet, as suggested, can this metaphor be transformed into a template that explains, and even predicts, much of the Supreme Court’s Indian law jurisprudence in the modern era, especially in regard to jurisdiction involving non-Indians and the States? The answer is yes.

First, how accurate is the emerging paradigm with regard to the cases cited thus far in this essay? The answer is one hundred percent accurate. In the cases where the tribes or individual Indians have used tribal sovereignty defensively, that is to claim that the states or individual non-Indians could not assert state authority over individual Indians or Indian tribes, the paradigm predicts vindication and success in the defensive use of sovereignty. And, indeed, that is the result in Williams v. Lee,⁴³ McClanahan v.

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⁴⁰ Id. at 224 (Stevens, J., dissenting).
⁴¹ Id. at 226, n.6.
⁴² Id. at 224-225.
⁴³ 358 U.S. 217 (1959), supra note 7 and accompanying text.
Arizona State Tax Commission,44 California v. Cabazon Band of Mission Indians,45
Manufacturing Technology, Inc.47

What about the attempts by tribes or individual Indians to use tribal sovereignty
offensively to assert authority over non-Indians and states, especially involving activities
that do not take place on trust land? The paradigm predicts a lack of success and
again it is one hundred percent accurate. The Court rejected such assertions of
offensive tribal sovereignty in all five cases cited and discussed, which include
Oliphant,48 Montana, 49 Strate,50 Hicks51 and the Sherrill52 case itself.

Second, the litany and litmus of predictive accuracy also encompasses a wide
range of cases not directly discussed. Such cases includes: Alaska v. Village of Venetie
Tribal Court,53 South Dakota v. Bourland,54 Idaho v. Coeur d’Alene Tribe55 and Atkinson
Trading Co., Inc. v. Shirley.56 In each of these cases, offensive tribal sovereignty was
struck down.

There is also a hybrid strain of cases in which the state is seeking to assert its
taxing authority over non-Indians on the Reservation. Such taxing cases also recognize

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44 411 U.S. 163 (1973), supra note 8 and accompanying text.
45 480 U.S. 202 (1987), supra note 16 and accompanying text.
46 526 U.S. 172 (1999), supra note 17 and accompanying text.
48 435 U.S. 191 (1978), supra note 3 and accompanying text.
49 450 U.S. 544 (1981), supra note 18 and accompanying text.
50 520 U.S. 438 (1997), supra note 29 and accompanying text.
51 533 U.S. 353 (2001), supra note 4 and accompanying text.
52 544 U.S. 197 (2005), supra note 33 and accompanying text.
53 522 U.S. 520 (1998) (Alaska Native communities are not located in Indian country and thus lack
    authority over non-Indian commercial entities).
54 508 U.S. 679 (1993) (tribes have no jurisdiction over non-Indians on federally taken land located
    within the boundaries of a reservation).
55 521 U.S. 261 (1997) (tribes cannot sue states in federal court over disputes about the ownership
    of a lake bed).
56 532 U.S. 645 (2001) (tribes cannot assert a hotel use tax against non-Indians staying at a non-
    Indian motel located on fee land within a reservation).
the right of the tribe to tax non-Indians engaged in activities on trust land and, arguably, therefore these cases do not directly involve either offensive or defensive tribal sovereignty. The Court has developed no predictive patterns in these cases. Sometimes the Court permits double taxation by the tribe and the state over non-Indians and sometimes it permits only tribal taxation. The cases often turn on a balancing of interests approach. These cases include White Mountain Apache v. Bracker,\textsuperscript{57} Cotton Petroleum Corp. v. New Mexico\textsuperscript{58} and Washington Confederated Tribes of the Colville Reservation.\textsuperscript{59}

There are few cases that require some special mention. In Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,\textsuperscript{60} the Court held that the Tribe did have zoning authority over a small parcel of non-Indian fee land located within the closed part of the Reservation; but it did not have zoning authority over non-Indian fee land within the larger, open part of the Reservation.\textsuperscript{61} Given that each part of the holding commanded a different majority of justices and the unique geographical configuration of “open” and “closed” portions of the Yakima Reservation, the case is rarely cited and appears to have limited precedential value. Within our paradigm, Brendale upholds one use of offensive tribal sovereignty and turns aside another in the same case. It is clearly \textit{sui generis} in this regard.

\textsuperscript{57} 448 U.S. 136 (1980) (state cannot tax non-Indian activity involving BIA roads and lumbering on trust land).
\textsuperscript{58} 490 U.S. 163 (1989) (state may \textit{concurrently} enforce a severance tax on non-Indian extraction activity on trust land).
\textsuperscript{59} 447 U.S. 134 (1980) (state may \textit{concurrently} tax the sale of cigarettes to non-Indians and non-member Indians on trust land).
\textsuperscript{60} 492 U.S. 408 (1989).
\textsuperscript{61} \textit{Id.} at 415.
In the cases of *National Farmers Union Ins. Cos., v. Crow Tribe of Indians*\(^\text{62}\) and *Iowa Mutual Ins. Co. v. LaPlante*,\(^\text{63}\) the Court appeared to uphold the offensive use of tribal sovereignty by requiring non-Indian defendants in tribal court proceedings to “exhaust” their tribal court remedies before making any jurisdictional challenge in federal court. As subsequent cases indicated, however, this “exhaustion” rule was “prudential” rather than jurisdictional\(^\text{64}\) and the Supreme Court has yet to find tribal court jurisdiction over a non-Indian in any modern era case. *National Farmers Union* and *Iowa Mutual* thus appear to stand for the proposition that while a lawsuit brought against non-Indians based on events that took place on fee land on the reservation must begin in tribal court, it is quite unlikely that it will ever be heard on the merits there.\(^\text{65}\)

