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BUDDING CONFLICTS: MARIJUANA'S IMPACT ON UNSETTLED QUESTIONS OF TRIBAL-STATE RELATIONS

KATHERINE FLOREY*

Abstract: In the wake of a December 2014 decision by the Department of Justice to deprioritize enforcement of federal marijuana laws against tribes as well as states, many tribes have reevaluated their policies toward marijuana. Tribal attitudes toward marijuana are diverse; some tribes regard marijuana as a public health menace, whereas others see it as a source of economic opportunity. Where tribal policies are significantly more or less restrictive than those of the surrounding state, tribal-state relations have often suffered friction. The problem is particularly acute given the jurisdictional uncertainty that characterizes Indian country and the absence of any equivalent to the conflict-mediating doctrines that help to smooth interstate relations. As a result, federal intervention may be needed to protect tribal sovereignty and resolve tribal-state conflict; any such action should be guided by recognizing the successes and failures of the Indian Gaming Regulatory Act.

INTRODUCTION

In some ways, we have been here before. In 1987, the U.S. Supreme Court decided *California v. Cabazon Band of Mission Indians*, holding that, under most circumstances, states lacked authority to enforce state anti-gaming laws against tribal operations.¹ By the end of the next year, Congress had passed the Indian Gaming Regulatory Act (“IGRA”),² which somewhat curtailed tribes’ sovereign right to regulate gaming while establishing a framework by which states and tribes could negotiate over the extent of tribal gaming operations. In a short time, tribal casinos became commonplace, and today, tribal gaming is a nearly thirty billion dollar industry.³

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* Professor, UC Davis School of Law. I would like to thank the symposium participants (Jessica Berch, Lea Brilmayer, Erwin Chemerinsky, Jack Chin, Chad DeVeaux, Alex Kreit, and Mark Rosen), the UC Davis faculty members who workshopped an earlier version of this paper, and Aviva Simon for superb research assistance.

¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220–22 (1987).

² See Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701–2721 (2012)).

³ See Nat’l Indian Gaming Comm’n, *NIGC: 2015 Experienced Largest Tribal Revenue Gain in a Decade*, INDIAN COUNTRY MEDIA NETWORK (July 20, 2016) <https://indiancountrymedia>

It is going too far to say that tribal-state relations in the gaming arena are free of conflict. Indeed, IGRA has been criticized for spawning its own litigation industry,⁴ and many tribes justifiably chafe at the ways in which IGRA permits state intrusion into what they see as internal tribal matters such as labor law.⁵ Nonetheless, the story of tribal gaming has, on the whole, been one of relative stability. From the state perspective, even states with strong anti-gaming traditions have, in many cases, tacitly welcomed the presence of tribal gaming operations within state borders, because such operations bring benefits to the surrounding communities without necessitating a change in state policy.⁶ Meanwhile, on the tribal side, tribes have often been able to leverage the positive spillover effects of casinos to find common ground with states on matters of mutual interest such as treating gambling addiction.⁷

One might expect tribal marijuana legalization efforts to follow a similar trajectory. At first glance, there are many parallels between the history of tribal gaming and the future of tribal marijuana. Tribes' ability to engage in gaming operations required relief from federal as well as state law.⁸ Similarly, it is only due to a relaxation in federal policy that tribes have been able to explore changes to their marijuana laws.⁹ Just as with gaming, marijuana has the potential to be an economic boon for tribes, whether they simply grow marijuana for sale to off-reservation commercial sellers or medical dispensaries or use marijuana to attract tourism—as the South Dakota Flandreau Santee Sioux Tribe hoped to do through their efforts to launch a “marijuana resort” in 2015.¹⁰

network.com/travel/nigc-2015-experienced-largest-tribal-revenue-gain-in-a-decade/ [https://perma.cc/AY2G-BUK5].

⁴ See, e.g., Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 MARQ. L. REV. 971, 1007 (2007) (explaining that the “IGRA’s lack of direction on the appropriate and legitimate role of state government in negotiating and enacting compacts has led to litigation”).

⁵ See Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 207–08 (2010).

⁶ See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294 (2003–2004) (discussing phenomenon of states with anti-gaming policies tolerating “islands” of tribal gaming).

⁷ See W. Ron Allen, *IGRA Intended Better State/Tribal Relations*, INDIAN GAMING, July 2007, at 14, 14 (discussing productive collaboration between Washington tribes and Washington State).

⁸ The Johnson Act made use of some gaming devices in Indian country a federal crime prior to the passage of the Indian Gaming Regulatory Act. 15 U.S.C. § 1175 (2012).

⁹ See *infra* note 23 and accompanying text.

¹⁰ Sarah Sunshine Manning, *Santee Sioux Assert Tribal Sovereignty, Open First Marijuana Resort*, INDIAN COUNTRY TODAY (Oct. 6, 2015), <http://indiancountrytodaymedianetwork.com/>

Yet, there are also significant differences that suggest that marijuana may force tribes and states to grapple with difficult issues of spillovers and extraterritorial regulation in a way that gaming did not. To begin with, a casino is, of course, inherently stationary. A tribal gaming enterprise can deliver to the surrounding state community both economic benefits and problems such as increased traffic, but its effects are limited by the certainty that the gaming itself will happen on-reservation. By contrast, marijuana is easily transported across reservation borders, increasing effects across borders as well.¹¹

Second, splits in opinion about marijuana appear deeper than was true of tribal gaming. Tribes were pioneers in widespread legalization of gaming. By contrast, states led the liberalization of marijuana policy,¹² yet liberalization still provokes a sharp divide among them.¹³ Tribal views on marijuana are likewise divided, sometimes even among tribes who occupy territory within a single state.¹⁴

The federal role is different as well. Federal involvement in tribal gaming was extensive and followed a mostly consistent course.¹⁵ By contrast, federal attitudes toward marijuana in general and tribal marijuana in particular have been both hands-off and ever-shifting, with the Department of Justice—possibly in response to state pressures—sending sharply mixed signals about the acceptability of tribal marijuana ventures.¹⁶

These differences suggest that different marijuana policies will pose issues for state-tribal relations in a way that gaming has not. In doing so, the marijuana regulation question is likely to reveal the inadequacies of current legal doctrine for addressing the horizontal dimension of state-tribal rela-

2015/10/06/santee-sioux-assert-tribal-sovereignty-open-first-marijuana-resort-161976 [https://perma.cc/EG5Y-NDNY] [hereinafter Manning, *Sovereignty*].

¹¹ See Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1837–38 (2015) (noting that a greater spillover problem exists for “goods” such as marijuana, as opposed to “actions” such as “gambling, prostitution, and prize-fighting” (citations omitted)).

¹² See Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves From Marijuana Spillover From Their Legalizing Neighbors*, 58 B.C. L. REV. 1, 2–4 (companion symposium piece forthcoming May 2017) (discussing the spread of marijuana legalization efforts following California’s 1996 legalization of medical marijuana).

