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Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law

Sarah Krakoff

University of Colorado Law School

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Sarah Krakoff, Associate Professor, University of Colorado Law School

MS. KRAKOFF: Thanks, and thanks again to NCAI and to Phil for pulling this all together.

And thank you, Chairman Melendez, for coming and talking. I am happy that many of our comments I think will dovetail very nicely.

I won't spend a lot of time on my work because I mainly want to talk about what other work we could all be doing. I think of this as just a beginning, almost an introduction and a framing of the kinds of work that need to be done.

Phil mentioned this morning, I think, that the title "New Realism" was misleading and that there's nothing particularly new about the idea of doing grounded research, and, of course, nothing particularly new about the idea of law and empiricism.

I think there should be something new, and I think there is something new now about the kind of empirical work that law professors are doing as opposed to the idea about empiricism when it was first raised by the realists, and very importantly so, back in the 1930s or so.

I think that there is, and should be, a larger degree of skepticism about this kind of work. There should be two kinds of skepticism. First, a skepticism about doing it the right way, and I think the comments we heard this morning were bracing to all of us in that regard.

So you should be worried about doing shoddy empirical work, as Phil has said. I know I am very worried about that. I'm sure everyone else in the room feels the same way.

But there is another kind of skepticism that I think we should all have, which is a skepticism about the work even when it goes well. Even when empirical work is done well, there are limits to what it can tell us about the world and what we should do in the world.

These aren't new thoughts of mine. They are informed by critical theory, which tells us that "empirical facts" often, if not always, come to us predetermined by cultural and political frameworks. We also might keep in mind Mark Twain's comments about statistics, which was that there are three kinds of lies: lies, damned lies, and statistics. That is probably putting too fine a point on it, but I do think we need to retain the ability to judge the "facts" we are receiving from empiricism, even while we embrace some aspects of engaging in legal empirical research.

So we should have those thoughts in mind, and we shouldn't be under the impression that, when we go out to find facts in the world, that we shouldn't be skeptical of those facts.

One additional framing comment is that we shouldn't be too optimistic about the way that we might be able to influence decision makers, even when we do very rigorous, careful and convincing empirical research. So here I have some thoughts about audience. On the one hand, it is very important that we think of our audience as being the Supreme Court, because in a sense it is. On the other hand, I think it could lead to frustration, if not certain kinds of delusion, to think that they might actually listen or that, even if they listen, that it will actually make a difference.

And if we think about the votes right now, and you can think about who we are aiming to influence, and even if we influence them, will we start getting better decisions about American Indian law? When we are talking about who we want to influence and where the votes are, I think we need to be realistic, which doesn't mean we shouldn't be trying to provide judges, including Justices, with very good information of the kinds that were outlined this morning. It is just that maybe our audience has to be bigger — all judges, not just the Supreme Court, and much longer-term.

We are also influencing the way people think about Indian nations; getting stories out about real Indian nations, like Chairman Melendez's nation, is part of our work, whether we can see it in the next term or the term after or the term after that or not. We are academics, and we have the benefit of considering a long time horizon for the ways in which we influence knowledge and policy, and our audiences should be geographically and temporally dispersed. Otherwise, we risk either distorting our research and/or becoming despondent that it seems not to matter.

So I will now quickly go through some work that I did studying the Navajo Nation. The paper, the article itself, didn't just cover taxation.⁶⁴ I attempted to cover, and I'm sure I did it insufficiently, the whole range of governmental powers that are affected by federal law.

I looked at the period from 1991 through 2001 and tried to get an answer to the following question in a very preliminary way: what difference does the federal law about legal sovereignty make to the ways tribes actually enact their sovereign powers on the ground? Because, as I think we have all observed, there's not a lot of information about that.

In our field we tend to pull our hair out about this or that Supreme Court decision. We do that, I think, not because we care that much about the formalisms of legal sovereignty. I don't.⁶⁵ I care about what the Court says about sovereignty because I care about the effects on the world and what happens to Indian

64. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

65. See Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797 (2006).

nations, Indian people and, of course, to the rest of us, too, because I believe we would all be worse off without functioning, self-governing Indian nations. So I thought I would try to go about trying to answer that question.

