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WAITING FOR THE SMOKE TO CLEAR: THE COMPLICATED BEGINNINGS AND PROMISING FUTURE OF TRIBAL CANNABIS

KATHERINE FLOREY[†]

When the Obama administration first extended its hands-off marijuana policy to tribes as well as states, much of Indian Country celebrated, believing that federal tolerance would be an immediate boon for tribes. The reality of tribal cannabis has been rockier. Tribes' initial ventures into cannabis were clouded by state opposition, federal raids, and troubling legal uncertainty. Over time, however, tribes are gradually gaining experience in navigating around these obstacles as they exercise their sovereign prerogative to set cannabis policies. This article reflects on some of the factors that caused tribal cannabis operations to move more slowly than anticipated while also considering the brightening prospects for the future.

I. INTRODUCTION

In December 2014, when the Obama administration first indicated that its hands-off marijuana policy would apply to tribes as well as states,¹ much of Indian Country celebrated.² A cannabis law blog called this action a “financial boon” for tribes and noted that “[t]he possibilities for Native American Tribes in the cannabis industry are vast.”³ Tribes too remote for gaming operations to be feasible expressed hope that cannabis operation could provide a similar—or even a greater—boost to economic development.⁴ A conference in Washington State

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1. The letter announced that the Department of Justice would deprioritize enforcement of federal marijuana law as to tribes that had legalized cannabis. See Memorandum from Monty Wilkinson, Dir. of the Exec. Off. for U.S. Att’ys, Dep’t of Just., for all U.S. Att’ys et al. on Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), <https://dfi.wa.gov/sites/default/files/monty-wilkinson-memo.pdf>. The memorandum was dated October 28, 2014, but was not released until December 11, 2014. See Lael Echo-Hawk, Garvey Schubert Barer Law, Presentation at California Indian Law Association Fifteenth Annual Indian Law Conference: Cannabis in Indian Country 3 (Oct. 16, 2015); see also Julie Kim & Jessica Roberts, *Green Means Go: Tribes Rush to Regulate Cannabis in Indian Country*, 8 AM. INDIAN L.J. 256, 264-67 (2019), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1209&context=ailj> (describing the effects of the action in detail).

2. See Hilary Bricken, *Tribes and Cannabis: This Will Be Big*, CANNALAW BLOG (Dec. 17, 2014), <https://harrisbricken.com/cannalawblog/tribes-and-cannabis-this-will-be-big>.

3. See *id.* (noting that tribes might be able to gain a competitive advantage by imposing lower cannabis taxes than those of surrounding states).

4. See Alana Semuels, *A New Growth Industry for Native Americans: Weed*, ATLANTIC (May 20, 2016), <https://www.theatlantic.com/business/archive/2016/05/weed-to-revive-native-american-reservations/483566/>.

about cannabis legalization attracted some seventy-five tribes,⁵ and some tribal leaders were “swarmed by tribal members demanding that marijuana be immediately legalized.”⁶ Even in areas where marijuana remained prohibited at the state level, tribes sought to develop their own cannabis operations; the Flandreau Santee Sioux Tribe (“FSST”), for example, planned both a grow facility and a marijuana-centered resort to attract tourists.⁷

Nearly seven years after the Obama administration’s action, cannabis has become a fast-expanding industry, bringing in \$17.5 billion in legal sales in 2020.⁸ As of November 2021, all but four states have legalized or decriminalized the use of at least some cannabis products, and cannabis is fully legal in eighteen states and the District of Columbia.⁹ In legal states, excise taxes on cannabis have bolstered state treasuries, bringing in \$526 million in California and \$469 million in Washington in the fiscal year 2020.¹⁰

For some tribes too, the cannabis boom paid off relatively quickly.¹¹ Other tribes have deliberately opted to remain on the cannabis sidelines due to concerns that public health or other negative consequences are not worth the potential economic gain.¹² For many tribes that were eager to move forward, however, early efforts proved more complicated than expected.¹³ The fate of the FSST’s marijuana resort illustrates some of tribes’ early struggles: despite initial progress in building a grow facility, planting crops, and beginning work on a planned smoking lounge, the tribe encountered unexpected resistance from the surrounding state of South Dakota’s attorney general, who threatened to prosecute nonmembers who visited the tribe’s facilities.¹⁴ After federal authorities warned

5. See Eliza Gray, *Why American Indian Tribes Are Getting into the Marijuana Business*, TIME (Sept. 4, 2015), <https://time.com/4019219/american-indian-tribes-marijuana/>. It should be noted, however, that a significant number of tribes and their members remain opposed to cannabis legalization. See Kim & Roberts, *supra* note 1, at 276-83 (discussing numerous reasons why some tribes are reluctant to legalize cannabis).

6. See Lael Echo-Hawk, *Cannabis in Indian Country - A Year Later . . .*, SMOKE SIGNALS- INDIAN L. BLOG (Jan. 28, 2016), <https://www.coquilletribe.org/wp-content/uploads/2017/10/BOC-10-06-16-9-ED-Att-4J-Lael-Echo-Hawk-HSDW-Smoke-Signals-01-28-16-Cannabis-in-Indian-Country-A-Year-Later.pdf>.

7. See Sarah Sunshine Manning, *Santee Sioux Assert Tribal Sovereignty, Open First Marijuana Resort*, INDIAN COUNTRY TODAY (Oct. 6, 2015), <https://indiancountrytoday.com/archive/santee-sioux-assert-tribal-sovereignty-open-first-marijuana-resort>.

8. *BDSA Reports Global Cannabis Sales Exceeded \$21 Billion in 2020; Forecasts \$55.9 Billion by 2026*, GLOBE NEWSWIRE (Mar. 2, 2021), <https://www.globenewswire.com/news-release/2021/03/02/2185408/0/en/BDSA-Reports-Global-Cannabis-Sales-Exceeded-21-Billion-in-2020-Forecasts-55-9-Billion-by-2026.html>.

9. *Map of Marijuana Legality by State*, DEF. INFO. SYS. AGENCY, <https://disa.com/map-of-marijuana-legality-by-state> (last visited Feb. 2, 2022).

10. Jeremiah Nguyen, *States Projected to Post Higher Marijuana Revenues in 2021*, TAX FOUND. (Aug. 3, 2021), <https://taxfoundation.org/states-projected-post-higher-marijuana-revenues-2021/>.

11. See *infra* notes 174-175 and accompanying text.

12. See *infra* note 188.

13. See *infra* Part II (illustrating the federal government’s decision to stay out of state and tribal cannabis regime).

14. Sarah Sunshine Manning, *Flandreau Santee Sioux Tribe Burns Crop, Suspends Marijuana Operation*, INDIAN COUNTRY TODAY (Nov. 8, 2015), <https://indiancountrytoday.com/archive/flandreau-santee-sioux-tribe-burns-crop-suspends-marijuana-operation>.

of a raid if the tribe continued with its plans, the tribe was forced to suspend the project, burning existing crops in order to demonstrate good faith.¹⁵ Other early efforts by tribes to enter the marijuana and hemp industry likewise were met with threats and raids.¹⁶

Even where tribal cannabis policy is in sync with that of surrounding states, tribes have faced regulatory and market challenges.¹⁷ In California, where medical cannabis has been legal since 1996, voters legalized recreational cannabis by ballot proposition in 2016.¹⁸ The state spent the next year developing a complex regulation and taxation scheme, with adult-use cannabis sales beginning in 2018.¹⁹ Since that time, California officials have generally not attempted to interfere with tribal efforts to grow and sell cannabis products on reservations.²⁰ But California's planning has taken little account of tribal interests, and California has not permitted tribes to enter the lucrative state market on their own terms, instead insisting they can do so only if they obtain a state license and waive their sovereign immunity.²¹ While a handful of California tribes have developed innovative workarounds,²² the state's intransigence has nonetheless put a damper on tribal efforts.²³

Yet despite these rocky beginnings, there are nonetheless recent signs that tribal cannabis efforts are on the upswing.²⁴ After its setback in 2015,²⁵ the FSST opened a medical marijuana dispensary in 2021, the first one to operate within South Dakota following the state's legalization of cannabis via ballot proposition in 2020 and subsequent legal wrangles.²⁶ In numerous other states, from

15. *Id.*

16. See Katherine Florey, *Budding Conflicts: Marijuana's Impact on Unsettled Questions of Tribal-State Relations*, 58 B.C. L. REV. 991, 996-97 (2017) [hereinafter *Budding*], <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3592&context=bclr>; Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 734-36 (2017), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4993&context=wlr>; see also Andrew Kennard, *Native Gro Offers Tribes a 'One-Stop Shop' for Entering the Cannabis Industry*, NATIVE NEWS ONLINE (July 19, 2021), <https://nativenewsonline.net/business/native-gro-offers-tribes-a-one-stop-shop-for-entering-the-cannabis-industry> (noting that fear of state raids continues to be a deterrent to tribes entering the cannabis market, particularly in P.L. 280 states where cannabis is illegal).

