Valuable Lessons to Learn From Tribal Innovation

by Hon. Elizabeth Ann Kronk Warner

Hon. Elizabeth Ann Kronk Warner is the immediate past editor in chief of The Federal Lawyer. *She is the associate dean of academic affairs, professor of law, and director of the Tribal Law and Government Center at the University of Kansas School of Law. She also serves as a reserve appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals and special district judge of the Prairie Band Potawatomi Nation. She is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians.*

This article explores the idea that tribes, as separate sovereigns capable of enacting their own laws, can be valuable laboratories of legal innovation from which states and the federal government can learn. The concept of states as laboratories of legal experimentation is an idea long buoying the value of American federalism.[1] States, as units of government possessing inherent sovereignty, have the ability to test different regulatory structures, and, in return, other states and even the federal government can learn and benefit from the result. But states are not the only sovereigns within the United States that can act as laboratories of innovation. Tribes can serve (and are serving) as valuable laboratories of experimentation. In fact, given the homogeneity of state governing structures,[2] the sometimes greater flexibility of tribal inherent sovereignty, and the increased incentive for tribal innovation, tribes can in some instances be even better places than states to experiment with environmental laws in new and innovative ways. Specifically, successful tribal experimentation and innovation can be seen in the field of environmental law. To demonstrate this conclusion, this article starts with a discussion of how tribes can serve as laboratories of legal innovation and then delves into the need for such innovation, especially within the context of environmental law. The article ends with a couple examples of how tribes have been truly innovative within the field. Overall, this article demonstrates that tribes can be valuable partners to states and the federal government in efforts to develop effective legal solutions to some of today's most pressing challenges.[3]

Tribes as Laboratories of Legal Innovation

Given the similarity between tribes and other governments within the United States, tribal experimentation with environmental law is something that should no longer be overlooked. After all, having multiple actors available to work on challenging regulatory solutions increases the potential for experiments to emerge, which in turn increases the likelihood of successful experimentation. Tribal environmental experimentation therefore benefits all units of government within the United States.

As an initial starting point, it is helpful to have a brief introduction to the authority of federally recognized tribes within the United States. Tribes generally possess exclusive authority to regulate their citizens and territory, subject to limitations imposed by federal law.[4] In certain circumstances, tribes also possess authority to regulate non-Indians.[5] The genesis of tribal governmental authority, however, lies not in federal delegations to tribes, but rather within inherent tribal sovereignty.[6] While states also possess inherent sovereignty, tribal inherent sovereignty has a different origin and, perhaps more importantly to this discussion, is not constrained by the U.S. Constitution to the same extent that states are constrained.[7] Accordingly, based on the foregoing, it is clear that tribes possess the inherent sovereignty to enact laws applicable within their communities. Because of this capacity, tribes can serve as laboratories similar to both states and the federal government.

The opportunity to have multiple sovereigns experiment to find the best legal solution to a problem is optimal. When multiple sovereigns experiment with regulations, other governments will select the best results.[8] In 1932, in his dissent in *New State Ice Co. v. Liebmann*, Justice Louis Brandeis famously elaborated on this idea of experiment:

> There must be power in the states and the nation to remould, [sic] through experimentation, our economic practices and institutions to meet changing social and economic needs.… It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[9]

Further, experimentation at the local level may be necessary to respond to the needs of the local citizenry. In 1999 testimony before Congress, the head of the Council of State Governments said that states play a role as "laboratories of democracy" and are sources of "innovation."[10] In Executive Order No. 13,132,

President Bill Clinton even recognized that states play an important role as "laboratories of democracy" since states can experiment with different regulations and policies.[11] In sum, since the founding of the United States through the modern era, jurists, politicians, and scholars have all recognized the importance of regulatory experimentation to the system of federalism.