Despite the very high order of accurate legal prediction, there is something quite disturbing about this emerging paradigm. Legal analysis is so unevenly applied within this family of cases that it undermines the integrity of much of the Court’s decisionmaking in this area. The general affirmance of the defensive use of tribal sovereignty to thwart state authority over tribes and their members largely conforms to relevant treaty analysis and application of the *Cherokee Nation* cases, especially *Worcester v. Georgia*. Yet the routine striking down of any offensive use of tribal sovereignty makes no reference to constitutional, statutory, or treaty analysis, but instead appears to rest on mere judicial preference; a preference that often seems to border on fear of, or even hostility to, tribal jurisdiction over non-Indians. The template

\[^{62}\text{471 U.S. 845 (1985).}\]
\[^{63}\text{480 U.S. 9 (1987).}\]
\[^{64}\text{Strait, 520 U.S. at 453.}\]
\[^{65}\text{See, e.g., Strate v. A-1 Contractors, supra note 29 and Nevada v. Hicks, supra note 4 and accompanying text. See also Plains Commerce Bank v. Long Family Land and Cattle Co., infra notes 79-92 and accompanying text.}\]
reveals a grievous asymmetry: law and analysis on one side, raw policy preference on the other.

III. Implications of the New Paradigm for the Exercise of Tribal Sovereignty

The emerging paradigm does even more in that it illuminates the many challenges to the exercise of tribal sovereignty in the twenty-first century. These challenges and implications include addressing matters relative to tribal nation building, expanding the vocabulary of sovereignty, and defining boundaries of tribal self-governance.

A. Sovereignty and Nation-Building

Offensive tribal sovereignty is different from defensive tribal sovereignty in a number of important aspects. Defensive tribal sovereignty is largely a project of tribal and individual resistance involving a commitment to decolonization, which seeks to avoid any further imposition of state authority in Indian country. Offensive tribal sovereignty is an active effort to advance community interests and to engage in nation building. Defensive tribal sovereignty largely revolves around the word “no” and the concept of pushing back against the advance of adverse authority. Offensive tribal sovereignty largely revolves around the word “yes” and a commitment to building structures and institutions to push forward. Defensive tribal sovereignty involves very little financial cost and may be effectuated with very little in the way of economic resources. Offensive tribal sovereignty involves significant cost in order to build institutions and to develop the necessary infrastructure to carry forward programs of affirmative nation building.

Defensive tribal sovereignty often can be deployed with minimal resources. Offensive tribal sovereignty usually cannot be deployed so easily because it requires
personnel, training, and infrastructure in order to develop an adequate and competent regulatory and adjudicatory regime. For example, if tribes are going to regulate hunting and fishing, collect taxes, enforce environmental standards, or provide civil jury trials, there is the need for sufficient fiscal resources to establish the necessary regulatory agency and judicial enforcement essentials. Without these resources, such efforts are likely to founder and are potentially at risk of being struck down, especially with regard to non-Indians, at the federal level as contrary to basic notions of due process and other less well articulated concerns related to racial and cultural stereotypes.

One policy initiative with which to confront this challenge might involve the establishment of a National Intertribal Infrastructure Development Authority (NIIDA). Given the growing asymmetry of wealth and economic development in Indian country, it makes sense that the more wealthy tribes (e.g. Mashantucket Pequot, Prairie Island Community, Saginaw Chippewa Tribe) that already disperse a small percentage of their net revenues to local non-Indian groups and county and city governments should commit a similar (if not greater) stream of revenue for infrastructure development of less developed tribes who are stymied by their own lack of resources. It makes little political or cultural sense not to comprehensively address some of the most apparent structural impediments to the advancement of tribal sovereignty, particularly for the treaty tribes of the western plains who remain outside the windfall of much casino gaming.

It is further true that the use of offensive tribal sovereignty is demanding and complex in an additional way. The ability to do something requires not only identification for the desired end, but also concern for the available means to achieve this end. The power to do something is no guarantee that the exercise of that power will not fail because deficient or defective means are employed. Offensive tribal
sovereignty may, like constitutional authority generally, provide a theater for the exercise of power, but it cannot guarantee the ratification of all such efforts. In the constitutional arena, any failed exercise of power remains available to be reworked within appropriate constitutional limits. It may not be so in the context of the exercise of offensive tribal sovereignty, because offensive tribal sovereignty has no such constitutional tether. When the use of offensive tribal sovereignty is struck down, it is likely struck down permanently. The risks of the use of offensive tribal sovereignty are exceedingly high and lack any constitutional safety net.

B. Expanding the Vocabulary of Sovereignty

The differentiation of modern tribal sovereignty into both its defensive and offensive components also reveals the necessity to expand its vocabulary. Sovereignty often is equated with power, a kind of power that is recognized within the larger national context as legitimate. The exercise of defensive tribal sovereignty comfortably fits within this meaning. The successful use of defensive tribal sovereignty requires the necessary power to say “no” to the use of offensive sovereignty by the states against tribes and individuals Indians in Indian country.

