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Burning Questions: Changing Legal Narratives on Cannabis in Indian Country

Sam J. Carter*

Robin M. Rotman**

I. INTRODUCTION

In the not-so-distant past, thoughts of Cannabis legalization in the United States were radical. In the present day, the narratives around Cannabis are changing. The term “present day” affixes this Article to early 2023, a snapshot in time. To understand the current legal narratives surrounding Cannabis, and what they might become in the future, it is important to examine the history of Cannabis law and policy in United States. This Article begins by discussing Cannabis regulation in the United States, from the rise of federal regulation to the gradual deregulation by states with tacit federal consent. The Article then examines the jurisdictional conflicts between tribes and states for tribes that attempt to decriminalize Cannabis on the reservation with specific attention paid to enforcement of criminal laws on reservation, regulation of commercial activity, and regulations regarding cannabis research in Indian Country. This Article then examines the recent marijuana policy statement issued by the Biden administration and current Congressional activity, including their possible implications for Cannabis in Indian Country and issues to watch. Finally, this Article concludes with a call to recognize the self-determination of tribes in establishing and enforcing their own Cannabis policies on reservation land.

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II. CANNABIS REGULATION

A. *Cannabis Definitions and Usages Prior to United States Colonization*

The words “Cannabis” and “marijuana” are often used interchangeably, but they are not the same.¹ *Cannabis* is a genus of flowering plant and refers to the larger classification of plants that include marijuana.² The Cannabis genus includes a few subspecies of plants. The two main subspecies are *Cannabis indica* and *Cannabis sativa*, and there are many hybrids of these two subspecies.³

Cannabinoids are the compounds found in Cannabis plants, the most well-known of which are delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD).⁴ *Marijuana* or *marihuana* is the name given to the psychoactive drug that consists of the dried leaves, flowers, stems, and seeds of the Cannabis plant, often containing a mixture of THC and CBD.⁵ *Hemp* is the low THC variety of the Cannabis plant, that can be used to derive CBD and its fibers used for food, clothing, and building materials.⁶ Only Cannabis over 0.3% THC (legal term *marijuana*) is defined in the United States Code.⁷ Under the Controlled Substances Act,⁸ marijuana means “all parts of the plant *Cannabis sativa* L and every compound, manufacture, salt, derivative, mixture, or preparation of such plant”⁹

1. Cannabis has historically been known by several names, including “hemp,” “Indian hemp,” and “marihuana.” Cannabis is the recognized term among scholars, as many other names are associated with anti-cannabis propaganda of the drug as foreign and dangerous. David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 3 (2020).

2. *Id.* at 4; see also “What are cannabis and marijuana?” *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FOOD & DRUG ADMIN. (Feb. 22, 2023), www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#whatare [https://perma.cc/J2PM-AB8G].

3. *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, *supra* note 2.

4. *Id.*

5. Lisa N. Sacco, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*, CONG. RSCH. SERV. (Apr. 7, 2022), crsreports.congress.gov/product/pdf/R/R44782.

6. *Hemp v. Cannabis*, HEMP.COM, www.hemp.com/hemp-vs-marijuana-vs-cbd/ [https://perma.cc/7PMC-KFPA] (last visited Feb. 11, 2023).

7. 7 U.S.C. § 1639o.

8. 21 U.S.C. § 802.

9. *Id.*

The use of Cannabis has been traced to the third millennium B.C. and is regarded as one of the world's oldest cultivated plants.¹⁰ Cannabis cultivation is thought to have originated in Western China, then migrated to Asia and Africa.¹¹ Cannabis cultivation then spread to Europe in the fourteenth century.¹² Cannabis was introduced to the Western hemisphere by the Spanish in 1545.¹³

Little written record exists of Cannabis in Native American culture prior to the period European colonization began in 1492, but Cannabis plant usage is rooted in Native culture. Cannabis cultivation was in accordance with some indigenous worldviews of engaging in a reciprocal relationship with land and natural resources.¹⁴ As a material, Cannabis was regarded as staple for some tribes across the United States, who used hemp fibers to make fishing nets, storage bags and *itatamat* or “counting the day” balls.¹⁵ Cannabis was also used as a psychotropic plant in some Native American cultures, including in shamanistic traditions to stimulate religious experiences and prior to communal tribal meetings to nurture social interaction.¹⁶

For settler Americans, Cannabis cultivation can be traced back to Jamestown, Virginia, in 1632, where it was used as a source of fiber and textile.¹⁷ By the mid-1800s, Cannabis cultivation had spread across the country.¹⁸ At the time, Cannabis was not used as widely as a recreational substance amongst white Americans, but was used in medicinal

10. Troy Daniel, *A Short History of Cannabis*, 1 S.B.M. MARIJUANA L. SECT. J. 22, 22 (2017).

11. Patton, *supra* note 1, at 4.

12. *Id.*

13. Ross Scully, *How Spain Brought Cannabis to the Americas and Influenced Hispanic Culture*, LEAFLY (Sept. 25, 2017), <https://www.leafly.com/news/lifestyle/cannabis-in-hispanic-culture> [<https://perma.cc/9UK9-2QW4>].