¹³ See *id.* at 5 (“Even while many states (and some tribes) have rushed to legalize marijuana . . . other states and the federal government remain chronically opposed to marijuana legalization.”).

¹⁴ See *infra* notes 44–48 and accompanying text.

¹⁵ See *Cabazon*, 480 U.S. at 216–17 (discussing federal involvement in “promoting tribal bingo enterprises” as part of the overall federal policy of “encouraging tribal self-sufficiency and economic development”).

¹⁶ See *infra* notes 40–41 and accompanying text.

tions. In the strange world of Indian country jurisdiction, both tribal and state powers are uncertain, potentially conflicting, and predicated largely on tribal membership (or lack of it) rather than tribal territorial borders.¹⁷ Structural constitutional provisions that might bring order to this landscape, such as the Full Faith and Credit Clause or the Privileges and Immunities Clauses in Article IV of the Constitution and in the Fourteenth Amendment,¹⁸ simply do not apply to tribes. As a result, many inevitable questions that will arise when tribal and state marijuana policies diverge have no clear answers.

This Article considers this problem. It begins with a survey of current tribal marijuana policies and initiatives and continues with a discussion of the background jurisdictional principles that make the cross-border effects of tribes on states (and vice versa) such a tangled area to navigate.¹⁹ Part I discusses recent developments in federal policy in this realm and illustrates that, even with apparent federal go-ahead, tribes still face the possibility of state pushback.²⁰ Part II examines this pushback and the legal uncertainty that often serves to heighten state-tribal tensions.²¹ Part III concludes with a cautious recommendation of a federal framework built on what has been described as “cooperative tri-federalism” to bring clarity to this sure-to-be-contested area.²²

I. THE PAST AND FUTURE OF TRIBAL MARIJUANA LEGALIZATION

On December 11, 2014, the U.S. Department of Justice issued a guidance letter to U.S. Attorneys and tribal liaisons suggesting that the same policies governing enforcement of federal marijuana laws applicable to states would also be extended to tribes.²³ Under these principles, the letter

¹⁷ See *infra* notes 87–114 and accompanying text.

¹⁸ U.S. CONST. art. IV, §§ 1–2; U.S. CONST. amend. XIV, § 1; see Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 731–32 (2007) (discussing role of these provisions in the interstate context); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 384–85 (2004) (questioning whether the Full Faith and Credit Clause applies to Indian tribes).

¹⁹ See *infra* notes 23–115 and accompanying text.

²⁰ See *infra* notes 23–49 and accompanying text.

²¹ See *infra* notes 50–115 and accompanying text.

²² Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 259, 282 (2010); see *infra* notes 117–132 and accompanying text.

²³ Memorandum from Monty Wilkinson, Dir. of the Exec. Office for U.S. Attorneys, U.S. Dep’t of Justice, to All United States Attorneys et al. (Oct. 28, 2014). The memorandum, while released in December, was dated October 28, 2014. See Lael Echo-Hawk, Garvey Schubert Barer

proclaimed that the “limited [federal] investigative and prosecutorial resources” would be focused on eight narrow areas, such as preventing marijuana sales to minors and drugged driving.²⁴ The letter specifically noted that “in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country,” the eight priorities would continue to “guide” federal authorities.²⁵ The policy articulated in the letter had been developed internally without tribal consultation;²⁶ nonetheless, the letter was widely seen by tribes and others as opening the door to tribal legalization.²⁷

Following the issuance of this guidance, some tribes began to test the waters. In one well-publicized initiative, the Flandreau Santee Sioux Tribe in South Dakota planned to open the nation’s first marijuana resort, including a grow facility, a lounge in which guests could use the tribally-grown product, and a shuttle service so that guests could avoid driving under the influence.²⁸ In preparation for this venture, the Flandreau Santee Sioux Tribal Executive Committee legalized marijuana on June 11, 2015.²⁹ Although tribal council members saw the venture as potentially profitable, they also supported it as an assertion of tribal power and autonomy. A tribal council member explained the tribe’s goals for the project by stating, “We have sovereignty and we have to assert it.”³⁰ The tribe’s assertion of sovereignty was particularly significant because the Flandreau Santee Sioux Tribe reservation is located within the boundaries of South Dakota, a state where marijuana remains illegal.³¹

Other tribes began more quietly to explore the possibilities that marijuana might offer. The Pinoleville Pomo Nation in California began construction of a ten million dollar greenhouse for a planned medical marijuana enterprise, and other California tribes also began to explore medical mariju-

Law, Presentation at California Indian Law Association 15th Annual Indian Law Conference & Gala: Cannabis in Indian Country 3 (Oct. 16, 2015).

²⁴ Memorandum from Monty Wilkinson, *supra* note 23, at 2.

²⁵ *Id.*

²⁶ Echo-Hawk, *supra* note 23, at 3.

²⁷ See, e.g., Steven Nelson, *Tribes Can Legalize Pot, Justice Department Decides*, U.S. NEWS & WORLD REP. (Dec. 11, 2014), <http://www.usnews.com/news/articles/2014/12/11/tribes-can-legalize-pot-justice-department-decides> [<https://perma.cc/U67J-RC92>].

²⁸ Manning, *Sovereignty*, *supra* note 10.

²⁹ See FLANDREAU SANTEE SIOUX TRIBE, TRIBAL CODE tit. 29 (2015); Flandreau Santee Sioux Tribe Res. No. 15-56 (2015) (approving and making effective the Marijuana Control Ordinance).

³⁰ Manning, *Sovereignty*, *supra* note 10 (quoting Kenny Weston).

³¹ *Id.*

ana operations.³² Inquiries poured into FoxBarry Companies, a tribal business development group, whose president claimed to have been contacted by more than one hundred tribes seeking advice on potential marijuana initiatives.³³

Unforeseen conflicts with state and federal authorities, however, soon put a damper on such plans. By mid-2015, for example, the Flandreau Santee Sioux Tribe's marijuana resort had advanced closer to reality.³⁴ The tribe had built the grow facility, planted crops, and begun to convert an existing building into the planned lounge.³⁵ The Tribe's plans encountered a hitch, however, when South Dakota's Attorney General threatened prosecution of nonmembers of the Tribe who ingested marijuana on the reservation or left Indian country under the influence of marijuana.³⁶ Despite the Tribe's willingness to work with nontribal authorities on such jurisdictional issues, federal authorities discouraged it from proceeding with the project, warning of an imminent raid if the Tribe persisted.³⁷ In response, the Tribe made the difficult decision to burn marijuana crops and suspend the project.³⁸

Elsewhere, tribes faced similar obstacles. In September 2015, federal and local officials raided the marijuana operations of Pinoleville Pomo Nation's Rancheria and the Pit River and Alturas Tribes, all located in northern California.³⁹ These actions worried tribe members who had seen the Justice Department's guidance letter as a green light for tribes to develop their own marijuana policies.⁴⁰ Instead, tribes began to realize that, in the words of

³² Alysa Landry, *Proceed with Caution: A Warning to Tribes Wanting to Grow Medical Marijuana*, INDIAN COUNTRY MEDIA NETWORK (Feb. 16, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/16/proceed-caution-warning-tribes-wanting-grow-medical-marijuana-159208> [https://perma.cc/G5PL-37PE].