17. See *infra* Part II.B-C (explaining the differences between South Dakota and California regulatory and market challenges).

18. Mark Saunders, *Timeline: How Marijuana Laws Have Changed in California*, 10 NEWS (Jan. 4, 2018), <https://www.10news.com/news/timeline-how-marijuana-laws-have-changed-in-california>.

19. *Id.*

20. Alexander Nieves, *Tribes Frustrated at Being Locked Out of California Cannabis Market*, KQED (July 19, 2019), <https://www.kqed.org/news/11762333/tribes-frustrated-at-being-locked-out-of-california-cannabis-market>.

21. *Id.*

22. See *infra* Part II.C.

23. See Nieves, *supra* note 20.

24. See *infra* notes 27-29 (describing tribal efforts in various states).

25. Manning, *supra* note 14.

26. Darren Thompson, *Without the State's Approval, Flandreau Santee Sioux Tribe Opens First Cannabis Dispensary in South Dakota*, NATIVE NEWS ONLINE (July 5, 2021), <https://nativenewsonline.net/sovereignty/without-the-state-s-approval-flandreau-santee-sioux-tribe-opens-first-cannabis-dispensary-in-south-dakota>.

Michigan²⁷ to Washington²⁸ to Nevada,²⁹ tribes have opened successful dispensaries. In some cases, tribes have acted after negotiations with surrounding states;³⁰ in others, they have forged ahead on their own.³¹

These recent successes suggest that cannabis may yet prove to be a source of major economic gains for tribes positioned to take advantage of it.³² As the prospects for popular acceptance and federal toleration of cannabis grow, tribes may find that the path to legalization and commercial success is becoming smoother.³³ At the same time, tribes' varied experiences to date highlight the importance of respect by federal and especially state authorities for tribal self-determination in setting cannabis policy.³⁴

This article reflects on some of the factors that caused tribal cannabis operations to move more slowly than anticipated, while also considering the brightening prospects for the future. It discusses two principal difficulties that hindered tribes' early efforts—in Part II, the special legal ambiguities that tribes have faced, and in Part III, the resistance by states to tribes' sovereign efforts to chart their own course in cannabis policy. This article concludes by arguing that both the growing acceptance of cannabis nationally and the pathbreaking efforts by tribes in surmounting early challenges suggest that the future of tribal cannabis looks much brighter than the tribal experience of the past several years might suggest.

II. THE UNCERTAIN LEGAL LANDSCAPE

Although Supreme Court decisions over the past few decades have narrowed tribal sovereignty in some respects, particularly as applied to nonmembers, tribes remain independent sovereigns with most accompanying powers, especially when it comes to their own members.³⁵ In theory, tribes have the power to make fundamental decisions about whether and how to legalize cannabis, free from state

27. *Sault Tribe, Lume Cannabis Co. Announce Historic Partnership*, SAULT TRIBE NEWSROOM (July 24, 2020), <https://www.saulttribe.com/newsroom/6911-sault-tribe-lume-cannabis-co-announce-historic-partnership>.

28. Kim & Roberts, *supra* note 1, at 292 (discussing Suquamish Tribe's early efforts to secure Washington's cooperation with the tribe's cannabis endeavors).

29. *Id.* at 272-73 (discussing tribal NuWu dispensary in Nevada).

30. *See infra* Part II.C (describing California's history with tribal usage of cannabis).

31. *See infra* Part II.A (addressing tribal sovereignty through enforcement of tribal gaming acts).

32. *See* Robert Conrad & Laura Jones, *New Administration Could Provide Ideal Backdrop for Tribes Entering Cannabis Industry*, NAT'L L. REV. (Dec. 17, 2020) [hereinafter *Ideal Backdrop*], <https://www.natlawreview.com/article/new-administration-could-provide-ideal-backdrop-tribes-entering-cannabis-industry> (expressing optimism about the industry's future prospects for tribes).

33. *See id.*

34. *See infra* Part II (discussing the impact of state-tribal relations on tribes' experiences with cannabis in several states).

35. *See, e.g.,* *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (discussing tribes' retained powers of self-governance).

involvement and subject only to federal law.³⁶ As a result, the Justice Department's decision to deprioritize enforcement of federal cannabis law in most circumstances should have brought tribes the same freedom to experiment with cannabis legalization that states have begun to exercise.³⁷

At the same time, tribes faced legal obstacles in the cannabis arena that states did not.³⁸ Perhaps most important, the exact contours of tribal sovereignty as applied to nonmembers are quite uncertain.³⁹ Because the viability of most tribal cannabis enterprises depends on sales to nonmembers to some degree, tribes have faced a climate of legal uncertainty and threats that have been difficult for many tribes with limited resources to weather.⁴⁰

Famously, in the foundational 1832 case of *Worcester v. Georgia*,⁴¹ the Court described tribes as “distinct communit[ies], occupying [their] own territory,” in which state law “can have no force.”⁴² Although the Court has never entirely repudiated those views, cases in recent decades have significantly undermined them.⁴³ In 1978, in one of a series of decisions that would weaken tribal autonomy over nonmembers, the Court decided *Oliphant v. Suquamish Indian Tribe*,⁴⁴ which held that tribes lacked criminal authority over non-Indians.⁴⁵

Oliphant, as well as the decisions and congressional actions that followed it, led to a complicated patchwork of rules in the criminal arena.⁴⁶ Tribes have criminal powers over Indians⁴⁷ in Indian Country.⁴⁸ Other than the few states earlier that were granted criminal jurisdiction in Indian Country under Public Law 280 (“P.L. 280”), states do not have any criminal authority over Indian Country

36. See Kim & Roberts, *supra* note 1, at 268 (noting that the Wilkinson Memo seemed to assume that tribes were on comparable footing with states with respect to their ability to make autonomous decisions about cannabis legalization).

37. See *id.*

38. See Echo-Hawk, *supra* note 6.

39. See Budding, *supra* note 16, at 1003 (noting some of the open questions in this area).

40. See Kennard, *supra* note 16.

41. 31 U.S. 515, 520 (1832).

42. *Id.*

43. See Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands*, 15 YALE J. HEALTH POL'Y L. & ETHICS 251, 262 (2015) (describing the Court's current views as “starkly different” from those Chief Justice John Marshall articulated in *Worcester*).

44. 435 U.S. 191 (1978).

45. *Id.* at 195.

46. See generally *Duro v. Reina*, 495 U.S. 676 (1990) (holding that tribes could not prosecute nonmember Indians. In response, Congress restored tribes' criminal jurisdiction over nonmember Indians through the so-called “*Duro* fix”); *United States v. Lara*, 541 U.S. 193 (2004) (upholding the “*Duro* fix”). Several years later, the Violence Against Women Reauthorization Act of 2013 authorized tribes meeting fairly restrictive conditions to prosecute spousal and dating violence perpetrated by non-Indians. See 25 U.S.C. § 1304 (2013).

47. The Indian Civil Rights Act sets forth the extent of tribal criminal jurisdiction. See 25 U.S.C. § 1302 (2013).

48. 18 U.S.C. § 1151 defines Indian Country 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 (2013).

crimes involving Indians⁴⁹ but can prosecute crimes involving only non-Indians whether they occur within or outside Indian Country.⁵⁰ It is currently unclear whether states may prosecute victimless crimes by non-Indians—arguably including cannabis-related offenses—although some have tried.⁵¹ The federal government also possesses some criminal authority over certain Indian Country crimes,⁵² sometimes concurrently with tribes.⁵³

This scheme is a little different in states that have opted into P.L. 280, a 1953 law that granted several states the ability to assume criminal jurisdiction in Indian Country if they wished, with no requirement of tribal consent.⁵⁴ Among states that were early legalizers of cannabis, California, Oregon, and (to a lesser extent) Washington possess powers under P.L. 280.⁵⁵ In yet another area of unpredictability, states' powers under P.L. 280 are murky when it comes to laws that fall on the borderline between civil regulatory laws (which P.L. 280 states have no power to enforce in Indian Country) and criminal prohibitory laws (which states may enforce) under the scheme put forth by the Supreme Court in *California v. Cabazon Band of Mission Indians* (“*Cabazon Band*”).⁵⁶ This distinction is “not a bright-line rule”⁵⁷ and often hinges on how much of a given activity is prohibited under state law, which in turn is dependent on how the activity is defined.⁵⁸ Because a state may, for example, maintain a general prohibition on cannabis but decriminalize it for certain purposes or legalize a very narrow category of use, the *Cabazon Band* test may be particularly tricky to apply in this arena.⁵⁹

Mapping the outer limits of tribal civil authority may also be difficult. Tribes are subject to most federal law⁶⁰ but otherwise have broad authority to regulate the on-reservation (and perhaps some off-reservation) activities of tribal members.⁶¹ Over the past few decades, however, the Supreme Court has sharply

49. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.03[1] (2012) [hereinafter COHEN'S HANDBOOK].