A program of offensive tribal sovereignty has a wider set of concerns and reference points. In this context, power is a necessary, but not sufficient, condition for its successful and meaningful exercise. One of the key concerns relative to such sufficient conditions is the concern with values. In any program of offensive tribal sovereignty, a central endeavor must be to identify the particular values that the offensive use of tribal sovereignty seeks to vindicate.

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66 Under the current rubric of congressional and jurisdictional plenary power in Indian affairs, there is, of course, no tribal “no” that may be successfully asserted against the federal regime in Indian affairs. The problems of such a regime are addressed infra Part VI at pp. 26-30.
Sovereignty unhinged from values risks losing its way in political and legal struggles that often seem to have no point of reference beyond the four corners of the power dynamic. In fact, such practice risks catching the infection of the colonizer, who governs by power and power alone. This point is particularly salient for tribes from two different perspectives. One perspective is that of the more or less continuing federal oversight that exists in Indian affairs. Whatever oversight exists, whether congressional, judicial, or administrative, it is more, rather than less, likely to be successfully navigated by tribes if those federal agents of oversight can identify and understand the values put into play by the various tribes. Without such understanding and convergence, misunderstanding and rejection threaten to undermine any tribal mix of power and values.

The second perspective derives from the explication of values with regard not only to the perception of those with oversight authority, but has the additional, perhaps more important, benefit of advancing clarity and feedback from those who are subject to tribal authority. Power alone can often impose its will, but it is the braid of power and values that weaves the fabric of consent and endorsement. Such a synthesis of power and values forms the core ingredient of political and cultural legitimacy at the tribal level.

The integration of power and values is most often constructed through the medium of the legal process. In the law saturated conditions of modern life, legal process contains the key workings that hold things together. Legal process in this context, despite much variation, finds its optimal definition within the framework of due process. A due process that reflects the classical elements of notice and the opportunity to be heard, whether in regard to such matters as social benefits,
termination of employment, voting, running for office, removal, or enrollment and
disenrollment, is central to the legitimate tribal enforcement of the relevant legal and
cultural norms. Due process is the legal process equivalent of dignity and respect.
Whether the tribal law is new or old, modern or traditional, dignity and respect are
essential. Legal process within the tribal system must advance this core in order that the
substance it seeks to implement will have the opportunity to flourish and to stand tall.

C. Boundaries, Checks and Balances, and the Abuse of Power

If it is true that legitimate legal process needs to permeate the substance of tribal
law in order to provide legitimacy, it is also necessary to address the issue of boundaries
and the potential abuse of power. While such discussions can often be no more than a
way to confine or even dismantle tribal sovereignty, the issue cannot be avoided. If
one bookend of legitimacy is reliable legal process, then the other is surely the one that
both distributes tribal power within tribal government and identifies the boundaries of its
exercise.

The issue of boundaries and checks and balances is one of the hallmarks of the
United States Constitution. This is true both within the federal government itself with
regards to the distribution and balance of power among the legislative, executive, and
judicial branches, as well as within the context of federalism and its balance between
the federal government and the states.67 The Constitution was written in large measure

67 See, e.g., Laurence Tribe, American Constitutional Law 6-7 (Foundation Press, 3d ed., Vol. One,
2000):
That all lawful power derives from the people and must be held in check to
preserve their freedom is the oldest and most central tenet of American
constitutionalism. . . . In this first model, the centralized accumulation of power in
any person or single group of persons meant tyranny; the division and separation
of powers, both vertically (along the axis of federal, state and local authority)
meant liberty. It was thus essential that no department, branch, or level of
government be empowered to achieve dominance its own. If the legislature
against the grain of monarchy and its despotism. As a result, the rallying cry of many citizens often is that the government (state or federal) cannot do something because of constitutionally imposed structural limitations to the scope of its power. There is, of course, the glaring irony in the context of Indian law, where the doctrines of congressional and judicial plenary power do not appear to have any boundaries, constitutional or otherwise, within the theatre of their exercise.68

Nevertheless, it is this backdrop that often provides the reference point within the non-Indian community, especially the non-Indian commercial community, when it comes to doing business in Indian country. There is always a familiar refrain that becomes part of legal conversation – does the tribe have an independent judiciary and a corresponding separation of powers? This is often regarded by non-Indians as the pivotal ingredient in deciding whether there is tribal court legitimacy. Non-Indian banks often invoke this mantra in dealing with tribes.69 This concern, while legitimate, is often presented within a very narrow exchange such that it often is almost a self-fulfilling prophecy, which undermines any meeting of the minds. And without any meeting of the minds, the sought after (mutual) commercial advantage never materializes.

The better question in these circumstances is not whether there is a strict separation of powers, but rather whether there is a structure or procedure in place


which guarantees the reliability and independence of the legal result. Nevertheless, when there are no convincing answers to these concerns, commerce often falters and mistrust holds sway. In these situations, there is a kind of *de facto* “implied divestiture,” “from above,” which holds that if tribes are not up to the “reasonable” demands of the forces of commerce, the fruits thereof shall be denied to them. With this reality before them, a number of tribes, including both the Cheyenne River Sioux Tribe and the Rosebud Sioux Tribe, have expressly amended their constitutions to include a separation of powers provision.\(^70\)

This concern for boundaries and safeguards is not limited to the outside non-Indian business community, but often is even more trenchantly articulated by the tribal membership itself. While the non-Indian community concerns often make their way into the media and federal court jurisprudence, the concerns of tribal members are more often localized within community discussions and tribal court jurisprudence.\(^71\)