³³ *Id.*

³⁴ See Sarah Sunshine Manning, *Flandreau Santee Sioux Tribe Burns Crop, Suspends Marijuana Operation*, INDIAN COUNTRY MEDIA NETWORK (Nov. 8, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/08/flandreau-santee-sioux-tribe-burns-crop-suspends-marijuana-operation-162363> [https://perma.cc/9TVH-VDXF] [hereinafter Manning, *Suspends*].

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *After Federal Raids, U.S. Tribes Cautioned About Marijuana*, CBS NEWS (Nov. 18, 2015, 7:48 PM), <http://www.cbsnews.com/news/after-federal-raids-u-s-tribes-cautioned-about-marijuana/> [https://perma.cc/S9G5-3X9H] [hereinafter *Raids*]; Glenda Anderson, *Raid on Northern California Tribal Marijuana Farms Underscores Uncertainty Over Pot Laws*, PRESS DEMOCRAT (Sept. 24, 2015), <http://www.pressdemocrat.com/news/4521945-181/raid-on-tribal-marijuana-farms> [https://perma.cc/JD6C-M47S].

⁴⁰ See *Raids*, *supra* note 39.

one tribal business development director, “The tribes are not going to be immune to what the local attitudes toward marijuana are going to be.”⁴¹

In light of this comment, it is notable that state concerns have often appeared to drive federal involvement to restrict tribal operations. South Dakota’s staunch opposition to the Flandreau Santee Sioux Tribe’s marijuana resort appears to have played a central role in unnerving federal authorities and ultimately halting the Tribe’s plans.⁴² Similarly, although medical marijuana was legal in California at the time the federal raids on tribal crops occurred, aspects of the tribal operations, such as their alleged for-profit purpose, may have been in tension with state law, prompting concern from state, federal, and local officials.⁴³

By contrast, tribes whose legalization policies are more clearly in harmony with those of the surrounding state have had significantly more success in their marijuana ventures. After Washington State decriminalized recreational marijuana use, some tribes located within the state decided to follow suit. The Squaxin and Suquamish Tribes, for example, both legalized marijuana and made deals with the State to sell it on tribal lands.⁴⁴ Notably, the Suquamish Tribe’s action was a direct result of the change in state policy, which tribal leaders saw as bringing unstoppable change to the region. As the Suquamish chairman noted, “The state legalized this,” and despite some tribe members’ qualms about legalization, “the fact is, it’s here.”⁴⁵

Indeed, it is the tribes wishing to maintain anti-marijuana policies that have had the most difficulty with Washington State’s change in policy. The Port Gamble S’Klallam Reservation, for example, has declined to legalize marijuana, citing potential public health issues.⁴⁶ The Yakama Nation, in an extension of its longtime clashes with Washington State over its alcohol ban, has taken a particularly strong stance against marijuana, attempting not only to prohibit its use on the reservation, but also to extend the proscription to off-reservation lands where the tribe possesses hunting and fishing rights.⁴⁷ In such off-reservation lands, which extend over ten counties, the

⁴¹ *Id.* (quoting Blake Trueblood).

⁴² See Manning, *Suspends*, *supra* note 34 (describing South Dakota’s role).

⁴³ See Anderson, *supra* note 39.

⁴⁴ Richard Walker, *Let It Be Pot: Two Washington State Tribes on Board*, INDIAN COUNTRY MEDIA NETWORK (Dec. 2, 2015), <http://indiancountrytodaymedianetwork.com/2015/12/02/let-it-be-pot-two-washington-state-tribes-board-162613> [<https://perma.cc/V5FW-F4W9>].

⁴⁵ *Id.* (quoting Suquamish Chairman Leonard Forsman).

⁴⁶ *Id.*

⁴⁷ Jonathan Kaminsky, *Indian Tribe Seeks Pot Business Ban in Part of Washington State*, REUTERS (Mar. 24, 2014), <http://www.reuters.com/article/us-usa-marijuana-tribe-idUSBREA2N12J20140324> [<https://perma.cc/C89K-EADB>] (discussing Yakama Nation’s stance against marijuana legalization).

Tribe has sought to deny marijuana business applications; whether the Tribe has the authority to do so is contested and may ultimately be decided in court.⁴⁸

Thus far, the tribal experience appears to illustrate that a focus on federal policy alone is incomplete. Even with an apparent federal go-ahead, tribes will face states that are uncomfortable with more liberal tribal marijuana policies than prevail statewide or, on the flip side, states that are unwilling or unable to assist tribes in enforcing more restrictive policies. Part II examines the legal uncertainty that often serves to heighten such state-tribal tensions.⁴⁹

II. MARIJUANA AND REGULATORY UNCERTAINTY

The tribal experience with marijuana raises at least two important questions. First, does the sovereign authority of tribes include the right to pursue marijuana policies in conflict with state law? As Section A discusses, a complicated and often uncertain jurisdictional landscape underlies that question.⁵⁰ Second, to the extent states' and tribes' marijuana policies diverge, what mechanisms do both sorts of sovereigns have to combat extra-territorial spillovers?⁵¹ This question is not merely unsettled but woefully underexplored. Section B attempts to provide an overview of these issues.

A. *The Hazy Boundaries of State and Tribal Law*

The first problem of negotiating conflicts between tribal and state authority is that the boundaries of both are poorly delineated. One might expect that tribal powers would be defined, at least in the first instance, by reservation borders that would not remove the issue of spillovers but would at least clarify what is legal on tribal lands. Nevertheless, since the U.S. Supreme Court decided the 1978 case *Oliphant v. Suquamish Indian Tribe*, which held that tribes lacked criminal authority over non-Indians,⁵² a series of decisions has both weakened tribal sovereignty and conditioned that sovereignty, to a great extent, on the status of the parties as "Indians" and/or tribe members.⁵³

⁴⁸ *See id.*

⁴⁹ *See infra* notes 50–114 and accompanying text.

⁵⁰ *See infra* notes 52–85 and accompanying text.

⁵¹ *See infra* notes 87–114 and accompanying text.

⁵² 435 U.S. 191, 208 (1978).

⁵³ For purposes of determining the scope of criminal jurisdiction, someone is defined as "Indian" if that person has some Indian blood and a "sufficient connection" to a federally recognized tribe. *See LaPier v. McCormick*, 986 F.2d 303, 304–05 (9th Cir. 1993).