50. *United States v. McBratney*, 104 U.S. 621, 623 (1881).

51. COHEN'S HANDBOOK, *supra* note 49, at § 9.03[1].

52. *Id.* at § 9.02.

53. *Id.* at § 9.04.

54. See Valentina Dimitrova-Grajzl, Peter Grajzl & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 LAW & SOC'Y REV. 127, 133 (2013).

55. See 18 U.S.C. § 1162(a) (2013) (listing states authorized by Congress to assume P.L. 280 jurisdiction); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 474 (1979) (discussing Washington's later partial assumption of criminal jurisdiction over Indian Country). Washington has retroceded its authority within the Yakama Nation. Phil Ferolito, *Yakamas Celebrate Return of Jurisdiction over Civil, Criminal Law*, YAKIMA HERALD (Apr. 23, 2016), https://www.yakimaherald.com/news/local/yakamas-celebrate-return-of-jurisdiction-over-civil-criminal-law/article_29326c56-0923-11e6-9a40-77d2bca31039.html.

56. 480 U.S. 202 (1987).

57. *Id.* at 210.

58. *Id.* at 209-10.

59. See *Budding*, *supra* note 16, at 1000 (exploring potential issues in applying the *Cabazon Band* standard in this area).

60. Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 123, 125-26 (2016), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1415&context=crsj>.

61. COHEN'S HANDBOOK, *supra* note 49, at § 7.02[1][c].

limited tribes' civil authority over nonmembers, although there are signs that the trend may, at last, be abating or reversing.⁶² Under *Montana v. United States*,⁶³ tribes have authority over nonmember activity on private land only if one of two fairly narrow exceptions is met—either the nonmember has formed a “consensual relationship” with the tribe and the suit arises out of that relationship, or alternatively where nonmember conduct significantly threatens tribal health or welfare.⁶⁴ Tribal power over nonmembers may sweep more broadly on tribal land, although the Court has not clarified exactly to what extent.⁶⁵

Historically, *Montana*'s exceptions have been interpreted narrowly,⁶⁶ though two recent cases suggest that the Supreme Court may have become more open to their wider application.⁶⁷ Perhaps even more troublesome for tribes, however, the degree to which they apply is often fact-specific and unpredictable, making it difficult to determine in advance whether a given assertion of tribal power is valid.⁶⁸ The gaps *Montana* leaves in tribal power, coupled with uncertainty about where those gaps begin and end, have implications in the cannabis context, given that, to protect the safety and integrity of their enterprises, tribes need nonmember compliance with tribal rules.⁶⁹

Another problem for tribes is the fact that recent Supreme Court cases have permitted some degree of state civil authority over nonmembers in Indian Country, potentially setting up clashes between state and tribal law—an unsettling situation not merely because it undermines tribal authority but also because this area too is

62. See generally Bethany R. Berger, *Hope for Indian Tribes at the U.S. Supreme Court?*, 2017 U. ILL. L. REV. 1901, https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1374&context=law_papers (reflecting on Supreme Court Justices' voting patterns for tribal decisions).

63. 450 U.S. 544 (1981).

64. *Id.* at 565-66.

65. Two decisions otherwise hostile to tribal regulatory power, for example, highlight the importance of land status: *Nevada v. Hicks*, 533 U.S. 353, 360 (2001), referred to land status as potentially “dispositive” of the existence of tribal power to regulate, while in *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (2007), the Court noted that tribes “retain considerable control over nonmember conduct on tribal land.” Subsequent to these cases, the Ninth Circuit developed a framework for analyzing tribal power that under which *Montana* does not apply to nonmembers' actions on tribal land. See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011).

66. For example, Professor Ann E. Tweedy in 2015, observed that the Court's application of the exceptions has been both “parsimonious” and “impossible to predict.” Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 897-98 (2015), http://www.albanylawreview.org/Articles/Vol78_2/78.2.885%20Tweedy.pdf.

67. In 2016, a 4-4 Court summarily affirmed the Fifth Circuit's opinion in *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016), which had held that the consensual relationship exception applied, based on Dollar General's lease with the tribe, in a suit against Dollar General by the family of a thirteen-year-old allegedly molested at the store. More recently, in *United States v. Cooley*, 141 S. Ct. 1638, 1641, 1643 (2021), the Court concluded that a tribal police officer had “authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation” under *Montana*'s health and welfare exception.

68. See Tweedy, *supra* note 67, at 897-88.

69. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002 (2010), https://lawreview-dev.cu.law/wp-content/uploads/2013/11/9.-Fletcher-Final_s.pdf (discussing overall issue of nonmember lawlessness in Indian Country and the problems it creates for tribes).

fraught with legal gray areas.⁷⁰ In several cases, the Court has applied an ever-shifting balancing test that includes some consideration of state, federal, and tribal policies and interests.⁷¹ Frequently, in applying this test, the Court has focused on whether, on the one hand, the tribe is merely reselling the good or activity the state wishes to tax or regulate or whether, on the other, the tribe has added value to it.⁷² Where, in *Washington v. Confederated Tribes of Colville Indian Reservation* (“*Colville*”),⁷³ the Confederated Tribes of the Colville Reservation were simply selling cigarettes manufactured elsewhere, for example, the Court found that the State of Washington had authority not only to tax sales but to require the tribe to take somewhat onerous actions to enforce the state tax.⁷⁴ By contrast, the Court found that the Cabazon Band *had* added value to the “comfortable, clean, and attractive facilities and well-run [bingo] games” it offered, meaning that California lacked the power to enforce its state gambling restrictions as to nonmembers.⁷⁵

Most early tribal cannabis plans and efforts hewed closer to the *Cabazon Band* model than the *Colville* one, featuring cannabis cultivated and processed on the reservation and other attractions, such as smoking lounges, designed to entice visitors to spend time on the reservation rather than simply making quick purchases.⁷⁶ As a result, tribes with such operations have a strong argument that any state cannabis regulations should not apply to such activities.⁷⁷ At the same time, the absence of federal support for an activity still illegal under federal law⁷⁸ may complicate an analysis that is already somewhat unpredictable and subjective.⁷⁹

Finally, tribes are also subject to some of the same uncertainties that states wishing to legalize cannabis have also faced. The Wilkinson Memorandum, like the Cole Memorandum announcing the hands-off policy as to states, could cease

70. See *Budding*, *supra* note 16, at 1002 (discussing the disparate results the Court has reached in this area).

71. Under one formulation of the test in *New Mexico v. Mescalero Apache Tribe*, “[s]tate jurisdiction is pre-empted . . . 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.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

72. *Budding*, *supra* note 16, at 1002-03.

73. *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 159-60 (1980).

74. *Id.*

75. *California v. Cabazon Band of Mission Indians (Cabazon Band)*, 480 U.S. 202, 219 (1987).

76. See, e.g., Manning, *supra* note 7 (describing the FSST’s initial plans for an upscale “marijuana resort”).

77. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) (finding no role for state regulation of hunting and fishing on regulation lands where tribe had added value by increasing and managing game stocks).

78. In *Cabazon Band*, for example, federal encouragement of the Cabazon Band’s bingo enterprise played a significant role in the Court’s conclusion that the state lacked power to impose its regulations. See *Cabazon Band*, 480 U.S. at 221 (explaining that “prevailing federal policy continues to support these tribal [gaming] enterprises . . .”).

79. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1600-08, 1620 (1996), <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1682&context=articles> (noting the element of subjectivity in applying the test for the applicability of state law).

to apply at any time—and, indeed, was revoked during the Trump administration, although the Justice Department has not actually resumed enforcement.⁸⁰ Further, particularly in the early days of cannabis legalization, differences between state policies also created interstate conflict and litigation.⁸¹ The degree to which states can prohibit extraterritorial conduct by their citizens—for example, whether a state where cannabis remains illegal can prosecute a resident who uses cannabis outside state borders—remains highly contested; similar questions apply when a citizen of a cannabis-illegal state travels to a reservation to partake.⁸² Neighboring states' different cannabis policies also caused friction at the governmental level, with the states of Nebraska and Oklahoma attempting to invoke the Supreme Court's original jurisdiction to enjoin Colorado's legalization of cannabis.⁸³ While unsuccessful, this effort illustrated that some states were willing to sue in order to avoid what they saw as the serious spillover effects of cannabis permissiveness elsewhere.⁸⁴

For tribes, the consequences of such legal uncertainty have been more than theoretical. Several early tribal cannabis operations—including those involving recreational cannabis, medical cannabis, and hemp⁸⁵—were subject to raids or threatened raids by federal, state, and local authorities.⁸⁶ These raids occurred in some cases despite efforts on the part of the tribes involved to abide by established law as much as possible and cultivate relationships with the authorities in question.⁸⁷ Even today, seemingly out-of-the-blue raids continue, including a September 2021 federal raid on a few household marijuana plants on tribal land in New Mexico that occurred even as several tribes were negotiating with the state to open cannabis businesses following the state's legalization of the substance.⁸⁸

80. Tom Firestone, *The Sessions Memorandum – Two Years Later*, GLOB. CANNABIS COMPLIANCE (Jan. 6, 2020), <https://globalcannabiscompliance.bakermckenzie.com/2020/01/06/the-sessions-memorandum-two-years-later/>.

81. See Chad DeVeaux, *One Token Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 957-59 (2017), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3591&context=bclr> (discussing interstate friction over cannabis).

82. See generally Gabriel J. Chin, *Policy, Preemption, and Pot: Extra-Territorial Citizen Jurisdiction*, 58 B.C. L. REV. 929 (2017), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3590&context=bclr> (discussing the numerous legal complexities involved).

83. See DeVeaux, *supra* note 81, at 957-58 (discussing these efforts).

84. See *id.* at 959 (discussing issues prompting the suit).

85. See *Budding*, *supra* note 16, at 996-97 (discussing effect of actual and threatened raids); 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), <https://perma.cc/D5LN-T449> (discussing raid on Menominee Tribe hemp crops).

86. See Kennard, *supra* note 16 (discussing how raids and threatened raids have deterred tribes from entering the cannabis industry).

87. The FSST, for example, engaged in extensive discussions with state and federal officials while planning its marijuana resort but was nonetheless threatened with a raid. Kim & Roberts, *supra* note 1, at 270.

88. *Cannabis Bust on U.S. Indigenous Land Highlights Legal Divide*, VOICE AM. (Nov. 21, 2021) [hereinafter *Cannabis Bust*], <https://www.voanews.com/a/cannabis-bust-on-indigenous-land-highlights-legal-divide/6319768.html>.

Tribal officials, as a result, see federal enforcement as “unpredictable and discriminatory.”⁸⁹

This uncertain climate causes significant difficulties for tribes considering cannabis ventures. Many tribes are under-resourced to begin with, especially relative to states; further, because tribes are generally direct players in the cannabis market, they face greater potential losses than states from raids or other legal actions.⁹⁰ Thus, the myriad legal uncertainties attending cannabis legalization have been a more significant problem for tribes than for states.⁹¹ While these issues are not limited to states where cannabis is illegal, tribes in such states may face particular issues, such as the state encouraging federal officials to engage in raids on tribal cannabis operations even where the state itself lacks jurisdiction to do so.⁹²

III. FOREGROUNDING THE STATE-TRIBAL RELATIONSHIP

The federal government’s decision to stay out of state and tribal cannabis decisions is what has enabled the cannabis legalization boom in the first place.⁹³ At the same time, the absence of an affirmative federal presence has largely left tribes on their own to negotiate with states without federal support or protection.⁹⁴ Because tribes are disadvantaged in dealings with larger, richer, and often better legally shielded states, this means that state policies and attitudes toward tribal cannabis are a large factor in whether tribes in practice can enter the cannabis industry successfully.⁹⁵ Further, because the federal prohibition makes interstate transactions problematic, any given tribal cannabis enterprise is more than usually dependent on cultivating relationships and goodwill with businesses and potential customers within the state in which the tribe is located.⁹⁶

The following section explores this phenomenon first by considering general issues in state-tribal relations in the cannabis arena, then discussing how tribal cannabis has played out in three states—South Dakota, where state officials have strongly opposed legal cannabis both within and outside Indian Country; California, where the state has created a highly structured and regulated cannabis

89. *Id.*

90. See Lauren Adornetto, Comment, *Indian Country Complexities and the Ambiguous State of Marijuana Policies in the United States*, 65 BUFF. L. REV. 329, 364 (2017), <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4674&context=buffalolawreview> (discussing dire economic consequences of potential raids for tribes in the cannabis business).

91. See Kennard, *supra* note 16.

92. See *id.*

93. See *supra* note 1 and accompanying text (discussing Wilkinson Memo).

94. See Kim & Roberts, *supra* note 1, at 257-59 (discussing the absence of federal guidance in this area and concluding that “the community that is hurt most by the federal government’s failure to craft a stable marijuana policy is the tribes.”).

95. See *id.* at 275 (discussing outsized effect of state policies on tribes’ ability to make autonomous cannabis decisions).

96. See Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857 (2021) (discussing the “hermetically sealed” cannabis markets that exist in each state where the substance is legal).

market but refused to allow tribes to participate in it; and Washington, where the state has created a compact process for tribal cannabis. Though tribes are moving ahead with cannabis operations in all three states, state intransigence has, in some cases, made the process far more difficult.

A. GENERAL ISSUES IN TRIBAL-STATE NEGOTIATIONS

State-tribal relationships have been fraught with conflict from the earliest days of the United States.⁹⁷ States have a history of failure to respect tribal autonomy and have often sought to impose state law even in areas where tribes have traditionally had the power to regulate.⁹⁸ By contrast, although the federal government has historically often been hostile to tribes as well, the United States has in recent decades provided at least some support for tribal self-determination.⁹⁹ Tribes have developed effective strategies for lobbying Congress,¹⁰⁰ and Native people are a recognized constituency that have been key in many congressional and even Senate races.¹⁰¹

As a result, many tribes have understandable qualms about working with states.¹⁰² In the gaming context, many tribes objected when Congress passed the Indian Gaming Regulatory Act (“IGRA”), which set up a tribal-state compact process that forced tribes to deal with states in an area in which tribes had previously had sovereign autonomy.¹⁰³ IGRA has continued to spawn conflict and litigation, and many tribes would like to see it revised.¹⁰⁴ In some ways, efforts by tribes to negotiate with states over cannabis policy are even more complicated and fraught. With respect to gaming, tribal operations are frequently, as Professor Kevin K. Washburn has put it, “islands of gaming permissiveness in an ocean of gaming intolerance.”¹⁰⁵ Many legislators, that is, may not want to allow gaming generally within a state, but are willing to tolerate it if it is strictly limited to reservations.¹⁰⁶ By contrast, cannabis’s portability (along with the fact that impaired drivers may easily travel from Indian Country to the surrounding

97. See *Budding*, *supra* note 16, at 1006 (discussing history of conflict in tribal-state relations).

98. See *id.*

99. See *id.* at 1006-07.

100. See Kristen Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1170-72 (2019), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3188&context=lawreview> (discussing growing importance of tribal lobbying).

101. See Joe McCarthy, *Native American Voters, Long Disenfranchised, Could Play a Decisive Role in the 2020 Election*, GLOB. CITIZEN (Oct. 12, 2020), <https://www.globalcitizen.org/en/content/native-american-voting-rights-2020-election/>.

102. See *Budding*, *supra* note 16, at 992.

103. See *id.*

104. See *id.* at 1011.

105. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294 (2003), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1288&context=nlj>.

106. *Id.*

state and vice versa) means that it is not so easily confined, and spillover effects are more problematic.¹⁰⁷

These issues may be less serious when a state and tribe have legalized cannabis on similar terms, but another problem arises in that scenario: states and tribes may find themselves competing for tax revenue, reducing states' incentives to cooperate.¹⁰⁸ As a result, efforts by tribes to find common ground on cannabis policy with states have been fraught with problems in many cases. The rest of this Part explores three examples.