14. “. . . [T]he earth is our mother. She nourishes us; that which we put into the ground she returns to us, and healing plants she gives to us likewise” T.C. MCLUHAN, *TOUCH THE EARTH: A SELF-PORTRAIT OF INDIAN EXISTENCE* 123 (Natalie Curtis eds., 1971) (quoting “Hunting the Moose” told by Ted Bedagi (Big Thunder) of the Wabankis Nation in 1900).

15. Alys Landry, *What Does Marijuana Memo Mean for Hemp Production and Traditional Uses?* INDIAN COUNTRY TODAY (Dec. 18, 2014), <https://ictnews.org/archive/what-does-marijuana-memo-mean-for-hemp-production-and-traditional-uses> [<https://perma.cc/Z5CN-8TU8>].

16. Mark S. Ferrara, *Peak-experience and the Entheogenic Use of Cannabis in World Religions*, 4 J. PSYCHEDELIC STUD. 179–91 (2020), <https://doi.org/https://akjournals.com/view/journals/2054/4/3/article-p179.xml>.

17. Patton, *supra* note 1, at 4; Daniel, *supra* note 10, at 22.

18. Patton, *supra* note 1, at 4; Daniel, *supra* note 10, at 22.

applications, including as an analgesic in the treatment of combat injuries in the United States Civil War.¹⁹

B. Rise of Regulation

Cannabis cultivation and usage was largely unregulated in the United States throughout the 1800s.²⁰ While the federal government began regulating supposedly dangerous drugs in 1906, following the passage of the 1906 Pure Food and Drug Act,²¹ Cannabis was not one of the drugs included in the act.²² Rather, state and local governments were the first to pass prohibitions on marijuana—often based on prejudiced perceptions on common recreational marijuana users at the time.²³ Mexican laborers in the Southwest who were subject to racist rhetoric of being criminally minded and dangerous, became associated with marijuana smoking and it was viewed as a catalyst for their “bad” behavior.²⁴ Similarly, black marijuana users in the South were subject to racialized perceptions of being violent criminals, with marijuana pointed to as the catalyst, rather than racism or social inequality.²⁵ In 1913 and 1914, California and El Paso, Texas, both areas with high populations of Mexican and black citizens, both respectively passed prohibitions on the sale or possession of marijuana.²⁶

Cannabis was not addressed by the federal government until 1915, when the US Secretary of Agriculture declared marijuana injurious to health and denied its importation.²⁷ However, marijuana was still readily grown domestically.²⁸ As regulations did begin to develop at the federal level, and state and local regulations spread, they were similarly tied to

19. Patton, *supra* note 1, at 5; Daniel, *supra* note 10, at 22.

20. Silvia S. Martins, et al., *Cannabis legalization in the US. Where do we go from here?* 44 TRENDS IN PSYCHIATRY AND PSYCHOTHERAPY 1 (2022), doi:<https://www.scielo.br/j/trends/a/cV3z3NGbJCWdryYfqgYnTrv/?lang=en>; see also Sacco, *supra* note 5.

21. 59 P.L. 384, 34 Stat. 768 (1906).

22. See Pure Food and Drug Act, 59 P.L. 384, 34 Stat. 768 (1906).

23. Frontline, *Marijuana Timeline*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/TB6X-63AY>] (last visited Feb. 11, 2023).

24. Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361 (2013), <https://digitalcommons.law.seattleu.edu/faculty/116> [<https://perma.cc/BG4G-9KTN>].

25. *Id.* at 362.

26. *Id.*

27. *Id.*

28. *Id.* at 363.

racist perceptions of Cannabis users, as well as negative media attention and economic interests.

In the 1930s, new technology for processing hemp streamlined its production and created competition with other fibers—including paper produced from wood pulp.²⁹ William Hearst, the head of a newspaper empire and owner of vast woodlands, began reporting on the alleged dangers of Cannabis, claiming in one 1928 paper that “one could grow enough Cannabis in a window box to ‘drive the whole population of the United States stark, raving mad.’”³⁰ In the 1930s, one Hearst-controlled newspaper reported that “marijuana make(s) the smoker wilder than a wild beast” as well as anecdotal evidence that the Cannabis user would become violent after smoking.³¹