In the criminal arena, the rules are fairly clear, if byzantine. Tribes may exercise limited criminal jurisdiction over Indians⁵⁴ in Indian country.⁵⁵ States, aside from a handful permitted to assume criminal jurisdiction in Indian country under Public Law 280, lack authority over Indian country crimes involving Indians,⁵⁶ but can prosecute cases involving only non-Indians regardless of whether they take place on or off tribal lands.⁵⁷ The question whether states possess jurisdiction over non-Indians who commit victimless crimes—which might include some marijuana-related infractions—is unsettled, although some states have asserted jurisdiction over such crimes.⁵⁸ The federal government fills in some of the gaps left by this scheme,⁵⁹ while also possessing concurrent authority with tribes in some cases.⁶⁰

An additional twist relevant to the marijuana context, however, is that several states, including some such as California and Washington where tribes have sought to adopt marijuana policies potentially at odds with state law, have extended their criminal jurisdiction through Public Law 280 (“P.L. 280”).⁶¹ P.L. 280 is a 1953 law that granted some states criminal powers in Indian country while establishing a process for other states to opt in and assume jurisdiction.⁶² Although P.L. 280 gives affected states full

⁵⁴ In the Supreme Court’s decision in *Duro v. Reina* in 1990, the Court held that tribes could not prosecute nonmember Indians, but Congress later restored this authority through the “*Duro* fix.” 495 U.S. 676, 694 (1990); see *United States v. Lara*, 541 U.S. 193, 216 (2004). In addition, the Violence Against Women Reauthorization Act of 2013 gives a handful of tribes narrow powers to prosecute spousal and dating violence perpetrated by non-Indians. See 25 U.S.C. § 1304 (2012 & Supp. I 2013).

⁵⁵ Indian country is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,” as well as “all dependent Indian communities within the borders of the United States” and “all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151 (2012).

⁵⁶ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.03[1], at 763 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK]. This includes crimes in which, of the perpetrator and victim, one is an Indian and one is not. *Id.*

⁵⁷ See *United States v. McBratney*, 104 U.S. 621, 624 (1881); COHEN’S HANDBOOK, *supra* note 56, § 9.03[1], at 763.

⁵⁸ See COHEN’S HANDBOOK, *supra* note 56, § 9.03[1], at 763.

⁵⁹ See *id.* § 9.02, at 738–62.

⁶⁰ See *id.* § 9.04, at 765–69.

⁶¹ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012)). California is one of the six jurisdictions that were originally vested with criminal jurisdiction in Indian Country under P.L. 280. 18 U.S.C. § 1162. Washington was not one of the original jurisdictions but opted in. See WASH. REV. CODE § 37.12.010 (2016) (assuming jurisdiction under P.L. 280 despite not being one of the six original jurisdictions).

⁶² Act of Aug. 15, 1953. South Dakota, another site of state-tribal marijuana clashes in the case of the Flandreau Santee Sioux, has assumed only limited jurisdiction on highways passing through reservations. See S.D. CODIFIED LAWS §§ 1-1-17 to -21 (2017).

authority to enforce criminal “prohibitory” laws against both Indians and non-Indians on tribal territory, the Supreme Court has held that it confers no special rights on states to enforce laws that are merely “regulatory.”⁶³ Under this distinction, first articulated in 1987 by the United States Supreme Court in *California v. Cabazon Band of Mission Indians*, California’s laws prohibiting high-stakes bingo fell on the “regulatory” side of the divide because California permitted many other forms of gambling.⁶⁴ That high-stakes bingo was a misdemeanor subject to criminal enforcement in California did not change the Court’s conclusion.⁶⁵

The Court itself admitted the difficulty of drawing the regulatory versus prohibitory distinction in *Cabazon*, noting that it was “not a bright-line rule” and “an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory.”⁶⁶ In the gaming context, Congress eliminated some of the uncertainty that might otherwise have persisted about the classification of other P.L. 280 states’ gaming laws by passing the IGRA, which narrowed tribal powers by making the scope of permissible tribal gaming largely contingent on state law.⁶⁷ In the marijuana context, however, courts will likely have to confront this thorny issue anew. Whether a state prohibition is “criminal” under P.L. 280 tends to depend on the scope of the activity banned. Thus, P.L. 280 states that forbid sale, possession, or use of all forms of marijuana are likely to be able to extend such laws to Indian country. By contrast, states that legalize marijuana to some degree, but with restrictions, may have more difficulty characterizing their laws as “criminal prohibitory.”

The civil context is even more complicated. First, a few broad principles: Tribes are subject to federal laws deemed to be “of general applicability,” which, under the approaches of most circuits, has proved to be the vast majority.⁶⁸ Tribes may regulate the conduct of their own members in Indian

⁶³ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209–10 (1987).

⁶⁴ *Id.* at 209–11.

⁶⁵ *Id.* at 211.

⁶⁶ *Id.* at 210.

⁶⁷ Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 18 U.S.C. §§ 1166–1168 (2012) and 25 U.S.C. §§ 2701–2721 (2012)); see Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 50–52 (1997) (discussing role of state law in the IGRA process).

⁶⁸ See Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. C.R. & SOC. JUST. 123, 125–26, 132 (2016) (explaining that most circuits have adopted an approach to this question under which they presume that federal regulatory law applies to tribes).

country and (perhaps, in limited circumstances) outside of it as well.⁶⁹ Tribes' civil authority over nonmembers, by contrast, is strictly limited under the so-called *Montana* framework, which applies both to tribal regulation and the jurisdiction of tribal courts.⁷⁰ From here on out, the landscape becomes more uncertain.

In theory, the overarching framework that the United States Supreme Court established in 1981 in *Montana v. United States* prohibits the assertion of tribal civil authority over nonmembers unless one of two exceptions is met: the nonmember has either entered into a "consensual relationship[]" with the tribe or is engaging in conduct that poses a severe threat to tribal health or welfare.⁷¹ In practice, many questions remain. To begin with, *Montana* itself involved solely nonmember activities on private land, and the Court has at times suggested that tribal power on tribal land may be greater.⁷² In 2011, in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, the Ninth Circuit Court of Appeals built on these suggestions, holding that the *Montana* framework did not limit tribal power over nonmembers acting on tribal land.⁷³ Because many tribal enterprises are located on tribal trust land, this narrow reading of *Montana* gives tribes in the Ninth Circuit a great deal more power to regulate nonmember activity.