B. SOUTH DAKOTA: FORGING AHEAD DESPITE STATE RESISTANCE

Soon after the Cole and Wilkinson memos were issued, the FSST in South Dakota made plans for what would have been the first “marijuana resort” in the United States and the first significant tribal cannabis initiative, seeing the project as an assertion of tribal sovereign autonomy in a state where marijuana was, at the time, illegal.¹⁰⁹ The resort was to feature reservation-grown cannabis, a smoking lounge, and a shuttle service.¹¹⁰ In anticipation of these plans, the FSST Executive Committee legalized marijuana on June 11, 2015,¹¹¹ and the tribe went on to build a grow facility, plant the first crops, and begin converting an existing building into a lounge.¹¹² Yet the tribe faced immediate and unexpected threats both from the state and the federal government: South Dakota's attorney general threatened prosecution of nonmembers of the tribe who used cannabis on the reservation or left Indian Country under the influence, while federal authorities warned of a possible raid, despite the tribe's efforts at cooperation.¹¹³ Faced with such threats, the tribe was forced to suspend the project indefinitely.¹¹⁴

In 2020, however, the FSST got an unexpected second chance to enter the cannabis business when two ballot measures legalizing medicinal and recreational uses of marijuana within the state were put before South Dakota voters—Initiated

107. See DeVeaux, *supra* note 81, at 957 (discussing potential for spillover effects caused by portability of cannabis in general).

108. See Debra Bruno, *Native American Tribes and the Future of Marijuana*, BLOOMBERG NEWS (Feb. 19, 2015), <https://www.bloomberg.com/news/articles/2015-02-19/native-american-tribes-across-the-u-s-will-meet-to-discuss-selling-marijuana> (discussing issue of competition from tribes for tax revenue, particularly in states where legalization was tied to the promise of additional tax revenue). Nontribal businesses may also resist tribes' entry into the market to reduce competition. See Amanda Chicago Lewis, *How California is Blocking Native Americans From the Weed Business*, ROLLING STONE (Feb. 14, 2018), <https://www.rollingstone.com/culture/culture-features/how-california-is-blocking-native-americans-from-the-weed-business-253651/>.

109. Manning, *supra* note 7.

110. *Id.*

111. *The story so far: S.D. tribe legalizes marijuana*, ARGUS LEADER (Sioux Falls, S.D.) (Sept. 16, 2015, 11:20 AM), <https://www.argusleader.com/story/news/2015/09/16/story-so-far-south-dakota-flandreau-santee-sioux-tribe-legalizes-marijuana/32495835/>; FSST, MARIJUANA CONTROL ORDINANCE, §§ 29-1-1 to -11-4 (2021), <https://fsst-nsn.gov/wp-content/uploads/2021/02/Title-29-Marijuana-Control-Ordinance-final-01202021.pdf>.

112. Manning, *supra* note 7.

113. Manning, *supra* note 14.

114. *Id.*

Measure 26 (“IM26”) for a medical marijuana program and Constitutional Amendment A (“Amendment A”) for recreational use.¹¹⁵

Nearly seventy percent of voters approved IM26, which created a medical marijuana program in South Dakota for individuals with a debilitating medical condition as certified by a licensed physician.¹¹⁶ As a result of IM26’s passage, medical marijuana was legalized in South Dakota on July 1, 2021, with rules and regulations to implement the program to be promulgated by October 4, 2021.¹¹⁷ While South Dakota leaders wrangled over IM26’s implementation, its key provisions are now in effect.¹¹⁸

Amendment A, on the ballot as an initiated constitutional amendment,¹¹⁹ was approved by a somewhat narrower fifty-four percent of voters.¹²⁰ Amendment A sought to legalize adult recreational use of cannabis.¹²¹ After its approval in November 2020, the amendment’s constitutionality was challenged in court,¹²² with the South Dakota Supreme Court ultimately holding the measure invalid in November 2021.¹²³ Advocates hope to place a new measure on the ballot in a future election.¹²⁴

Despite the complexities complicating the two measures’ implementation at the state level,¹²⁵ the FSST moved swiftly to exercise its sovereignty and seize the opportunity IM26 offered, opening the first medical marijuana dispensary within the state.¹²⁶ The FSST’s Native Nations Dispensary officially opened on July 1, 2021, the first day medical marijuana became legalized in the state, as agreed upon

115. *South Dakota 2020 Ballot Measures*, BALLOTPEdia, <https://bit.ly/3lxD90m> (last visited Mar. 9, 2022).

116. *Id.*

117. *Id.*

118. IM26 called for medical marijuana programs to be implemented in the state by July 1, 2021, but Governor Kristi L. Noem’s office sought a one-year delay. Austin Goss, *Noem Wants Year Delay to Implement Medical Marijuana*, KEVN BLACK HILLS FOX (Feb. 10, 2021), <https://bit.ly/3C8BOCJ>. South Dakota House Speaker then introduced legislation to replace the terms of IM26 with Governor Noem’s plan. *Id.* After some sparring over this proposal, a compromise was passed under which, among other provisions, medical marijuana would be legalized on the original date of July 1, 2021, rather than a year later. *Id.*

119. *South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)*, BALLOTPEdia (Aug. 5, 2021), <https://bit.ly/3Abfl6p>.

120. *Id.*

121. *See id.*

122. A successful legal challenge to the amendment filed in South Dakota state court argued that it violated the state’s “single-subject” rule, under which a voter initiative must address only one question or issue, and that it is a “revision” requiring a constitutional convention. *See Thom v. Barnett*, 2021 SD 65, ¶ 65, 967 N.W.2d 261, 283; Lee Strubinger, *‘Single Subject’ Rule Gets First Test in Marijuana Case Before State’s Top Court*, SDPB RADIO (Apr. 27, 2021), <https://listen.sdpb.org/politics/2021-04-27/single-subject-rule-gets-first-test-in-marijuana-case-before-states-top-court>.

123. *Thom*, 2021 SD 65, ¶ 65, 967 N.W.2d at 283. *See also South Dakota’s Supreme Court Rules Against Legalization of Recreational Marijuana*, NPR (Nov. 24, 2021) [hereinafter *SDSC Rules Against Legalization of Marijuana*], <https://www.npr.org/2021/11/24/1058884032/south-dakotas-supreme-court-rules-against-legalization-of-recreational-marijuana> (summarizing ruling).

124. *SDSC Rules Against Legalization of Marijuana*, *supra* note 123.

125. *See supra* notes 114–119.

126. Chris Roberts, *Sioux Tribe Opening First Legal Marijuana Business in South Dakota*, FORBES (June 30, 2021), <https://bit.ly/37gFMva>.

in the final compromise between the House and Senate over IM26.¹²⁷ Native Nations Dispensary is located within the tribe's reservation and is operated through the tribe's wholly owned limited liability company, FSST Pharms.¹²⁸ While medical marijuana is officially legal in South Dakota as of July 1, state officials have cautioned that it will be "almost another year" before medical marijuana may be available in state-licensed dispensaries.¹²⁹

The faster tribal timeline has sparked concerns that Native Nations Dispensary customers might encounter legal repercussions for leaving the FSST Reservation while in possession of medical marijuana.¹³⁰ This is particularly an issue given the differences, albeit modest, that exist between the state and tribal regulatory schemes.¹³¹ Soon after IM26 and Amendment A were passed by voters, FSST pressed forward with writing and passing its own cannabis regulations that apply within the boundaries of its reservation.¹³² These regulations follow "roughly the same rules as the state," with the additional requirement that prospective customers must apply for a FSST-issued card,¹³³ distinct from the medical marijuana identification card that will be issued by the state's Department of Health.¹³⁴ Prospective customers do not need to be members of the FSST or any federally recognized tribe to obtain a FSST medical cannabis card.¹³⁵ The FSST will also honor valid medical cannabis cards issued by any other tribe, state, territory, or country.¹³⁶

In response to the FSST's opening of its own dispensary and promulgation of its independent regulations regarding medical marijuana, Governor Kristi L. Noem's office released, as part of a framework to be used by the South Dakota Highway Patrol in formulating enforcement guidelines beginning July 1, 2021,¹³⁷ a statement saying that state troopers would not acknowledge FSST-issued marijuana cards unless the cardholder was an FSST member.¹³⁸ At the same time, however, the framework limits the Highway Patrol's ability to arrest South Dakota residents unable to present an unexpired medical cannabis card in situations where they abide by quantity limits and have documentation of a medical condition

127. Thompson, *supra* note 26.

128. *South Dakota's First Medical Marijuana Dispensary Opening in Flandreau*, DAKOTA NEWS NOW (June 25, 2021), <https://bit.ly/3lmEFSC>.

129. Christopher Vondracek, 'Greener Pastures: How a South Dakota Native American Tribe defied odds and re-started their cannabis industry', MITCHELL REPUBLIC (June 30, 2021), <https://bit.ly/2WJ1LbT>.