I picked Navajo because, getting back to the questions about access that were raised this morning, I had good access to information and data on the Navajo Nation. Having worked there, I know a lot of the people there. I got permission from the legislative counsel's office and could do it all on the up and up and was extremely fortunate to have that kind of access to information and data.

So here's how the study was structured. First, describing the cases that recognize the inherent tribal power to tax: *Colville*,⁶⁶ *Merrion*,⁶⁷ and *Kerr-McGee*⁶⁸ — my favorite under-celebrated Indian law case because there was no secretarial authority required, so it recognized actual inherent authority of tribes, not just a quasi-delegated authority. So those are the cases recognizing the inherent power to tax.

Kerr-McGee, of course, is very, very important to the Navajo Nation. They named a holiday after it: "Sovereignty Day." There aren't too many other jurisdictions, I would suggest, that recognize and celebrate and give everybody the day off about the power to tax.

(Laughter.)

It always gets a little laugh, but also it is important, because this is about how deeply I think people in Indian country feel about their government's governmental powers, which tells a different story than we might tell with our somewhat libertarian instincts, particularly in the West, about how we feel about our government and its powers.

Okay, so what has the Navajo Nation done with its powers to tax? Quite a lot, and, again, this dovetails really nice with the Chairman's comments, because one of the things that I did study and write about was the sales tax.

Starting right when they were — well, just preceding actually — when their inherent legal authority to tax was affirmed, they passed a possessory interest tax, an oil and gas severance tax, hotel occupancy tax, tobacco products tax, fuel excise tax, and then in 2001 — the sales tax.

The sales tax was undertaken very, very thoughtfully. As Chairman Melendez has mentioned, it was strategically conceived of to replace the stream of revenue that comes from resource extraction. So taxation is a sustainable form of revenue. And all environmentalists should be in favor of taxation, right,

66. *Colville*, 447 U.S. at 153.

67. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

68. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 599 (9th Cir. 1984).

because it has a lesser toll on the environment than, say, pulling coal out of the ground.

It was the brain child of the former president, Peterson Zah, and the Navajo Nation did a lot of studies among its people to make sure that they would be comfortable with this because sales taxes are, of course, regressive taxes. When you pass a regressive tax that is going to fall on a very impoverished population, you want to do it carefully, in the right way, and make sure it has acceptance of the people, and it did.

So the sales tax took the form of, after all this study, three percent of gross receipts. The legal incidence falls on the seller, but is passed on to the buyer. I will talk a little bit more about that three percent figure in a second.

So where does the tax money go on the Navajo Nation? Twelve percent goes to a permanent trust fund. Again, this is a renewable source of income. That was, again, conceived of by President Zah to replace the resource extraction money.

Some of the tax revenue goes to land acquisition, which is a very important function for most Indian nations, and for many even more so than Navajo, which has a relatively large and intact land base.

The tax money also goes to fund tourism, roads, all the basic stuff of government; some of it goes into a general fund, and then some revenue goes back to the chapters, so they can do more local government and infrastructure.

Part of the point here is — this is what researchers often do is state the obvious, right? — this is a government functioning like any other government, I think. Painting that picture was very important and one of my objectives in doing this work, because it seems to be a crucial bit of knowledge missing from the way some courts think about tribes.

Now what about the cases in which the Court has allowed concurrent taxation to occur in Indian country? Again, we are all familiar with these. *Moe v. Salish*,⁶⁹ *Colville*,⁷⁰ *Cotton Petroleum*,⁷¹ in particular, stands out, as the case that allowed for states to tax non-Indians extracting resources within Indian country; and then *Milhelm Attea*,⁷² which really just heightened the kinds of burdens that states can impose on tribes when they are collecting their taxes.

69. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

70. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

71. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177-78 (1989).

72. *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea*, 512 U.S. 61 (1994).