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\(^{70}\) See, e.g., Article IV, Sec. 1(k) of the Cheyenne River Sioux Tribe Constitution (1992) and Article XI of the Rosebud Sioux Tribe Constitution (2007). Article VI, Sec. 1(k) of the Cheyenne River Sioux Tribe Constitution provides:

To promulgate ordinances for the purpose of safe-guarding the peace and safety of residents of the Cheyenne River Indian Reservation, and the Tribal Council shall establish courts for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe or any Indian present on the Cheyenne River Indian Reservation, and for the trial and punishment of Indians charged with the commission of offenses prescribed by ordinances of the Tribal Council. *Decisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council.* (emphasis added)

Article XI of the Rosebud Sioux Tribe Constitution provides:

Section 1. The Rosebud Sioux Tribal Court shall be separate and distinct from the Legislative and Executive Branches of Tribal government. No person, including any tribal official or person acting in behalf of a tribal official, shall induce or attempt to induce a favorable decision, or interfere in any manner whatsoever with any decision of any judge of the Tribal or Supreme Court. The Tribal Council shall pass legislation which shall denote sanctions for the violation of this section. Despite these changes, many in the non-Indian business community remain uninformed about them. Old stereotypes die hard.

\(^{71}\) As a general matter, federal courts have no authority to review the merits of tribal court decisions. Federal review only involves challenges to tribal court jurisdiction, which is only a potential issue when non-Indians are involved. *Getches, et al.*, *supra* note 1 at 609-643.
are the challenges from “below.” Within my own experience serving on several tribal appellate courts, there have been myriad due process challenges raised by tribal members in such diverse contexts as voting, eligibility to run for office, referendum, removal from office, disenrollment, employment termination, and mandatory drug testing. These challenges are all intimately connected to matters of dignity, respect, and political consent, which are the cornerstone of essential legitimacy. The basic concern of many tribal members is that they simply want a place where they can speak and be heard. A tribal sovereignty that attempts to squelch the common tribal member’s opportunity to be heard risks taking on the identity of the dominant society, which has done so much to marginalize the Indian voice within the federal system. Meaningful tribal sovereignty does not mean untrammeled power, but rather power with responsible, self-imposed checks and constraints.

IV. Plains Commerce Bank: Testing the Paradigm

The recent Plains Commerce Bank case provides a forceful example with which to test the reliability and outer limits of the new tribal sovereignty paradigm. This is so because it splits neatly into two parts: the view of the lower courts\textsuperscript{72} and the view of the Supreme Court itself in its decision this past June 2008.\textsuperscript{73}

A. Lower Courts

In Plains Commerce Bank, two Cheyenne River Sioux tribal members, husband and wife, and their Indian controlled corporation brought a lawsuit in tribal court against a non-Indian owned bank based on several breach of contract claims involving loans to lease and purchase fee land and to run a cattle operation on the

\textsuperscript{72} 491 F.3d 878 (8th Cir. 2007) \textit{cert. granted} 128 S.Ct. 829 (2008).
\textsuperscript{73} 128 S.Ct. 2709 (2008). The original draft of this article, including Section IVA was written before the Court’s decision on June 25, 2008.
Cheyenne River Sioux Reservation. There was also a discrimination claim based on an assertion that the terms of the lease and purchase agreement were more onerous than normal because the borrower was Indian.\textsuperscript{74} There was a two day jury trial and a general verdict for $750,000 (plus interest) was rendered in favor of the Plaintiffs.\textsuperscript{75} The Tribal trial court, the Tribal Court of Appeals, the federal district court, and the Eighth Circuit Court of Appeals all found – without a single dissent – that the tribal court had jurisdiction over the claims and that the Bank was not denied due process.\textsuperscript{76}

What is unique about the \textit{Plains Commerce Bank} case is that it is the first jurisdictional case in the modern era to reach the federal courts, including the Supreme Court, in which there was a full jury trial on the merits in the tribal trial court. In all other cases, federal jurisdiction challenges were based on interlocutory appeals of tribal appellate decisions on motions to dismiss and without any adjudication on the merits. In this case, there was no surmise or speculation about how the tribal court would adjudicate both as to matters of substance and procedure. For the first time, it was all there in the record before the federal reviewing courts.

It is quite significant to note in this regard that the Bank raised due process as well as jurisdictional issues at every stage of the proceeding. It lost the due process (and jurisdictional) challenge at every stage, both tribal and federal.\textsuperscript{77} In the action filed in federal court – after the exhaustion of tribal court remedies – the Bank raised two

\begin{itemize}
  \item \textsuperscript{74} \textit{Plains Commerce Bank}, 481 F.3d at 882.
  \item \textsuperscript{75} More specifically, the Tribal court jury found in favor of the Plaintiffs on the breach of contract, bad faith, and discrimination claims and against the Plaintiffs’ claim of improper use of self-help remedies. \textit{Id.} at 882-883.
  \item \textsuperscript{76} \textit{Id.} at 892. Note also that I am the Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals and wrote the unanimous opinion of the Court.
  \item \textsuperscript{77} \textit{Id.}
\end{itemize}
specific issues, namely that the Tribal court lacked jurisdiction over the discrimination claim\textsuperscript{78} and that the Tribal court denied the Bank due process.