130. *Id.*

131. *Id.*

132. Roberts, *supra* note 126; FSST, MARIJUANA CONTROL ORDINANCE, §§ 29-1-1 to -11-4.

133. Vondracek, *supra* note 129.

134. Thompson, *supra* note 26.

135. Press Release FSST, Flandreau Santee Sioux Tribe Plans Opening of Dispensary July 1, 2021 (June 25, 2021), <https://fsst-nsn.gov/wp-content/uploads/2021/06/FSST-Press-Release-06252021.pdf>.

136. *Id.*

137. *Governor Noem Supports Highway Patrol Framework for Law Enforcement Implementation of Medical Cannabis*, S.D. STATE NEWS (June 30, 2021), <https://bit.ly/3ioTgLG>.

138. Thompson, *supra* note 26.

requiring the use of medical marijuana.¹³⁹ Further, law enforcement authorities throughout the state have stated that, as of July 1, 2021, they would not pursue charges against *any* adult found in possession of three ounces of marijuana or less, regardless of medical card status.¹⁴⁰ FSST Attorney General Seth Pearman has argued that the Highway Patrol would violate South Dakota Codified Laws if they were to arrest nontribal members bearing a FSST medical cannabis card validly issued by the tribe.¹⁴¹ As of this writing, the FSST and customers of the Native Nations Dispensary have not yet run into legal issues with the state.¹⁴²

The Native Nations Dispensary has been a success; it is meeting financial targets, and the FSST is working on an expansion of its cultivation efforts that will increase production nearly threefold.¹⁴³ The dispensary's success has depended, however, both on the existence of a tribe willing and able to test the waters and the state's decision to avoid an all-out conflict with the tribe—something South Dakota's governor has certainly shown willingness to do in other situations.¹⁴⁴ In part, South Dakota may have been spurred by popular pressure not to attempt to interfere with the dispensary's operations, suggesting some shift in public sentiment about cannabis since the FSST's early struggles.¹⁴⁵

In other states where cannabis is now legal, tribes have also had success forging ahead with dispensary plans without trying to get states on board first.¹⁴⁶ In New York State, for example, the St. Regis Mohawk Tribe's gained a "head start" on cannabis legalization by opening several dispensaries; for now, New York State officials appear to have accepted the tribe's sovereign authority to do so.¹⁴⁷ The Bay Mills Indian Community in Michigan likewise went ahead with plans for a large cannabis operation and dispensary despite "unhelpful . . . and disrespectful" interactions with state cannabis regulators and a refusal by the state

139. MEDICAL CANNABIS IN SOUTH DAKOTA, <https://medcannabis.sd.gov/> (last visited Mar. 1, 2022).

140. Thompson, *supra* note 26.

141. *Id.* See also SDCL § 34-20G-51 (2021) (providing an affirmative defense in the state's medical marijuana statutes that should shield valid customers from convictions if they are arrested); SDCL § 34-20G-54 (2021) (protecting individuals from disciplinary action and forfeiture where individuals are able to demonstrate their medical purpose in using cannabis).

142. Roberts, *supra* note 126 (indicating that there's "still a possibility that [Governor] Noem or other authorities in South Dakota law enforcement could decide to take action" but that it would violate FSST's federally protected status as a sovereign nation and potentially spark a major legal battle in which the state's position would be "vastly unpopular").

143. Jacob Newton, *Medical Marijuana in High Demand at Native Nations Cannabis*, KELOLAND (Nov. 23, 2021), <https://www.keloland.com/keloland-com-original/medical-marijuana-in-high-demand-at-native-nations-cannabis/>.

144. For an account of the extended clash between Governor Noem and South Dakota tribes over checkpoints designed to limit COVID-19 transmission, see generally Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19*, 2021 UNIV. CHI. LEGAL F. 233.

145. See Roberts, *supra* note 126 (discussing the state's apparent tolerance of the dispensary).

146. See Jesse McKinley, *Selling Marijuana on Tribal Lands: A Legal Gray Area*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/23/nyregion/new-york-marijuana-regulations.html>; Suzy Cook, *Tribes Choose Paths into Cannabis Industry*, TRAVERSE CITY REC. EAGLE (Aug. 23, 2020), https://www.record-eagle.com/mishigamiing/tribes-choose-paths-into-cannabis-industry/article_90e0fd8e-e427-11ea-9fbb-8fce4146c3b8.html.

147. McKinley, *supra* note 146.

to negotiate.¹⁴⁸ As such examples proliferate, forging ahead with plans even in the absence of state agreement may become an increasingly viable option for tribes.

C. CALIFORNIA: LEFT BEHIND IN A BOOMING LEGAL MARKET

In contrast to the previous examples, California tribes have had difficulty entering the market even in a state where cannabis has been legal for several years.¹⁴⁹ Following the passage of Proposition 64 in 2016, the State of California created a statewide recreational cannabis regulatory and licensing system.¹⁵⁰ Under this system, county and local governments could choose who would get licenses to sell recreational marijuana; only operations approved by local governments could then obtain state licenses.¹⁵¹ In this scheme, California's tribes, 109 of which are federally recognized, were notably absent.¹⁵²

From the beginning of legalization, tribes struggled to find a way to enter California's recreational cannabis market.¹⁵³ While tribes can grow and sell cannabis within Indian Country, they cannot grow product for the state market or sell cannabis outside reservation lands.¹⁵⁴ Rather, California has conditioned tribes' participation in the state market on the requirement that tribes cede their regulatory power over cannabis cultivation and sales to the California Department of Food and Agriculture and the Bureau of Cannabis Control.¹⁵⁵ Tribes must also waive part of their sovereign immunity.¹⁵⁶ Absent a state license, the state forbids tribes from conducting any "commercial cannabis activity" in the state market.¹⁵⁷ Proposed legislation backed by twenty-three California tribes would permit tribes to enter the State's cannabis market without sacrificing their regulatory control but has so far been unsuccessful.¹⁵⁸

Despite these formidable obstacles, a handful of tribes have created workarounds to allow them to profit from legalized cannabis.¹⁵⁹ Only one tribe

148. Cook, *supra* note 146.

149. See Lewis, *supra* note 108 (discussing issues tribes have faced in California).

150. *Id.*

151. *Id.*

152. JUD. COUNCIL OF CAL., *California Tribal Communities*, <https://www.courts.ca.gov/3066.htm> (last visited Mar. 1, 2022).

153. Nieves, *supra* note 20.

154. *Id.*

155. *Id.*

156. Brad A. Bartlett, *Tribes and Cannabis: Reaching New Highs in the Burgeoning Cannabis Marketplace*, 66 FED. L. 49, 50 (2019).

157. Nicole Cohen, Guinness Costello & R.C. Fellmeth, *Bureau of Cannabis Control*, 24 CAL. REG. L. REP. 232, 235 (2019), <https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1389&context=crlr>.

158. J. Harry Jones, *Shut Out of the Legal Pot Market, Indian Tribes Pursuing Cannabis Sales on Their Own Land*, SAN DIEGO UNION-TRIB. (Mar. 24, 2019), <https://www.sandiegouniontribune.com/communities/north-county/sd-no-indian-pot-20190304-story.html>.

159. See Jocelyn Kane, *Cannabis in the CV: California's Native American Tribes Are Largely Excluded From the State's Cannabis Industry*, COACHELLA VALLEY INDEP. (Apr. 20, 2021), <https://cvindependent.com/2021/04/cannabis-in-the-cv-californias-native-american-tribes-are-largely->

to date has done so via the state licensing system, the product of a complicated deal with the surrounding county.¹⁶⁰ In 2019, the Elk Valley Rancheria, located in California's Del Norte County, entered into an agreement with the Del Norte County Board of Supervisors that allows the tribe to lease reservation land to cannabis operations.¹⁶¹ Under the terms of the arrangement, the tribe retains regulatory power over the cannabis operations on the reservation; tax revenue is split evenly between the county and the tribe.¹⁶² Tribes elsewhere in the state have not, however, been able to reproduce this complex arrangement.¹⁶³

Another potential option for California tribes is to create cannabis enterprises entirely separate from the state market. The Iipay Nation of Santa Ysabel in San Diego County, for example, has created a vertically integrated cannabis operation, with a grow facility, a dispensary, and its own regulatory agency.¹⁶⁴ The cannabis grown on the Santa Ysabel reservation can be sold on the reservation or to other tribes but not on the state market.¹⁶⁵

Despite this tight regulatory control, the tribe has nonetheless experienced friction with San Diego County officials.¹⁶⁶ A San Diego County directive prohibits dispensaries in unincorporated parts of the county; because the San Ysabel Reservation land is unincorporated, some county officials and their constituents initially took issue with the tribe's cannabis endeavors.¹⁶⁷ Following a tour of the facility, county supervisor Dianne Jacob came away better understanding tribes' sovereign right to operate the dispensary and praised the facility as an "impressive operation" with strong regulation and enforcement.¹⁶⁸ Nonetheless, illustrating the ongoing skepticism tribes face from local officials, Jacob continued to express concerns about off-reservation effects and the possibility that other tribes might engage in similar ventures.¹⁶⁹

excluded-from-the-states-cannabis-industry/ (noting that seven California tribes have entered the cannabis industry in some form).