Additional controversy exists about how narrowly or broadly the *Montana* exceptions should be read. Most recently, in 2014, the Fifth Circuit Court of Appeals in *Dolgener Corp. v. Mississippi Band of Choctaw Indians* held that the "consensual relationship" exception permitted a tribe to exercise jurisdiction over a corporation that had signed a lease whose provisions could be enforced in tribal court—even though the suit at hand involved not a lease dispute but the sexual molestation of a tribe member.⁷⁴ The Supreme Court granted certiorari and was widely expected to narrowly reverse;⁷⁵ instead, following Justice Scalia's death, the Court split 4-4 in a

⁶⁹ See COHEN'S HANDBOOK, *supra* note 57, § 7.02[1][c], at 603 (suggesting that tribes have authority over nonmembers outside of Indian country with respect to core tribal interests such as domestic relations).

⁷⁰ See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (holding that the framework applies to assertions of both tribal "legislative" and "adjudicative" jurisdiction).

⁷¹ See *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

⁷² See *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (concluding that land status is an important factor that may be dispositive); *Strate*, 520 U.S. at 454 (explaining that "tribes retain considerable control over nonmember conduct on tribal land"); *Montana*, 450 U.S. at 547.

⁷³ *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810–12 (9th Cir. 2011).

⁷⁴ 746 F.3d 167, 169 (5th Cir. 2014), *aff'd sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

⁷⁵ See Adam Liptak, *Justices Weigh Power of Indian Tribal Courts in Civil Suits*, N.Y. TIMES (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/us/politics/justices-weigh-power-of-indian->

brief per curiam opinion, affirming the Fifth Circuit result for the moment but leaving the underlying issue still uncertain.⁷⁶

The limits of state civil authority in Indian country are also unclear. In the foundational 1832 case of *Worcester v. Georgia*, the United States Supreme Court described Indian country as a place where state law “can have no force,” but that view has since been eroded to some degree.⁷⁷ Today, in assessing the limits of state power in Indian country, courts apply an ill-defined balancing test that incorporates principles of federal preemption, tribal sovereignty, and state interests.⁷⁸ Under this scheme, for example, in 1980, in *Washington v. Confederated Tribes of Colville Indian Reservation*, the U.S. Supreme Court determined that Washington State had the authority both to tax nontribal purchasers of cigarettes sold by a tribe in Indian country and to require the tribe to take measures to enforce the tax, including maintaining “detailed records of both taxable and nontaxable transactions.”⁷⁹

In other cases, however, the Court has found that states lack regulatory authority in Indian country. For example, in *Cabazon*, the Court held that California’s efforts to enforce its bingo restrictions against a tribal enterprise to be not only unauthorized by P.L. 280, but also impermissible as an exercise of California’s inherent powers in Indian country.⁸⁰ In reaching this conclusion, the Court cited both the federal policy of support for tribal gaming enterprises and the Tribe’s “comfortable, clean, and attractive facilities and well-run games,” the latter of which led the Court to reject the state’s view that the tribe was “merely marketing an exemption from state gambling laws.”⁸¹

As such examples suggest, the Court’s application of the balancing test is thus highly context-specific, often hinging on the degree to which the tribe has added value to the product or service being sold.⁸² Indeed, some have argued that the varying results have as much to do with the degree to

tribal-courts-in-civil-suits.html [https://perma.cc/J3JW-WSAX] (suggesting that, following oral argument, “[t]he Supreme Court . . . seemed poised to limit the power of Indian tribal courts to hear civil cases against outsiders”).

⁷⁶ See *Dollar Gen. Corp.*, 136 S. Ct. at 2160

⁷⁷ 31 U.S. (6 Pet.) 515, 520 (1832).

⁷⁸ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) (explaining that “[s]tate jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority”).

⁷⁹ 447 U.S. 134, 159–60 (1980).

⁸⁰ 480 U.S. at 212, 221–22 (1987).

⁸¹ *Id.* at 217–19.

⁸² See *Colville*, 447 U.S. at 155 (noting that “[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest”).

which the Court approves the underlying activity (smoking on the one hand, “clean . . . and attractive” gaming facilities on the other) than with objective differences such as the degree of federal support or the impact of tribal activities on surrounding state areas.⁸³

The hallmark, then, of the doctrines regulating state and tribal authority in Indian country is their unpredictability and lack of susceptibility to anything but case-by-case analysis. The possibility of varying state and tribal marijuana regulation promises to test these murky boundaries as perhaps never before. Are California’s regulations on medical marijuana production regulatory or prohibitory? To what extent can states require tribes to enforce state marijuana law against nonmembers who travel to Indian country to partake? Is it permissible for a tribe in South Dakota to grow marijuana for on-site use and sell it only to tribe members and residents of states where marijuana is legal? Does an upscale, well-run marijuana resort resemble more closely the gaming facility in *Cabazon*, allowed to operate without interference from state law,⁸⁴ or the cigarette enterprise in *Colville*, deemed by the Court to be merely “market[ing] an exemption” and thus subject to state tax?⁸⁵ These questions do not at the moment have clear answers, and this uncertainty complicates the problem of coexistence between state and tribal policies. Section B considers the spillover problems that may arise when state and tribal marijuana laws diverge.⁸⁶

B. The Rarely Considered Issue of Tribal-State Spillovers

The doctrines regarding extraterritorial assertion of state power are famously unclear.⁸⁷ Even so, however, mechanisms that include both constitutional requirements and informal norms serve to make severe interstate friction on these issues relatively rare.⁸⁸ The Supreme Court has read the dormant Commerce Clause to encompass some restriction on clearly extra-

⁸³ *Cabazon*, 480 U.S. at 219; see, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1600–08, 1619–20 (1996) (describing justices’ subjective opinions as driving the results in both *Colville* and *Cabazon*).

⁸⁴ See *Cabazon*, 480 U.S. at 219.

⁸⁵ *Colville*, 447 U.S. at 155.

⁸⁶ See *infra* notes 87–115 and accompanying text.

⁸⁷ See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (noting that the scope of extraterritorial limits on state power is “notoriously unclear”).

⁸⁸ See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 64 (2014) (making the case that “our system is reasonably well structured to harness democratically productive forms of interstate friction while avoiding its more damaging varieties”).

territorial state legislation;⁸⁹ likewise, state courts may apply their state's law to out-of-state events only if the case has some connection to the state.⁹⁰ Both prohibitions are fairly lenient and to some extent contested, but they act at a minimum as a backstop to states' overt attempts to interfere in each other's affairs.