Cotton is one of the cases that academics really get upset about. So it was interesting to find out — and, again, this is consistent with Chairman Melendez's remarks — that in many respects the concurrent taxation cases, while doctrinally very problematic, have fewer effects on the tribes' de facto sovereignty, to borrow Cornell and Kalt's terms,⁷³ than the categorical exclusion cases, which I will talk about next, because tribes can react to their neighboring governments and can go to them and say, "Let's create a win-win situation."

Neither government wants an economic environment in which multiple layers of taxes discourage business and investment. And the tribal attorneys who crafted these agreements were quite explicit about the way that they talked about the economics here. Amy Alderman, who I know John Dossett works with, too, was extremely helpful and provided me with a lot of information, the back story to these agreements.

The tribal officials would go to the states and say, "Nobody wants an unfriendly tax environment such that nobody's doing business on the Navajo Nation because then neither government gets any money. So let's reach a deal." The result is to enter into agreements that essentially cap the tax at the maximum level of the state tax and then the two governments share the revenues. So that is what a lot of those intergovernmental agreements are about.

It would be very helpful, I think, to have a much larger sense of the extent to which this is going on — that is something that John mentioned this morning — and a much larger sense, too, and this is where we could come in here and be helpful, we academics, on the difference that it actually makes.

What difference does it make to revenue for Indian nations and neighboring governments when these agreements are reached? Are they actually economically beneficial to everyone, and so on? So there's definitely more work that could be done.

Now there are impacts that are negative in terms of tribal revenue, as one might expect. The sales tax is only three percent. In Boulder, where I live, it is about seven percent.

So when you are in a dual-taxation environment, does each government get less? Well, certainly, right? So that is a negative impact. Then there are other hidden impacts.

73. See Stephen Cornell & Joseph Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 1, 14 (Stephen Cornell & Joseph P. Kalt eds., 1992).

The “lightbulb example,” as I call it, I will just run through quickly. States can tax non-Indians on certain items, like lightbulbs in the State of Arizona, but not tribal members. In order to actually collect the tax fairly, you would have to have a separate cash register when a white person walks into Bashas’ Supermarket and buys lightbulbs on an Indian reservation. But there is no such thing.

So what the State Taxation Department accepts is Bashas’ saying, “Oh, yeah, we collected the tax and here it is,” right? But, in fact, it means the tax is spread evenly among non-tribal members and tribal members. So, essentially, I get a break on my lightbulbs at Bashas’ because I’m not actually paying the full amount of State tax I should pay and tribal members are paying more.

I know it is a little obscure, but still, a little hidden impact of this dual taxation regime. More work, again, should be done to flesh this out and discern with more precision these kinds of impacts.

Finally, quickly, I’ll just talk about limitations on the tribal power to tax. We know now Indian nations can’t tax non-Indians doing business on non-Indian fee land unless they can fit their tax into one of the two *Montana* exceptions. Part of this study was just trying to provide some backdrop and context to this decision.

Atkinson Trading Post, i.e., Cameron Trading Post, sells itself as a gateway to Indian culture. So there are many ironies here of their resisting tribal jurisdiction. They hire, of course, a lot of the workforce from the Navajo Nation. So they benefit from that. And they get fire and police protection, which was argued before the Supreme Court, and they advertise themselves quite explicitly on their website about how they’re this gateway to Indian culture. So that was just some context about the case that is always important to provide, even though when it is provided, it doesn’t seem to go anywhere with the Court.

But what about the impacts on Navajo? Clearly, there’s a revenue loss. It is very clear, right? They use the hotels that are on fee land. Navajo can no longer collect the hotel occupancy tax, and that’s that. But because Navajo, unlike many tribes, has a lot of trust land, they still are able to collect taxes from a lot of hotels and B&Bs, twelve out of fourteen, that are on trust land.

Now it just so happens, not coincidentally, that the two biggest money-making hotels are on fee land: Gouldings in Monument Valley, and Atkinson itself. We could probably, again, use some research about the extent to which that’s true in Indian country generally. Does fee land play a role in terms of where most of the revenue generation happens? If so, then these decisions are much more meaningful on other Indian nations than on Navajo.