160. *Id.*

161. *Del Norte Supervisors Approve Cannabis License with Elk Valley Rancheria*, REDWOOD NEWS KIEM-TV (Jan. 22, 2019) [hereinafter *Del Norte*], <https://kiem-tv.com/2019/01/22/del-norte-supervisors-approve-cannabis-license-with-elk-valley-rancheria/>. See also Lewis, *supra* note 108 (discussing the experience of other tribes attempting to enter the cannabis market in California).

162. *Del Norte*, *supra* note 161.

163. See Kane, *supra* note 159.

164. J. Harry Jones, *Tribe Opens Dispensary in Former Santa Ysabel Casino*, RAMONA SENTINEL (Feb. 25, 2019), <https://www.sandiegouniontribune.com/ramona-sentinel/news/local-news/sd-cm-ram-ysabel-marijuana-20190225-story.html>. The Santa Ysabel Tribal Cannabis Regulatory Agency has maintained strict standards through constant electronic surveillance and seizures of black market cannabis. See SANTA YSABEL TRIBAL CANNABIS REGUL. AGENCY, <https://sytcra.com/> (last visited Mar. 23, 2022); J. Harry Jones, *Tribal Regulators Seize Nearly 60 Pounds of Black Market Cannabis at Santa Ysabel*, SAN DIEGO UNION TRIB. (Feb. 8, 2020), <https://www.sandiegouniontribune.com/communities/north-county/story/2020-02-08/tribal-regulators-seize-nearly-60-pounds-of-black-market-cannabis-at-santa-ysabel>.

165. J. Harry Jones, *County Supervisor Tours Region's First Tribal Cannabis Operation*, BALTIMORE SUN (June 6, 2019), <https://www.baltimoresun.com/county-supervisor-tours-regions-first-tribal-cannabis-operation-story.html/>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

The disparate routes to success involved in the Elk Valley Rancheria and Iipay Nation models may ultimately serve as models for California tribes wishing to benefit from the cannabis industry. Other tribal cannabis efforts are ongoing or in the works; for example, the Fort Independence Indian Community, a federally recognized tribe of Paiute people, sells tax-free cannabis grown at its own cultivation facility,¹⁷⁰ and several other tribes or Native-owned businesses are proceeding with plans to produce both marijuana and hemp.¹⁷¹ Nonetheless, the state's refusal to allow tribes a clear path to producing and selling cannabis that would allow them to retain their sovereignty is a notable failure that has greatly hindered tribes' ability to enter the nation's largest cannabis market.¹⁷²

D. WASHINGTON: NEGOTIATION AND COMPROMISE

Finally, in Washington, states and tribes have worked together on tribal cannabis from the beginning, producing both downsides and benefits.¹⁷³ Washington was the first state to legalize recreational cannabis;¹⁷⁴ shortly thereafter, the Suquamish Tribe within the state not only followed suit, but began working with the state to coordinate regulation of marijuana sales.¹⁷⁵ These efforts resulted in a state-tribal cannabis compact that was also the first of its kind, signed on September 15, 2015.¹⁷⁶ In 2015, Washington passed a law authorizing its governor to enter into compacts with tribes;¹⁷⁷ nineteen of Washington's twenty-nine federally recognized tribes have now negotiated compacts.¹⁷⁸ Many tribal dispensaries in Washington are booming, providing jobs and enabling tribes to invest in healthcare, education, and programs to combat opioid dependency.¹⁷⁹ During the COVID-19 pandemic, cannabis became a growing market for some Washington tribes at a time when many other economic opportunities were unavailable.¹⁸⁰

170. See OAK CREEK DISPENSARY, <https://oakcreekdispensary.com/> (last visited Mar. 1, 2022).

171. Mary Jane Oatman et al., *Conscious Consumption: 100+ Indigenous-Owned Cannabis Businesses to Support Right Now*, EMERALD MAG. (Sept. 24, 2020), <https://theemeraldmagazine.com/conscious-consumption-100-indigenous-owned-cannabis-companies-to-support-right-now/>.

172. See Kane, *supra* note 159 (noting that tribes' struggles to enter the cannabis market in California contrasts with the compacting process that exists in several other western states).

173. See Kim & Roberts, *supra* note 1, at 274 (describing tribes' experience with Washington's cannabis framework).

174. *Id.* at 262.

175. *Id.*

176. *Id.* at 292.

177. *Id.* at 272.

178. GOVERNOR'S OFF. INDIAN AFFS., 2021 CENTENNIAL ACCORD AGENCY HIGHLIGHTS 40 (2021), <https://goia.wa.gov/sites/default/files/public/2021%20Centennial%20Accord%20Agency%20Highlights.pdf>.

179. Syd Stone, *In Washington, Some Tribes Turn to Cannabis to Support Health and Healing*, NORTHWESTERN MEDILL INVESTIGATIVE LAB (June 30, 2020), <https://mil.medill.northwestern.edu/in-washington-some-tribes-turn-to-cannabis-to-support-health-and-healing/>.

180. Brian Beckley, *The Changing, Challenging World of Tribal Cannabis*, MARIJUANA VENTURE (July 13, 2021), <https://www.marijuanaventure.com/tribal-cannabis-2021/>.

Washington's tribal-state compacts have enabled many tribes to enjoy success in the cannabis marketplace.¹⁸¹ Some of their provisions are quite favorable to tribes: tribes enjoy considerable autonomy under the compacts, for example, to enforce their own regulations with minimal involvement from the state.¹⁸² The compacts also allow tribes to vertically integrate their operations, which is not permissible for nontribal cannabis enterprises under state law.¹⁸³ Finally, the compacts contain co-defense provisions promising state cooperation if tribes face federal legal challenges, giving tribes a measure of security in this unpredictable arena.¹⁸⁴

At the same time, however, compacts are not without disadvantages. As Julie Kim and Professor Jessica Roberts note, for example, some of the "fine print" in the Suquamish Tribe's compact includes significant limitations on tribal sovereignty, such as a requirement that the tribe only purchase cannabis approved by the state and a provision that tribes must levy taxes comparable to state ones when selling a product made outside Indian Country.¹⁸⁵ Other tribal compacts contain similar provisions.¹⁸⁶

A further downside of Washington's generally favorable policy toward tribal cannabis is that it has caused difficulties for tribes that wish to set a course on cannabis policy that differs from the state's.¹⁸⁷ The Yakama Nation, which has been staunchly opposed to both alcohol and drug use by tribal members, has encountered opposition from the state in its efforts to apply its strict cannabis prohibition to nonmembers on off-reservation lands that are subject to the tribe's hunting and fishing rights.¹⁸⁸ Other tribes may find themselves, for better or worse, shaking off such concerns to participate in the economic opportunity cannabis offers. The Port Gamble S'Klallam Reservation initially declined to legalize cannabis due to public health concerns.¹⁸⁹ Eventually, however, despite strong opposition from some tribal members,¹⁹⁰ the tribe decided to enter a compact with the state and open its own dispensary on March 10, 2018.¹⁹¹

181. *See id.*

182. *See id.*

183. *Id.*

184. *See* Amber Cortes, *On This Reservation, Cannabis Is the New Casino*, NARRATIVELY (June 1, 2016), <https://narratively.com/on-this-reservation-cannabis-is-the-new-casino/>.

185. Kim & Roberts, *supra* note 1, at 293.

186. *See* John Levesque, *Washington's Native American Tribes Get into the Cannabis*, SEATTLE BUS. MAG. (Jan. 2019), <https://www.seattlebusinessmag.com/policy/washingtons-native-american-tribes-get-cannabiz> (noting that compacting tribes must agree not to deviate from the state's taxation rates).

187. *See Budding, supra* note 16, at 997-98.

188. 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> (discussing Yakama Nation's stance against marijuana legalization).