As the Constitution limits state overreaching, it also contains mechanisms that foster day-to-day interstate harmony. The most important of these is likely the requirement of the Full Faith and Credit Clause that states enforce sister-state judgments automatically.⁹¹ This provision allows the relatively seamless transfer of judicial authority from one jurisdiction to another, and prevents the friction that might ensue—as it often does in the international context—were states allowed to second-guess each other's policy choices and judicial procedures.⁹²

More informal norms and doctrines also help to smooth interstate relations. The choice-of-law doctrines state courts use to select decisional law in cases with multistate contacts often take into account the interests of other states. California's "comparative impairment" principle, for example, directs courts confronting otherwise insoluble conflicts to apply the law of the state whose interest "would be more impaired if its policy were subordinated to the policy of the other state."⁹³ The choice-of-law process brings states together in another way; by familiarizing judges with the law of other states, particularly neighboring ones, it may help to smooth out interstate differences and permit states to easily borrow successful policy innovations.⁹⁴ At the legislative level, states exert mutual influence on each other as well; for example, states sometimes react to regional problems with cross-border effects (such as impaired driving) by harmonizing their laws with those of their neighbors.⁹⁵

⁸⁹ See generally Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. (forthcoming 2017) [hereinafter *Making It Work*] (discussing devices for mediation of interstate conflicts and their absence in the tribal context).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 933 (Cal. 2006) (internal citation and quotation marks omitted).

⁹⁴ Shane A. Gleason & Robert M. Howard, *State Supreme Courts and Shared Networking: The Diffusion of Education Policy*, 78 ALB. L. REV. 1485, 1511 (2014–15).

⁹⁵ See James Macinko & Diana Silver, *Diffusion of Impaired Driving Laws Among US States*, 105 AM. J. PUB. HEALTH 1893, 1893 (2015) (concluding that "[t]he proportion of younger drivers and the presence of a neighboring state with similar laws were the strongest predictors of first-time law adoption").

Finally, when relations break down, states have conflict resolution mechanisms available. States may invoke the Supreme Court's original jurisdiction, as Nebraska and Oklahoma attempted to do (albeit unsuccessfully) to enjoin Colorado's efforts to legalize recreational marijuana.⁹⁶ As Heather Gerken and Ari Holzblatt have argued in a co-authored article, numerous less formal options exist as well. Turning to Congress, which can help negotiate compromises and deals, is "a natural choice for those aggrieved by an interstate spillover and seeking a referee."⁹⁷ Political parties can help build trust and coalitions across state lines.⁹⁸ Interstate compacts and uniform laws likewise help in mediating differences.⁹⁹ Together, these mechanisms add up to frequently "robust, cooperative networks among federal, state, and local officials that can and do safeguard horizontal federalism."¹⁰⁰

The point of this discussion is not that these mechanisms work perfectly. Indeed, the issues described in other contributions to this Symposium offer ample evidence that they do not.¹⁰¹ But as patchy and imperfect as the doctrines promoting interstate harmony may be, they likely play at least some role in forestalling interstate conflict. By contrast, for two important and related reasons—the absence of equivalent mechanisms and the poor history of tribal-state relations—open conflict between tribes and states seems far more likely.

To start with the first problem, the Constitution simply does not regulate the relationships between tribes and states. There is no Full Faith and Credit Clause applicable to tribes; a number of states have extended full faith and credit or other forms of comity to tribal judgments, but the majority of states still have not.¹⁰² Tribes are not subject to any constitutional limits in the decisional law they apply to multijurisdictional disputes, a fact that appears to have influenced some Supreme Court justices in the direction of limiting tribal sovereignty.¹⁰³ Presumably, the converse of this principle is

⁹⁶ See *Nebraska v. Colorado*, 136 S.Ct. 1034, 1036 (2016) (mem.) (Thomas, J., dissenting) (denying states' motion for leave to file); Complaint at 1, *Nebraska*, 136 S.Ct. (No. 220144).

⁹⁷ Gerken & Holtzblatt, *supra* note 88, at 108.

⁹⁸ *Id.* at 110.

⁹⁹ *Id.* at 110–11.

¹⁰⁰ *Id.* at 111.

¹⁰¹ See, e.g., Gabriel J. Chin, *Policy, Preemption and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929 (2017) (exploring how states exercise their jurisdiction on ; Atheir citizens' behavior in states with legalized marijuana).

¹⁰² See COHEN'S HANDBOOK, *supra* note 56, § 7.07[2][a]–[b], at 658–61 (discussing disparate approaches states have taken to enforcing tribal judgments).

¹⁰³ See Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1531 (2013) (noting remarks from the oral argument in *Strate* suggesting

true as well—in other words, the Constitution does not require states to apply tribal law to disputes with tribal contacts.¹⁰⁴ The informal borrowing and mutual influence that occurs among states also rarely occurs between states and tribes, and when it does, it is one-sided; tribes sometimes borrow from state law to fill in gaps in tribal codes, but tribal law seldom exerts an influence on state legislatures or courts, which may (wrongly in many cases) regard it as too difficult to ascertain or apply.¹⁰⁵ All this means that tribal and state authorities are relatively unacquainted with each other, and are unlikely to have had the routine encounters with each other's law that build familiarity and trust.

This problem is compounded by the historical (and often justified) skepticism that tribes tend to feel about state interference in tribal affairs. Throughout U.S. history, states have frequently attempted to encroach on tribal sovereignty by applying their law to tribal territory, setting the stage for many important legal battles from *Worcester*, which held that Georgia law had no force in Cherokee territory,¹⁰⁶ to the more recent *Williams v. Lee*, in which the Court held that the principle that tribes should be able to “make their own laws and be ruled by them” required trying a claim against tribe members in Navajo rather than Arizona court.¹⁰⁷

Even when tribes and states have not been in active conflict, they have tended to inhabit separate spheres. From the 1830 United States Supreme Court decision in *Cherokee Nation v. Georgia*, the United States has been understood to have a trust relationship with tribes.¹⁰⁸ Though the federal government has certainly been a perfidious guardian through many phases of U.S. history, in recent years it has for the most part pursued a bipartisan policy of fostering tribal sovereignty and autonomy.¹⁰⁹ The United States defends tribal interests in court,¹¹⁰ aids tribal economic development,¹¹¹ and

that the absence of constitutional constraints on tribal choice-of-law would be a concern if tribal courts were permitted more expansive jurisdiction).

¹⁰⁴ See COHEN'S HANDBOOK, *supra* note 56, § 7.07[2][a]–[b], at 658–61.

¹⁰⁵ See Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1651 (2006) (noting that some states have concluded, sometimes with little evidence, that ascertaining tribal law is “simply too difficult”); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 300–01 (1998) (discussing tribal court practice of relying on state law where tribal codes are incomplete).

¹⁰⁶ *Worcester*, 31 U.S. (6 Pet.) at 520.

¹⁰⁷ *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959).

¹⁰⁸ 30 U.S. (5 Pet.) 1, 2 (1831) (asserting that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else”).

¹⁰⁹ See COHEN'S HANDBOOK, *supra* note 56, § 1.07, at 93–108 (describing policy of federal support of tribal self-determination that has been in place for the last half-century).