These claims, as noted, were all denied by the Tribal trial judge, the Cheyenne River Sioux Tribal Court of Appeals, the federal district court, and the Eighth Circuit Court of Appeals. There was not a single dissent along the way. The unanimous Eighth Circuit Court of Appeals decision is particularly instructive. The due process claim of the Bank was disposed of with dispatch:

The bank has also suggested that as a non Indian company it could not obtain a fair hearing in tribal court on a claim that it discriminated against Indians, but there is simply no evidence to support this assertion. If the bank feared prejudice from an all Indian jury, it could have requested that the tribal court exercise the discretion granted to it by the tribal code to summon non Indians to serve on the jury. It made no such request, but instead proceeded to trial without striking any jurors or challenging the composition of the panel. Absent some indication that the tribal courts were biased or subject to political control, we must presume the court system to be competent and impartial. \textit{Duncan Energy}, 27 F.3d at 1301. The bank has failed to show any bias in this case.\textsuperscript{79}

The discrimination claim was held to be firmly within the reach of the Tribal court’s authority under \textit{Montana’s} consensual agreement exception.\textsuperscript{80} The written agreement to lease and to sell the fee land at issue was quintessentially consensual in nature and the (tribal) prohibition against discrimination in such lease and sale was a quite unsurprising legal standard. In fact, such a common law tribal rule paralleled the development of mainstream common law:

\textit{Tort law has historically developed incrementally in the courts. See \textit{id}. at 3. (“The progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before.”). If the encouragement of tribal self governance through the development of legal institutions is to remain a federal priority, see \textit{e.g.}, \textit{Iowa Mut.}, 480 U.S.\textsuperscript{81}}

\textsuperscript{78} The Bank apparently conceded the Tribal court’s jurisdiction over the contract based claims.
\textsuperscript{79} 491 F.3d at 892.
\textsuperscript{80} \textit{id}.

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at 16-17, 107 S.Ct. 971, then tribal appellate courts must be given latitude to shape their own common law to respond to the cases before them, as our own courts have done over the centuries.  

The Eighth Circuit result appeared to reflect a straightforward convergence of legal reasoning and respect for tribal court decisionmaking. The paradigm failed. The use of offensive tribal sovereignty was vindicated.

B. Supreme Court

The Supreme Court reversed the decision of the Eighth Circuit by a five-four decision and appeared to continue its death march toward a de facto (soon to be de jure?) Oliphant on the civil side of the tribal court docket. Nevertheless, there was also a growing resistance within the Court to this march that brushed aside all that stands in its way, including the facts, the law, and basic legal reasoning. The majority also flunked (perhaps intentionally?) the basic vocabulary of sovereignty test identified in this article relative to power, values, and legal process. Whether this performance is due, in whole or in part to a pro-business bias, racial animus, Indian law illiteracy, or simple indifference remains to be seen.

The rule that emerges from the Court’s decision is a new black letter standard, which holds that tribal courts lack jurisdiction to bar discrimination in any sale of fee land within the reservation by a non-Indian to an Indian. This is so despite the fact that such a transaction is a classic example of a “consensual agreement” as identified in the “pathmarking” case of Montana v. United States. Chief Justice Roberts’s majority opinion, his first in Indian law, boldly states that tribes lack authority to prohibit

81 Id.
82 Plains Commerce Bank, supra note 73, at 2709.
83 See discussion supra at pp. 13-15.
84 Plains Commerce Bank, supra note 73, at 2720.
85 Montana, 564 U.S. at 565.
discrimination (by non-Indian sellers) in such transactions. In arriving at such an innovative and questionable result, the Court made no attempt to provide any legal authority to support its conclusion.

In the context of Montana’s controlling test, if there is a “consensual relationship,” the tribe “may regulate, through taxation, licensing or other means the activities of nonmembers” or when the “conduct threatens or has direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Despite the apparent obviousness that the sale of land is an “activity” and involves “conduct,” the Court blatantly stated the contrary without citation of any authority. When Justice Ginsburg’s dissent questioned this maneuver, Chief Justice Roberts responded in a footnote, again without any citation of authority, that such a distinction was “readily understandable.”

As to the basic query of whether the Tribe had the authority to prohibit discrimination on the reservation, the Court noted again, without citation to any authority, in a rejoinder to Justice Ginsburg’s dissent, that tribes simply lacked that power. If a tribal government cannot bar discrimination by non-Indians in the sale of fee land, there is a fundamental rupture to the essential notion that discrimination is against the law and ought not to be tolerated in a civilized society.

Chief Justice Roberts’ opinion also appeared to debunk the very notion of discrimination by the Bank in the proposed land sale with the observation that “the upshot was to require the bank to offer the same terms of sale to a perspective buyer

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86 Plains Commerce Bank, supra note 73, at 2720.
87 Montana, 564 U.S. at 565 (emphasis added).
88 Id. at 566 (emphasis added).
89 Plains Commerce Bank, supra note 73, at 2729-30 (Ginsburg, J., dissenting).
90 Id. at 2722 n.1.
91 Id. at 2723.
who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default." The problem with this ploy is that there is no such factual evidence in the record of the case. No evidence about the alleged creditworthiness of the Long Family was presented to the tribal jury that made the finding of discrimination. And even if there was (which there was not), Justice Ginsburg’s dissent points out this would still be the wrong legal standard:

First, the record does not confirm that the Longs were riskier buyers than the nonmembers to whom the Bank eventually sold the land. Overlooked by the Court, the Bank’s loans to the Longs were sheltered by BIA loan guarantees. See supra at 3-4. Further, a determination that the Longs encountered intentional discrimination based solely on their status as tribal members, in no way inhibited the Bank from differentiating evenhandedly among borrowers based on their creditworthiness. The prescription of