Tribes can fill this role as innovators, just as states have in the past. Although states and tribes are different in some regards, such as in the origins of their governing authority and their relationships with the federal government, similarities do exist, such as defined territories, general regulatory authority over citizens, and governing power that exists outside of the federal government.[12] Further, empowering multiple sovereigns to solve the same problem has value as it creates "alternative actors to solve important problems."[13] Such empowerment also increases the potential for experiments to emerge.[14] In this way, tribes, like states, can serve as laboratories for regulatory experimentation.

Even if tribes are seen as being more akin to local governments or municipalities, the benefits of their legal experimentation cannot be ignored. First, even laws enacted on a smaller, regional scale are valuable since similarly situated communities can learn from the tribe's successes and failures. And norms originally developed on a local scale have the capacity to become binding nationwide. Take, for example, smoking bans. Banning smoking in public initially started as a result of local efforts but has become a consistent nationwide phenomenon.[15] Furthermore, the size of the units of government is likely not as important in promoting the benefit of experimentation as is the need for multiple jurisdictions working toward a common goal. To achieve the benefits of experimentation, it is enough that tribes are empowered to experiment and are working toward a goal in common with the states and the federal government.

The proposition that tribes can function in a manner similar to states for purposes of valuable experimentation is buttressed by the fact that, in the environmental arena, the federal government already treats tribes like states. Tribes can participate in a manner similar to states through the tribes as states (TAS) provisions included in several of the major federal environmental statutes, such as the Clean Air Act[16] (CAA) and Clean Water Act.[17] TAS status refers to the ability of the EPA to "treat eligible federally recognized Indian tribes in the same manner as a state for implementing and managing certain environmental programs."[18] Even if the statute does not specifically include TAS provisions, it can include language suggesting that the tribe should be treated like a state.[19] If a federal environmental statute does not specifically speak to the role of tribes, the EPA can determine whether tribes are treated similar to states under the statute.[20]

Furthermore, not only does tribal regulatory experimentation have the potential to be as valuable as any experimentation under federalism, the potential exists for tribal experimentation to be even more robust than experimentation at the state or federal level. First, greater diversity exists between tribal governments than between state governments. The political structure of most states is nearly identical.[21] In comparison, the political structures of tribal governments can vary significantly, from theocracies to systems utilizing three branches of government, similar to the federal system.[22] Accordingly, tribes not only function in a way similar to states when evaluating the benefits of federalism, but, given the heterogeneity of tribal political structures, tribes also can experiment with regulation in new and exciting ways unfathomable to state administrators.

Moreover, tribes may be motivated to innovate and experiment with tribal environmental law given factors that could be potentially more rousing for tribes than states. Although certainly not true in every instance,[23] many tribes and individual Indians possess a strong connection to land and the environment. First, many tribes have a strong legal connection to the land they inhabit. Accordingly, if a tribe were ever to leave land with such special legal status, the tribe would also lose certain legal rights based on the status of the land. This legal connection to a singularly defined piece of land becomes important when considering environmental challenges. In addition to this legal connection to the land, many tribes also possess spiritual or cultural connections to the land. As the Onondaga Nation explains, "the people are one with the land, and consider themselves stewards of it."[24] Beyond the tribes, many individual Indians possess a spiritual connection with land and the environment.[25] Conversely, states, lacking in similar connections to the land and environment, may be less likely to experiment.[26] In sum then, tribes are capable of legal experimentation similar to that of states and, given their unique attributes, may be particularly well placed to engage in innovation valuable to other sovereigns within the United States.

Tribal Innovation Is Currently Needed

Having established that tribal environmental law experimentation is valuable, it is helpful to now explore why such experimentation is necessary in the modern era by specifically focusing on the environmental field. Despite significant progress in reducing environmental pollution over the last 50 years, significant challenges persist, and new obstacles, such as climate change, have emerged as severe threats to the environment. Since 1988, "there has been little innovation in environmental programs," especially at the federal level.[27] Congress has only truly innovated in a few areas since the late 1980s; some examples include the CAA amendments of the 1990s and hazardous waste and oil spill laws.[28] Many scholars have speculated that the reason for this federal inaction is political partisanship within Congress.[29] Yet environmental threats persist, such as air and water pollution and climate change; threats that tribes are actively combating with their tribal environmental laws.