¹¹⁰ *See id.*

¹¹¹ *See id.*

permits tribes to develop their own environmental regulations that may differ from those of the surrounding state.¹¹²

Even today, of course, the federal government may meddle in tribal self-governance or fail to defend tribal interests with sufficient vigor. For better or worse, however, the United States is the focal point of tribes' government-to-government interactions. Tribes are used to negotiating with the federal government and have some assurance that it will safeguard their interests. By contrast, tribal-state relations are fraught with suspicion, legal uncertainty, and simple lack of historical experience. Where tribes and states have been compelled to negotiate with each other, as, for example, the IGRA demands, the results have often been unsatisfactory.¹¹³

None of this is to suggest that tribal-state relations are uniformly bleak or that there have not been significant successes. Some states and some tribes have productively cooperated even when the issues at stake are contentious ones. A tribal chairman, for example, highlights the "co-regulatory environment" and "respectful government-to-government relationship" that his tribe has achieved with Washington State in negotiating gaming compacts.¹¹⁴ Such instances do not change the reality, however, that few legal structures are in place to foster or cement such relationships.

The absence of such mechanisms for smoothing state-tribal relationships is likely to be felt particularly acutely as tribes and states explore new policies toward marijuana. Regulation of marijuana raises economic, moral, medical, public health, and safety considerations; as seen by the experience of Washington State tribes, tribes may adopt views on these subject that differ both from those held in the surrounding state and from each other. Even when tribes adopt policies that are broadly similar to those of the surrounding state, details of implementation may vary in ways that invite conflict. The next section argues that, although individual states and tribes may be able to negotiate resolutions to these issues, ultimately federal involvement (whether in the form of guidance or legislation) may be necessary both to protect tribal sovereignty and to foster tribal-state harmony.¹¹⁵

¹¹² See Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 U. COLO. L. REV. 789, 807–09 (2015).

¹¹³ See 25 U.S.C. § 2710(d)(3)(A) (2012); Gover & Gede, *supra* note 5, at 194 (discussing the way overreliance on the state-tribal relationship has turned IGRA into "experiment in permanent and unremitting litigation").

¹¹⁴ Allen, *supra* note 7 (internal citations omitted).

¹¹⁵ See *infra* notes 117–132 and accompanying text.

III. THE FEDERAL GOVERNMENT'S POTENTIAL ROLE

Part III suggests that the federal government should play a role in mediating potential state-tribal conflicts over marijuana.¹¹⁶ Before elaborating on this argument, it is important to note that this argument rests on norms of federal-tribal relations that, though longstanding, may quickly become obsolete under the new administration. Even if a Trump Administration continues to deprioritize enforcement of federal marijuana laws against states and tribes—an outcome that increasingly seems in doubt¹¹⁷—there is no guarantee that the administration will preserve the pro-tribal sovereignty policies that have been in place since the Nixon Administration. A forthcoming article argues that, in the area of tribal self-governance, Donald Trump “has a dark history in this arena, propagating lies and racial accusations to promote his casino interests.”¹¹⁸ Such attitudes could upend the longtime support for tribal autonomy that this section assumes the federal government would and should exercise.

If some degree of consistency with past practices is assumed, however, the federal government has two important roles to play. The first is to ensure that tribes, like states, have the ability to reach independent sovereign judgments about the degree to which marijuana should be legal. The second is to provide a structure—whether through legislation or more informal mechanisms—by which states and tribes can resolve conflicts about the spillover effects of their marijuana laws.

To consider the first issue, it goes without saying that the hundreds of tribes located within the United States, of which there are 566 federally registered tribes alone,¹¹⁹ will vary in their stances toward marijuana growing,

¹¹⁶ See *infra* notes 119–132 and accompanying text.

¹¹⁷ President Trump’s Attorney General, Senator Jeff Sessions, for example, has stated that “[w]e need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized.” Mike McPhate, *California Today: What Jeff Sessions Could Mean for Legal Marijuana*, N.Y. TIMES (Nov. 22, 2016), <http://www.nytimes.com/2016/11/22/us/california-today-jeff-sessions-marijuana.html> [https://perma.cc/65ZW-X9J3]. The United States Senate confirmed Senator Sessions on February 8, 2017. Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html> [https://perma.cc/ZDE9-GK6E]. Even if the overall policy were to be continued, there remains the separate question whether it would be applied to tribes as well as states.

¹¹⁸ See Bethany R. Berger, *Does the Supreme Court Hate Tribes (or, Was 2016 Just a Blip)?*, U. ILL. L. REV. (forthcoming 2017) (manuscript at 39–40), https://www.academia.edu/30202224/Does_the_Supreme_Court_Hate_Tribes_or_Was_2016_Just_a_Blip_U.III.L.Rev.2017 [https://perma.cc/EL2N-XEA7].

¹¹⁹ See NAT’L CONFERENCE OF STATE LEGISLATURES, *Federal and State Recognized Tribes*, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [https://perma.cc/V6LY-XM7N] (last updated Oct. 2016).

sales, or use. In Washington State alone, for example, the Suquamish police chief has seen marijuana legalization as a route to bringing higher environmental standards to a formerly clandestine industry.¹²⁰ By contrast, the director of the Port Gamble S'Klallam tribe has described marijuana as a public health threat,¹²¹ and the leadership of the Yakama Nation—in keeping with the tribe's longstanding anti-alcohol stance—has viewed marijuana use as directly contrary to tribal values.¹²² As with states' differing views on marijuana, these distinct tribal positions, informed by history, culture, economics, and recent experience, are entitled to protection.

It is not just tribes, however, but governments more generally that may benefit from allowing tribes autonomy to regulate marijuana as they see fit. Because of their demographic and cultural variety and their often smaller and more responsive governments, tribes offer particular potential as Brandeisian laboratories of democracy.¹²³ In a nation still experimenting with a variety of marijuana policies, tribes offer the opportunity to test results on a smaller scale and in an environment where unsuccessful policies may in some cases be more easily reversed.

Tribal autonomy, therefore, is an important value, and one that the federal government can protect in the first instance by ensuring that the Justice Department's enforcement policy toward tribal marijuana legalization is both clear and as consistent as possible with the policy applied to states. Although the 2014 guidance letter seemed superficially to put tribes and states on an equal footing with respect to marijuana enforcement, it is not clear that it reflected a complete reckoning with the potential conflicts that might result were states and tribes to pursue different policies. In addition, the federal authorities' subsequent raids and threatened raids have called into question whether the guidance letter continues to represent the federal view.¹²⁴ Consultation with tribes would enhance the Justice Department's decision-making process in future, which would both show respect for tribal sovereignty and potentially head off sources of tribal-state friction. Willing-

¹²⁰ Walker, *supra* note 44.

¹²¹ *Id.*

¹²² See Kaminsky, *supra* note 47.

¹²³ The author has developed this idea at greater length in a forthcoming paper. See Florey, *Making It Work*, *supra* note 89.