92 Id. at 2725. Chief Justice Roberts went beyond the record in the exact same way at oral argument of the case:

CHIEF JUSTICE ROBERTS: Does the judgment here that the bank discriminated against the Indian corporation because they didn’t give them as favorable terms as they gave someone who hadn’t defaulted on a loan impede dealings with Indian corporations by outside members - - outside nonmembers?
MR. GANNON: We, as was pointed out earlier, Mr. Chief Justice, the - - the - - the only duties that the bank was exposed to here were a duty not to breach contracts and not to discriminate. And the only question is the source of those duties.
CHIEF JUSTICE ROBERTS: What was the basis for the finding of discrimination?
MR. GANNON: It was the - - under - - according to the jury instruction it was a person or entity denied a privilege to a person based solely upon that person’s race or tribal identity.
CHIEF JUSTICE ROBERTS: It had nothing to do - - the bank’s justification had nothing to do with the fact that the entity had defaulted earlier?
MR. GANNON: No, I don’t believe so, Your Honor. Thank you.
CHIEF JUSTICE ROBERTS: Thank you, counsel.

Transcript, Oral Argument (April 14, 2008) at 54-55.

93 Note also Chief Justice Roberts’ earlier statement at oral argument:

MR. FREDERICK: The difference here, Mr. Chief Justice, is that the bank required BIA loan guarantees as a condition of making the loans.
CHIEF JUSTICE ROBERTS: I’m asking you about: In a general case, let’s say they don’t require BIA loan guarantees. They require just as in this case, collateral.
MR. FREDERICK: They did not. They required more, and that’s the important point. The facts actually matter.
CHIEF JUSTICE ROBERTS: Well, I’m sure the facts here matter.

Transcript, Oral Argument (April 14, 2008) at 34-35 (emphasis added).

Unfortunately, in the end, Chief Justice Roberts’ opinion demonstrated that the facts didn’t matter.
discrimination simply required the Bank to offer the Longs the same terms it would have similarly situated non-Indians.\footnote{Plains Commerce Bank, supra note 73, at 2731, n.2 (Ginsburg, J., dissenting) (emphasis in original). Justice Ginsburg also quoted the opinion of Cheyenne River Sioux Tribal Court of Appeals approvingly: “With regard to checks against discrimination, as the Tribal Court of Appeals observed, ‘there is a direct and laudable convergence of federal, state, and tribal concern’. “ Id. at 2732, n.3.}

The majority’s opinion is rather shameless. It creates a new rule based on the sleight of hand that sale of land is not an “activity” with respect to the land, assumes facts not in evidence, and prohibits the Tribe from barring discrimination in the sale of fee land by non-Indians to Indians. The basic result is a new low for the Court in Indian law. It disregards both the law and the facts, as well as essential elements of sovereign-to-sovereign respect. Yet this disturbing result (if not the actual reasoning) was indeed predicted by the new paradigm. The offensive use of tribal sovereignty, regardless of its dignity and analytical soundness, will not be permitted by the Supreme Court.

V. Implications of the New Paradigm in the International Law Context

What about the implications, if any, of the new paradigm in the international law context? The leading model of the rights of indigenous peoples under international law focuses substantially on the promotion and advancement of self-determination.\footnote{See, e.g., JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed., 2004, Oxford University Press).} To date, this effort has largely meant that international law and international forums serve to protect indigenous peoples, both individually and collectively, in the exercise of their international human rights relative to such matters as non-discrimination, participation in national political life, and the right to engage in indigenous cultural and religious practices.
The well-known case of Lovelace v. Canada illustrates this trend.\(^96\) In this case, the United Nations Human Rights Committee found that Canadian law, namely the Indian Act, which terminated the Indian status of women who married non-Indians (but not in the converse situation when a male Indian married a non-Indian), was in violation of Art. 27 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right of minorities to participate in their culture.\(^97\)

The trajectory of the Lovelace case is consonant with the concept of defensive tribal sovereignty described in the new paradigm. This is the use of self-determination to say ‘no’ to an attempt by the dominant sovereign to impose a law on indigenous individuals that is inconsistent with international human rights norms.

The Lovelace case is only one of many examples. In the case of the Dann Sisters, who are members of the Western Shoshone Tribe, the Inter-American Commission on Human Rights (IACHR) held that the United States violated their aboriginal property rights under the American Declaration of the Rights and Duties of Man.\(^98\) The United States took no remedial action except to curtly note that it “respectfully declines to take any further actions to comply with the Commission’s recommendations.”\(^99\)

In addition to these cases, new issues are likely to arise in the international law context relative to the challenges and consequences of the new paradigm’s concern with the “offensive” use of tribal sovereignty. To put it bluntly, are tribes potentially liable within international law and before international forums violating international human

\(^97\) Id. ¶¶ 9.8-17. Canada subsequently amended the Indian Act to eliminate the gender discrimination.
\(^98\) Inter-Am. C.H.R. No. 75/02 (2002).
\(^99\) Id. ¶ 176.
rights law? While there are no cases directly on point, the answer, at least doctrinally, appears to be yes.

This “yes” represents an extension of the analysis concerning the “offensive” use of tribal sovereignty within the domestic Indian law context of United States law. An elevated implementation of tribal sovereignty domestically heightens its likely scrutiny within the international law regime as well. While there are some special conceptual concerns unique to international law accountability, the basic approach is rather straightforward. The central issue from an international law perspective is whether actions of a tribal sovereign satisfy the requirements of state action under international law norms and if so, whether such actions may also be imputed to the United States in accord with the complementary principle of state attribution.