I think a hidden story to the way that Atkinson and Strate together have combined to have effects on the negotiating environment in Indian country is that, now that the presumption is that non-Indians can resist jurisdiction, there is a fight about negotiating every single right-of-way. So the Court has really created a much more difficult and contentious negotiation environment than existed prior to these decisions.

I suspect that that is not well-known to the Court, right? I mean this is a classic example of common law interfering with contractual negotiations, right? Again, more work can and should be done on that. My work on this was certainly very preliminary.

Then, of course, in this group I'm sure I don't need to spend too much time on the expressive effects of these kinds of decisions. The way that Indian people and tribal leaders feel about their inherent powers is not abstract, right? It's very emotional and concrete and connects directly to their sense of how well they can continue to govern for their people. A couple of quotes from prominent Navajo tribal members here, which I include in my article, provide a sense of this:

Sovereignty is more of an experience than anything. The experience of being on any reservation, taking into account the tribe's culture, traditional practices, religion, how they see themselves . . . Only when you have experienced it can you describe what it is — for you.⁷⁴

The Court is trying to do what the Congress and Executive Branch have learned they cannot do — eliminate tribes.⁷⁵

And finally, here are some of my conclusions from this very preliminary study about the impacts of legal decisions on the power to tax. First, with regard to decisions that affirm the inherent power to tax: the Navajo Nation is exercising its sovereignty to raise revenue for essential governmental programs, and acting both uniquely as an Indian nation and yet similarly to other governments. Second, with regard to the decisions allowing concurrent state power: there are clear impacts on revenue, but also surprisingly positive government-to-government relationships as a result. And finally, with regard to decisions limiting the tribal taxing power: They are a blow to legal

74. Interview with LeVon Henry, Exec. Dir. of DNA-People's Legal Services in Window Rock, Ariz. (Dec. 10, 2003) (on file with author).

75. Telephone Interview with Raymond C. Etcitty, Navajo Nation Legislative Counsel (July 7, 2003) (on file with author).

sovereignty, and create mischievous complications in the transactional environment. But they are likely not as damaging to Navajo as to other tribes.

Finally, a few thoughts I just want to close with about future research: I think it would be great to have more and better work like this done that compares several different tribes to one another and can, therefore, assess things like, what difference does it make that a tribe was heavily allotted? You know, what difference does the presence of fee land make?

I think that some of the questions we might ask in that regard relate again back to Chairman Melendez's remarks. I would be very curious to try to design a study that looks at the extent to which being confrontational about legal sovereignty affects actual de facto sovereignty on the ground compared, for example, with strategies taken by Indian nations that probably feel like they have a weaker legal case and, therefore, do more in the way of exercising de facto sovereignty without going through litigation.

What I have in mind is comparing, for example, Navajo, which has litigated its sovereignty, and it was very successful up to a point, right, up until very recently, with, say, Southern Ute. The Southern Ute Tribe has been very successful economically. It is heavily allotted, but they have a lot of natural resources, and they have done a lot with their de facto sovereignty on the ground while, avoiding a lot of the legal battles.

So that, I think, would be quite interesting, and such a study could be undertaken in the taxation context or any number of regulatory contexts, asking different kinds of questions about what tribes are doing.

We certainly need more information about intergovernmental agreements generally, the kind that the Reno-Sparks tribe has engaged in and Navajo and, again, the difference that they make, right? What features do they have, and how do they affect the economic picture, and how they affect relations, more generally, with local and state governments.

And I could go on. There's no shortage of research ideas. There certainly is a shortage of time, and then in my case expertise, but I'm going to go home and call up my sociologist friends and political scientists, because, believe me, I don't think I want to do that stuff on my own.

So those are just some thoughts. I hope I have done a good enough job of talking really quickly and getting through this, so we have some time for questions and discussion.

(Applause.)

Questions and Answers

MR. FLETCHER: Well, I'm going to take the first question. I'm curious about what both of the participants here have to say about Justice Ginsburg's