¹²⁴ See Echo-Hawk, *supra* note 23, at 17 (suggesting that personnel changes may have led to a retreat from the Justice Department's announced policy); see also Lael Echo-Hawk, *Federal Raids on Tribal Hemp Operation Raise Questions About True Effect of DOJ Tribal Marijuana Memo*, SMOKE SIGNALS: INDIAN L. BLOG (Oct. 26, 2015), <http://www.smokesignalsindianlaw.com/2015/10/26/federal-raids-on-tribal-hemp-operation-raise-questions-about-true-effect-of-doj-%e2%80%8etribal-marijuana-memo/> [<https://perma.cc/D5LN-T449>] (suggesting that the “recent federal and state law enforcement activity on federal land calls into question the true efficacy of [the guidance letter]”).

ness to enter into memoranda of understanding with individual tribes considering marijuana legalization, as one lawyer working in the area has suggested,¹²⁵ would also remove some of the legal uncertainty that has plagued efforts such as the marijuana resort. Finally, efforts to establish clarity in the law and protect tribal interests should not be confined to pro-marijuana tribes; tribes that wish to maintain marijuana policies more restrictive than those of the surrounding state should be able to seek federal enforcement aid where appropriate.

Perhaps the more difficult problem is that of resolving frictions between tribes and states that choose to pursue different policies. In this regard, it is worth noting that the potential for state/tribal clashes over marijuana is not necessarily materially different than the possibility of similar conflicts in the interstate setting. South Dakota, for example, opposed having a tribal marijuana resort within its borders because of fears that it might entice non-Indian state residents to engage in conduct illegal under state law.¹²⁶ Yet even as the Flandreau Santee Sioux Nation was forced to suspend its marijuana resort plans, numerous “bud and breakfast” operations were opening in Colorado and Washington, potentially creating similar difficulties for neighboring states with differing marijuana policies.¹²⁷

Despite this basic similarity in the nature of the potential conflicts, however, the tribal context differs in the sheer unsettledness of the legal climate. Major questions remain about the extent of state authority to regulate state citizens’ purchase or use of marijuana in Indian country and about the power of tribes to regulate nonmember conduct. Further, states and tribes relate to each other in a climate often characterized by distrust and unfamiliarity, and in the absence of the mechanisms that facilitate better interstate relations.

Although a more certain legal climate would benefit tribes in many areas of law, clearly mapping out tribal powers with respect to marijuana should be one of the most urgent priorities given the interest of many tribes in the issue, the controversy surrounding the area in general, and the complexity of the federal, state, and tribal regulation that may potentially apply.

¹²⁵ See Echo-Hawk, *supra* note 23, at 39.

¹²⁶ See Manning, *Suspends*, *supra* note 34.

¹²⁷ See Philip Ross, *Marijuana Industry Reaches New Heights with Gourmet Kitchens, Day Spas, and Maybe Even Luxury Hotels*, INT’L BUS. TIMES (Mar. 12, 2015, 2:55 PM), <http://www.ibtimes.com/marijuana-industry-reaches-new-heights-gourmet-kitchens-day-spas-maybe-even-luxury-1845276> [<https://web.archive.org/web/20170330151905/http://www.ibtimes.com/g00/marijuana-industry-reaches-new-heights-gourmet-kitchens-day-spas-maybe-even-luxury-1845276>]; Allison Spiegel, *‘Wake and Bake’ Gets a Whole New Meaning at Bud+Breakfast, Colorado’s Pot-Friendly Hotel Group*, HUFFINGTON POST (May 12, 2015, 2:38 PM), http://www.huffingtonpost.com/2015/05/12/budbreakfast-pot-hotel-colorado_n_7259292.html [<https://perma.cc/S7AX-WABY>].

In some cases, tribes may be able to negotiate agreements individually with states or the federal government. But comprehensive legislation would avoid the potential conflict or delay attending such efforts. Congress has vast powers under the Indian Commerce Clause to make laws affecting both tribes and tribal-state relations, powers that likely include the ability to affirm and reinforce traditional aspects of tribal sovereignty.¹²⁸ Given that Congress may already consider legislation to help resolve the marijuana issue more generally, it is important that tribes and their interests should be taken into account.¹²⁹

Imperfect as it is, the IGRA may be useful as a source of both positive and negative guidance. Marijuana legislation could benefit from some of the arguable successes of IGRA, such as creating a structured process for negotiation, while avoiding some of its failures, including insufficient federal oversight of the compacting process and the unequal sovereign immunity regime it establishes. Alex Tallchief Skibine has advocated for a revised version of IGRA reliant on what he calls a “cooperative tri-federalism: a version of federalism involving the tribes, the federal government, and the states.”¹³⁰ Skibine suggests suggest, for example, that the federal government could set forth generalized requirements for tribal gaming with input from tribes and states and then negotiate compacts with particular tribes.¹³¹ A similar model—that is, a structure under which federal law sets standards that leave individual tribes and states room to negotiate—could also work in the marijuana context. Along related lines, Melinda Smith has offered a detailed proposal for what a federal framework might look like, including the establishment of a commission that would issue permits to all marijuana businesses conditioned on prior consultation with affected tribal, state, and local governments.¹³²

Both proposals would improve upon IGRA by foregrounding the federal-tribal relationship, while still offering mechanisms for state input and devices for resolving state-tribal conflicts. In an area fraught with uncertainty and unconstrained by constitutional principles, legislation could play an important role in allowing tribes to exercise their sovereignty in a manner

¹²⁸ See Gover & Gede, *supra* note 5, at 186–87 (describing federal powers).

¹²⁹ See Stephanie Akin, *Congress Turning a New Leaf on Marijuana*, ROLL CALL (Sept. 8, 2016, 5:00 AM), <http://www.rollcall.com/news/new-leaf-congress-poised-decriminalize-marijuana-momentum-reform> (describing lobbyists’ pressures on Congress to consider nationwide decriminalization).

¹³⁰ Skibine, *supra* note 22, at 282.

¹³¹ *Id.* at 288.

¹³² See Melinda Smith, Comment, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507, 548 (2015).

that does not unduly interfere with states' ability to enforce their own laws outside of Indian country.

CONCLUSION

Allowing individual tribes the autonomy to develop their own marijuana policies is a potential boon both for the Native community and for the nation as a whole. For tribes, marijuana represents both an economic opportunity and a chance to translate tribal values into policy. Meanwhile, state and local governments can benefit from the diverse experiences of tribes acting as Brandeisian laboratories of democracy. Yet the potential for tribes to forge their own paths in the area of marijuana is hindered by the problems inherent in maintaining smooth relationships with states while they do so. In an area where law is uncertain and mutual suspicion is often high, it may be necessary for the federal government to provide both protection for tribal sovereignty and mechanisms for resolving legitimate spillover concerns that both states and tribes may have. The state, tribal, and federal experience with IGRA, as troubled as it has sometimes been, nonetheless provides useful lessons that should shape any federal involvement.