In addition to a lack of federal innovation, many existing federal environmental regulations are not properly designed to handle the nuanced environmental challenges of the current era, given the segmented approach of federal environmental laws.[30] The approach is segmented because, instead of recognizing the interconnected nature of the environment, federal environmental statutes tend to focus on one resource, such as air or water, or one source of contamination, such as solid waste, rather than recognizing the interconnected nature of these elements. As an example of the interconnected nature, pollutants released into the air can ultimately be deposited in water. Accordingly, not only is the federal government failing to innovate in the area of environmental law, but the existing environmental statutory structure may be ill-positioned to address many of the modern environmental challenges.

Examples of Tribal Innovation in the Environmental Field

Within the environmental field, there are several examples where tribes have innovated beyond what either the federal government or states have done. For example, the federal government has not yet enacted a comprehensive federal strategy to address climate change, and, as a result, the federal government lags far behind state, tribal,

and local governments. Because the federal government has failed to take action on climate change for so long, state, tribal, and local governments have taken the lead in climate change-related regulation.[31] For example, the Confederated Salish and Kootenai Tribes have adopted a climate adaptation plan that incorporates traditional ecological knowledge and develops a plan for how to protect valuable cultural resources threatened by the negative impacts of climate change.

Another example of tribal innovation comes in the context of cultural resources. Tribes have largely acted to protect cultural resources from environmental contamination, but the federal government has yet to incorporate similar provisions into federal law, despite the fact that there exists a federal desire to protect cultural resources. With increasing tribal environmental regulations designed to protect cultural resources, the federal government may ultimately feel pressured to adopt similar regulations. Relatedly, many tribal laws related to the regulation of water pollution are more protective of the environment than their federal counterparts because of the significant connection between water and culture for many tribes. The foregoing demonstrates that tribes are not only capable of valuable innovation, but, within the environmental context, are already doing so in a way that the states and federal government may benefit from.

In short, there is a third sovereign in the United States—tribes—that is fully capable of legal innovation, especially within the field of environmental law. The federal government and states should certainly take note of such innovation since tribal experimentation may prove very helpful in addressing environmental challenges threatening modern society. ⊙

Endnotes

[1]*New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

[2]Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 922 (1994) ("There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of variation.").

[3]Portions of this article were originally published in Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 Ariz. State L. J. 857 (2015).

[4]*See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding that, absent an explicit statement to the contrary, the laws of the state of Georgia did not apply within the Cherokee territory); *Ex parte Crow Dog,* 109 U.S. 556, 572 (1883) (holding that, absent a federal law to the contrary, the tribe possessed the authority to apply criminal punishment within its territory); *Fisher v. Dist. Court of 16th Jud. Dist. of Mont., in and for Rosebud Cnty.,* 424 U.S. 382 (1976) (per curiam) (holding that the tribe possessed jurisdiction over an adoption matter involving solely tribal citizens and residents of the tribe's reservation). Admittedly, over the centuries, numerous federal laws have been enacted to curtail tribal sovereignty. However, a complete discussion of such limitations is beyond the scope of this article. For our purposes, it is enough to acknowledge that tribal sovereignty persists absent federal limitation.

[5]*See, e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) (holding that tribes may regulate non-Indians on non-Indian land located within tribal territory where the non-Indian in question has consented to regulation and when the non-Indian's conduct threatens the health, safety, and welfare of the tribal community).

[6]Cohen's Handbook of Federal Indian Law § 4.01[1][a] (Nell Jessup Newton, et al., eds., 2012) ("Cohen's Handbook").

[7]Admittedly, tribal sovereignty is constrained by federal plenary power over tribes. *United States v. Kagama*, 118 U.S. 375, 378-80 (1886). However, unless either Congress or the federal courts have acted to limit tribal sovereignty, the presumption is that tribal sovereignty persists. Cohen's Handbook § 4.01[1][a].