There is likely little doubt that acts of tribal governments fulfill the requirement for action as a “state organ” or “constituent unit” under international law. Tribes are well-known sovereigns that exercise substantial authority within the domestic legal system of the United States. This includes remnants of a pre-constitutional authority, as well as authority derived from treaties with the federal government and their status as domestic dependent nations. These powers encompass civil and criminal authority over Indians and non-Indians, under varying circumstances within Indian country.

Domestic remedies against Indian tribes for alleged violations of individual civil rights and international human rights are significantly circumscribed by the doctrine of

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102 Id. at 6-9. See also *Getches, et al.*, supra note 1 at 377-455 and *Pommersheim*, supra note 72 at 37-57.
tribal sovereign immunity. The Supreme Court held that the leading federal statute establishing basic civil rights protections against tribal governments did not waive tribal sovereign immunity and thus the only federal remedy available in such circumstances is habeas corpus relief.\footnote{Santa Clara Pueblo v. Martinez, 406 U.S. 49 (1978) (federal court has no jurisdiction over an Indian Civil Rights Act equal protection claim challenging a tribe’s membership ordinance, which prohibited enrollment of the children of a tribal woman who has married outside the tribe but not the enrollment of children of a tribal male who married outside the tribe).} Such limited federal relief is pertinent only when there is specific tribally-imposed limitation on an individual’s liberty of movement, which usually only occurs in a criminal case. Many potential civil rights violations do not involve deprivation of liberty interests that are significant enough to invoke federal habeas relief.

The other primary forum for potential judicial relief in such circumstances are the tribal courts themselves. Whether a tribe has waived its sovereign immunity for such actions in its own court is strictly a matter of tribal law. Many tribes have, but some have not.\footnote{See, e.g., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 956-959 (2005 ed., LexisNexis).} Some tribal courts have also interpreted certain language in the Santa Clara Pueblo opinion as effectively waiving tribal sovereign immunity for suits brought in tribal court based on alleged violations of the Indian Civil Rights Act.\footnote{Santa Clara Pueblo, 436 U.S. at 65: Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which those forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.}

The contours of the doctrine of tribal sovereign immunity are thus important in determining both whether there is an effective domestic remedy and whether there has been an exhaustion of such remedies under United States domestic law. Once these hurdles have been cleared, the principle of state attribution comes to the fore.

Under the basic principle of international law, “sub-State entities cannot themselves be
responsible for violations of a State’s international human rights obligations.”

Therefore under the contours of current international law, no tribe could possibly be named a defendant or respondent in an action brought before an international forum.

This rule, however, does not insulate tribes from potential international scrutiny and vicarious responsibility. The United States is legally culpable and amenable to international adjudication through the doctrine of state attribution for the violation of any international human rights by “sub-State entities,” which would include tribes. In the international law construct, international obligations which bind the United States extend to every person within United States territory or control.

In sum:

that the United States is bound by certain conventional and customary international human rights norms and that all individuals within U.S. territory or control hold such basic rights. Although this Article uses language such as “tribal violations of human rights,” strictly speaking these statements refer to a tribal act or omission which breaches an individual right that is protected by international law and that binds the United States. A tribe may violate an individual’s internationally protected right because the individual is a bearer of such right, not because the international human rights law at issue binds the tribe.

A potential case might be framed in the following way. Recall the *Lovelace* case and the holding by the United Nations Human Rights Committee that Canada’s Indian Act trenched on principles of non-discrimination and the right to participate in one’s culture. Could a similar case be brought against the United States for its failure to challenge the law of *Santa Clara Pueblo*, which appears to permit gender discrimination against tribal women who marry non-tribal men? While this has not been

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107 Cowan, *supra* note 100 at 4.
108 *Id.*
109 *Id.* (emphasis in original).
110 *Supra* note 96 and accompanying text.
111 *Santa Clara Pueblo*, 425 U.S. at 63.
done, there does not seem to be any legal bar to pursue such a potential action, especially as a violation of the International Convention on the Elimination of All Forms of Racial Discrimination and the American Declaration of the Rights and Duties of Man (American Declaration) and their guarantees of non-discrimination, equal protection, effective remedy, and perhaps, additionally the right to participate in minority culture or to take part in government.\textsuperscript{112} The essential point of this example is not to explore its merits, but rather to illustrate an inexorable trend, a trend in which the expansion of the offensive use of tribal sovereignty brings with it higher levels of scrutiny and potential legal challenge. This challenge will eventually make its way into the arena of international law.

VI. Conclusion: The Implications of the New Paradigm for a New Constitutional Model

The new paradigm not only predicts, but also shines a light on much of the (federal) detritus that despoils a good deal of the landscape of modern Indian law. Beneath the glib surface of meaningful self-determination is a growing conceptual disintegration that greatly fragments and undermines any unified theory or

\textsuperscript{112} The \textit{Lovelace} and \textit{Santa Clara Pueblo} parallel is drawn from Cowan, \textit{supra} note 100 at 20-23. See also Professor Anaya’s observation:

In any assessment of whether a particular cultural practice is prohibited rather than protected, the cultural group concerned should be accorded a certain margin of deference for its own interpretive and decision-making processes for the application of universal human rights norms, just as states are accorded such deference. It may be paradoxical to think of universal human rights as having to accommodate to diverse cultural traditions, but that is a paradox embraced by the international human rights regime by including rights of cultural integrity among the universally applicable human rights, precisely in an effort to promote common standards of human dignity in a world in which diverse cultures flourish.