189. Richard Walker, *Let It Be Pot: Two Washington State Tribes on Board*, INDIAN COUNTRY TODAY (Dec. 2, 2015), <https://indiancountrytoday.com/archive/let-it-be-pot-two-washington-state-tribes-on-board>.

190. Tad Sooter, *Port Gamble S'Klallam Reservation Eyeing Marijuana Sales*, KITSAP SUN (Apr. 6, 2017), <https://www.kitsapsun.com/story/news/local/2017/04/06/port-gamble-sklallam-tribe-eyeing-marijuana-sales/100125246/>.

191. *Port Gamble S'Klallam Tribe Joins Marijuana Industry with New Store*, INDIANZ.COM (Mar. 6, 2018), <https://www.indianz.com/News/2018/03/06/port-gamble-sklallam-tribe-joins-marijua.asp>.

Other states have picked up on the compacting model. Soon after the Washington legislature authorized its governor to enter into compacts with tribes, Nevada followed suit with similar legislation, and several tribes in Nevada also negotiated favorable deals.¹⁹² The Las Vegas Paiute Tribe, for example, opened the NuWu Cannabis Marketplace, touted as the largest in the world and currently attracting both publicity and revenue.¹⁹³ Even in the absence of a legislative framework, other tribes have sought to strike individualized deals with states—for example, negotiations between tribes and New Mexico, which recently legalized cannabis, are ongoing.¹⁹⁴

When these arrangements are successful, they mirror other efforts at cooperation between tribal and nontribal governments—often a fraught enterprise given the history of state hostility to tribal autonomy, but one that has also sometimes allowed tribes and states to work together productively.¹⁹⁵ Compacts may be more likely to be successful in states that already have a fairly good working relationship with tribes.¹⁹⁶ In Washington State, for example, tribal-state cooperation on gaming under the IGRA framework has proceeded more smoothly than in some other states, perhaps helping to set the stage for productive negotiations on cannabis.¹⁹⁷ Conversely, especially where tribal-state relations are not particularly friendly, it is important to recognize the limitations of compacting, particularly in the absence of any federal involvement or protections.¹⁹⁸ Ultimately, compacts rest on the good faith and cooperation of the states that enter them, something that tribes may find difficult to count on.¹⁹⁹

IV. CONCLUSION

Although federal toleration of legal cannabis initially promised to be an immediate boon for tribes, the reality of tribal cannabis has been rockier.²⁰⁰ Even

192. See Kim & Roberts, *supra* note 1, at 272.

193. See *id.* at 272-73 (noting that NuWu is “receiving a lot of attention” and “garnering much-needed revenue”).

194. See *Cannabis Bust*, *supra* note 88.

195. See Barnard, *supra* note 43, at 279 (noting that tribes have entered into intergovernmental agreements with neighboring jurisdictions on “such diverse subjects as law enforcement authorities, water rights, regulation of hunting and fishing, taxation, waste disposal, economic development, and social service delivery.”).

196. See *id.*

197. See W. Ron Allen, *IGRA Intended Better State/Tribal Relations*, 17 INDIAN GAMING 14 (2007), <https://perma.cc/5KPXCC2> (explaining, from the author’s perspective as chairman of the Jamestown S’Klallam Tribe, that, in Washington state, the IGRA compact negotiation process has “enhanced a co-regulatory environment within a respectful ‘government-to-government’ relationship.”). For a discussion of tribes’ overall far less successful experiences with IGRA, 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, 208 (2010).

198. For example, tribes have faced raids and hostility in some instances despite efforts to cooperate with state, local, or federal authorities. See Kennard, *supra* note 16.

199. See *Budding*, *supra* note 16, at 1007 (discussing historical issues with tribal-state relations).

200. See Wilhelm Murg, *Native American Tribes Weigh in on Legalizing Medical and Recreational Marijuana*, OKLA. GAZETTE (Apr. 20, 2016), <https://www.oudaily.com/news/native-american-tribes->

as states jump into cannabis legalization with relatively little fear of friction with their neighbors or crackdowns by the federal government, tribes face a much more uncertain legal landscape, with many more obstacles thrown in their path by both federal unpredictability and state intransigence.²⁰¹

Nonetheless, the future of tribal cannabis looks more promising for two reasons. First, while the cannabis landscape remains complicated, tribes are increasingly experienced and adept in maneuvering around it.²⁰² The setbacks of 2015, for example, left the FSST ready to seize a new opportunity for a medical marijuana dispensary when it arose in 2020.²⁰³ Likewise, while having trouble being heard on the state level, California tribes are taking the first steps toward an independent tribal cannabis marketplace.²⁰⁴ Tribes in many other states are benefiting from each other's experience in negotiating compacts, forming innovative leasing arrangements with nontribal businesses, managing day-to-day aspects of cannabis regulation, and many other areas.²⁰⁵

Second, external events appear on many fronts to be moving in a more favorable direction. With the election of President Joseph R. Biden, Jr., federal legalization or reclassification of cannabis as a Schedule II drug remains a viable possibility.²⁰⁶ While greater clarity on the federal level would remove many complicating factors for the cannabis industry in general, it would make an enormous difference to tribes.²⁰⁷ Tribes have fewer resources than states to weather legal uncertainty, to create detailed regulatory schemes and enforcement measures, and to fashion workarounds for everything from banking to pesticide use.²⁰⁸ Because tribes have been disproportionately affected by the federal prohibition, removing these obstacles would place tribes on a more even footing with states, while at the same time making tribes less dependent on state policies.²⁰⁹ Eventually, tribes might be able to receive federal support in launching operations or safeguarding sovereign policies in the face of state opposition.²¹⁰

weigh-in-on-legalizing-medical-and-recreational/article_ac8be3c8-033a-11e6-9475-933559cfb5c0.html (discussing some of the early challenges for tribes).

201. See *id.*

202. See Laura Drotleff, *Tribal Nations Looking to Collaboration to Realize Cannabis Business Opportunities*, HEMP INDUS. DAILY (Nov. 3, 2021), <https://hempindustrydaily.com/tribal-nations-looking-to-collaboration-to-realize-cannabis-business-opportunities/> (discussing how tribes are collaborating and sharing knowledge on cannabis ventures).

203. See *supra* Part II.B.

204. Kane, *supra* note 159.

205. See Drotleff, *supra* note 202.

206. See *Ideal Backdrop*, *supra* note 32 (discussing possible impact of Biden election).

207. See Lewis Koski, *What Would Federal Cannabis Legalization Look Like?*, FORBES (June 30, 2021), <https://www.forbes.com/sites/lewiskoski/2021/06/30/what-would-federal-cannabis-legalization-look-like/?sh=7fbaef057fed> (noting that legalization could help clear up the many legal ambiguities tribes face in the cannabis market).

208. See, e.g., Kim & Roberts, *supra* note 1, at 282 (discussing issues with pesticides and cannabis cultivation caused by its illegal status federally).

209. See Budding, *supra* note 16, at 1007 (discussing problems in relying on tribal-state negotiation).

210. See Koski, *supra* note 207 (explaining how federal legalization could help tribes).

In addition to legal developments, the success of legalization and growing acceptance of marijuana nationwide may simply make tribal cannabis enterprises less controversial in general.²¹¹ It is worth noting that state legalization initially provoked conflicts with non-legal states, and two states (Nebraska and Oklahoma) attempted to seek legal redress against Colorado's legalization.²¹² These issues, however, have faded with time as general attitudes toward cannabis have shifted. Similarly, the hostility of some states to tribal cannabis ventures may fade as feared spillover effects prove overblown over time.²¹³

Finally, it is important to remember that decisions about cannabis are ultimately a matter of tribal sovereignty. Even in a more cannabis-favorable landscape, for example, it should be noted that not all tribes wish to legalize or profit from cannabis.²¹⁴ At the same time, tribes that make the decision to enter the cannabis market should have the opportunity to do so free from undue state interference. Cannabis raises important questions about public health, economic policy, and morals; tribes should be able to exercise their sovereignty to chart whatever path their members and leaders choose.²¹⁵ Increasingly, with and without the cooperation of states, tribes are doing so.

211. Polling, for example, shows continued growth in support for legalization. See *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx>.

212. DeVeaux, *supra* note 81, at 957-58.

213. One example of this may be South Dakota's apparent decision to accept a tribal medical marijuana dispensary, even when its policies vary from state ones. See Roberts, *supra* note 126.

214. See Kaminsky, *supra* note 188.

215. See Kim & Roberts, *supra* note 1, at 275-88 (exploring the varied tribal arguments for and against cannabis legalization).