[8]*See* Nina Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 709 (2008).

[9]*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[10]Tommy G. Thompson, Governor, State of Wis., and President, Council of State Gov'ts, Federalism: Hearings Before the S. Comm. on Governmental Affairs, 106th Cong. 15, at 5 (1999).

[11]Federalism, 64 Fed. Reg. 43255, 43255-56 (Aug. 4, 1999).

[12]For a general discussion of tribal authority, *see* Cohen's Handbook, § 4.

[13]Deborah J. Merritt, *Federalism as Empowerment*, 47 Fla. L. Rev. 541, 545 (1995) (citing Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 539 (1995)).

[14]*Id.* at 551.

[15]Committee on Secondhand Smoke Exposure and Acute Coronary Events, Secondhand Smoke Exposure and Cardiovascular Effects: Making Sense of the Evidence 109-24 (2010), http://www.nap.edu/openbook.php?record_id=12649&page=109 (last visited Jan. 8, 2017).

[16]42 U.S.C. §§ 7401-7431.

[17]33 U.S.C. §§ 1251-1387.

[18]*Tribal Assumption of Federal Laws—Treatment as a State (TAS)*, U.S. Envtl. Prot. Agency, https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas (last visited Jan. 8, 2017).

[19]Cohen's Handbook, § 10.02[2].

[20]For example, although both the Emergency Planning and Community Right-to-Know Act and lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs. Cohen's Handbook, § 10.02[2].

[21]Rubin & Feeley, *supra* note 2.

[22]Cohen's Handbook, § 4.04.

[23]At the time of writing, there are over 567 federally recognized tribes within the United States. *Who We Are*, U.S. Department of the Interior, Indian Affairs, http://www.bia.gov/WhoWeAre/ (last visited Nov. 8, 2016). Given every tribe constitutes a separate and distinct government with its own history and culture, one should avoid generalizing a common Indian experience.

[24]*Stewards of the Land*, Onondaga Nation, http://www.onondaganation.org/land-rights/stewards-of-the-land/ (last visited Nov. 19, 2016).

[25]*See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination*, 21 Vt. Law. R. 225, 272-75 (1996).

[26]Rubin & Feeley, *supra* note 2, at 925.

[27]Robert L. Glicksman, David L. Markell, William W. Buzbee, Daniel R. Mandelker & Daniel Bodansky, Environmental Protection: Law and Policy 72 (6th ed. 2011).

continued on page 16

Top left: (l to r) Chief Judge Nancy Freudenthal (Wyoming); Magistrate Judge Kelly Rankin (Wyoming); Chief Bankruptcy Judge Casey D. Parker (Wyoming); and Magistrate Judge Evelyn Furse (Utah). Top right: (l to r) Marcus Johnson; Judge Candy Wagahoff Dale (Idaho); and Colt Catlin, president, University of Idaho Student Chapter. Middle left: (l to r) Bob Sykes, Senior Judge Dale Kimball (Utah), Judge William Thurman (Utah), and Bankruptcy Judge Joel Marker (Utah). Middle right: (l to r) Randall L. Skeen, Cook, Skeen & Robinson (Utah); and Senior District Judge Dee Benson (Utah). Bottom: (l to r): Susie Headlee, executive director, Idaho Chapter, and Parsons Behle & Latimer; and Penny Anderson.

At Sidebar *continued from page 8*

[28]*Id.*

[29]*Id.* Robert V. Percival, Christopher H. Schroeder, Alan S. Miller & James P. Leape, Environmental Regulation: Law, Science and Policy 7 (6th ed. 2009); James Salzman & Barton H. Thompson, Jr., Environmental Law and Policy 12 (3d ed. 2010).

[30]Robin Kundis Craig, Environmental Law in Context 29 (2d ed. 2005).

[31]*See* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 Emory L.J. 159, 160 (2006); Glicksman et al., *supra* note 27, at 75.