\textsc{Anaya, supra} note 95, at 133.
understanding of tribal sovereignty. The mismatched shards of offensive and defensive tribal sovereignty are unlikely to reconnect with any sense of coherence until they are constitutionally yoked back together as two halves of the same whole.

Tribal sovereignty was originally recognized and held in place by the Constitution, principally through the Indian Commerce Clause and treatymaking. These constitutional markers ultimately gave way under the pressures of western expansion and the willingness of the Supreme Court to depart from these constitutional boundaries into the wide open spaces of plenary power as first articulated in *Lone Wolf v. Hitchcock*. Under this new regime, as we have seen, defensive tribal sovereignty remains viable as cobbled together from treaties and the heft of the *Cherokee Nation* cases. Offensive tribal sovereignty has not been so fortunate, especially when non-Indians are involved. Judicially created doctrines such as “implied divestiture” and “inconsistent with their dependent status” effectively curtailed its ability to take root as a fundamental component of modern tribal governance and Indian law jurisprudence.

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113 The Supreme Court itself is not unaware of its self-created problems, but it does not really seem to know what to do. See, e.g., *United States v. Lara*, 541 U.S. 193 (2004), in which the following statements were made:

Lara, after all is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. *Id.* at 212 (Kennedy, J., concurring in judgment).

Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases. *Id.* at 219 (Thomas, J., concurring in the judgment).

114 Art. I § 8(3). The Indian Commerce Clause provide that Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

115 Art. II § 2(2). The treatymaking clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate to make Treaties, . . .”

116 187 U.S. 553 (1903).
Even though Congress certainly has the authority to confront these judicial excesses, it has shown little interest in doing so. With the single exception of the Duro override, Congress has let stand the results of each and every case that has confined the use of offensive tribal sovereignty. While Congress may yet reassert its commitment to meaningful self-determination, the long, arduous journey to constitutional amendment appears to be the way with the greatest potential to provide dignity, respect, and durability.

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117 Duro v. Reina, 495 U.S. 676 (1990) (tribes have no criminal jurisdiction over non-member Indians). This case was legislatively overturned by an amendment to the Indian Civil Rights Act of 1968, which provides:

For purposes of this subchapter, the term “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.


This amendment was upheld in United States v. Lara, 541 U.S. 193 (2004) as described supra note 90.

The new paradigm\textsuperscript{119} is made up of three distinct threads or patterns. A thread that predicts likely results in Indian law cases before the Supreme Court, a thread that describes the current doctrinal confusion created by the uncoupling of defensive tribal sovereignty from offensive tribal sovereignty, and a thread that speaks to the necessity of joint policy reform and advancement at the federal and tribal levels. This paradigm is most significant, not because of its high predictive power of results before the Supreme Court, but rather for how it illuminates both the absence of an adequate constitutional nexus to vouchsafe the implementation of tribal sovereignty in this dynamic new era and the corresponding need to develop a wider vocabulary of sovereignty within federal and tribal systems of governance. Like the hellhound.

\\textsuperscript{119} My colleague at the University of South Dakota School of Law, Professor Patrice Kunesh, informs me that this new paradigm needs a name. While I’m hesitant, I’ll borrow her insightful suggestion to call it the “offensive tribal sovereignty divestiture” paradigm or more in the vernacular, perhaps, “the crossroads blues of tribal sovereignty lost and stolen” paradigm.

Another way of describing the “offensive” versus “defensive” use of tribal sovereignty is with the sword-shield metaphor. The Court is quite inhospitable to the use of tribal sovereignty as a ‘sword’ to assert authority over non-Indian parties, especially for activities on non-trust land. The Court is significantly more hospitable to the use of tribal sovereignty as a ‘shield’ against state encroachment in Indian country. Indeed, this is the exact metaphor used by the South Dakota Supreme Court in the case of South Dakota v. Cummings, 679 N.W.2d 484 (S.D. 2004):

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\text{In Hicks, the Tribe was attempting to extend its jurisdiction over state officials by subjecting them to claims in tribal court. Here, the State is attempting to extend its jurisdiction in the boundaries of the Tribe’s Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction. In other words, in Hicks, tribal sovereignty was being used as a \textit{sword} against state officers. Here, tribal sovereignty is being used as a \textit{shield} to protect the Tribe’s sovereignty from incursions by the State. This is significant because historically, the Federal Government has been highly protective of the Tribe’s right to the free from harm and interference by states.}\]

Id at 486 (emphasis added).

Note also that the sword-shield metaphor is not new to Indian law. It is often used to describe the trust relationship. A harmful ‘sword’ to advance federal authority over Indians and Indian tribes. A helpful ‘shield’ to protect tribes against state authority in Indian country. See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) and Lone Wolf v. Hitchcock: One Hundred Years Later, 38 TULSA L. REV. 1 (2002) (Symposium issue).
pursuing Robert Johnson, the famed Delta bluesman, the soul of tribal sovereignty is down at the crossroads.

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120 See, e.g., ROBERT JOHNSON, THE COMPLETE RECORDINGS (Sony 1996). The essential folklore surrounding Robert Johnson is that while traveling a particular crossroads in the Mississippi Delta, he sold his soul to the devil in exchange for mastery of the guitar. See also Sherman Alexie’s novel RESERVATION BLUES (Atlantic Monthly Press, 1995).