Economic interests were also influential to marijuana prohibitions.³² In 1930, Harry Anslinger was appointed the first director of the Federal Bureau of Narcotics.³³ Notably Anslinger was appointed to the position by then Secretary of Treasury Andrew Mellon, the uncle of Anslinger’s wife.³⁴ Mellon was an investor in the DuPont company, a major producer of synthetic fibers.³⁵ Following his appointment, Anslinger was vocal about the alleged dangers of Cannabis, often calling upon racialized sentiments. Anslinger alleged in a prejudiced statement that “[t]here are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and others.”³⁶ These sentiments were echoed in the 1936 anti-Cannabis propaganda film *Reefer Madness*.³⁷

By 1931, all but two states west of the Mississippi had restricted or prohibited marijuana use in form.³⁸ In 1937, Congress established a *de*

29. *Why Hemp Was Banned In 1937—A Look At Hemp Prohibition History*, GREAT HEMP, <https://greathemp.net/why-hemp-was-banned-in-1937/> [<https://perma.cc/3J3T3-LR4M>] (last visited Feb 11, 2023).

30. Robert Solomon, *Racism and Its Effect on Cannabis Research*, CANNABIS & CANNABINOID RSCH. (2020), www.liebertpub.com/doi/full/10.1089/can.2019.0063 [<https://perma.cc/UAS7-924L>]; see also GREAT HEMP, *supra* note 29.

31. Solomon, *supra* note 30; see also *Why Hemp Was Banned In 1937—A Look At Hemp Prohibition History*, *supra* note 29.

32. Bender, *supra* note 24, at 387.

33. Solomon, *supra* note 30.

34. *Id.*

35. *Id.*

36. *Id.*

37. REEFER MADNESS (G&H Productions 1936).

38. Bender, *supra* note 24, at 362.

facto federal marijuana ban under the Marihuana Tax Act (MTA),³⁹ which “banned unlicensed and nonmedical uses” of marijuana.⁴⁰ The MTA imposed certain registration and reporting requirements on individuals dealing in marijuana, and it imposed high-cost transfer tax on marijuana sales both on an annual basis and per-transaction.⁴¹ In the decades that followed, the federal government continued to pass drug control legislation and criminalize drug use. Later acts, such as the 1951 Boggs Act⁴² and 1956 Narcotics Control Act⁴³ established and increased federal penalties for marijuana offenses.⁴⁴

In 1970, the federal government enacted the Controlled Substances Act (CSA) as Title II of the Comprehensive Drug Abuse Prevention and Control Act,⁴⁵ which repealed the Marihuana Tax Act. The CSA established a regulatory framework for certain drugs, such as marijuana. Under the CSA, marijuana is defined as a Schedule I substance, the most restricted federal drug class, with “no . . . accepted medical use.”⁴⁶ As a Schedule I substance, this means that the cultivation, possession, and distribution of marijuana are illegal, except for the purposes of highly sanctioned federally approved research.⁴⁷ Two federal agencies, The Drug Enforcement Administration (DEA) and the Food and Drug Administration (FDA) determine which substances appear on various schedules.⁴⁸ The DEA is also tasked with enforcing both the registration and trafficking provisions. The CSA remains in full force today.

C. Era of Deregulation

In the 1970s, despite the passage of the CSA, there were limited decriminalization efforts in some state jurisdictions, leading to the overturning of some state laws criminalizing marijuana.⁴⁹ In 1973, Oregon became the first state to mandate punishment by fine, rather than incarceration, for small amounts of marijuana for recreational use—

39. 50 Stat. 551 (1937).

40. Martins, *supra* note 20; *see also* Bender, *supra* note 24, at 364.

41. Nima H. Mohebbi et al., *Crafting a Constitutional Marijuana Tax*, 69 TAX LAW 223 (2015); *see also* Sacco, *supra* note 5.

42. 65 Stat. 767 (1951).

43. 70 Stat. 567 (1956).

44. Bender, *supra* note 24, at 364–65.

45. Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801–971.

46. Martins, *supra* note 20, at 1.

47. Sacco, *supra* note 5, at 1.

48. Sungeun Julie Kim & Jessica Roberts, *Green Means Go: Tribes Rush to Regulate Cannabis in Indian Country*, 8 AM. INDIAN L.J. 255 (2019).

49. Mohebbi et al., *supra* note 41, at 216.

and in the years that followed many states and cities enacted similar policies.⁵⁰ California became the first state to decriminalize a form of marijuana in 1996 when it passed Proposition 215, the Compassionate Use Act,⁵¹ which allowed for the usage of medical marijuana in the state for limited medical purposes.⁵²

The DOJ has articulated its stance on federal marijuana enforcements through a series of memoranda. In 2009, as more states passed laws legalizing Cannabis during this time, the DOJ sought to present a more uniform approach to Cannabis law enforcement. Former Attorney General David Ogden issued a memo, often referred to as the Ogden Memorandum, which iterated that the DOJ would prioritize combatting major drug traffickers.⁵³ While the Ogden Memo is often regarded for clearing a path for state Cannabis policies, the memo notably included guidance that “no state can authorize violations of federal law” and that “nothing herein precludes investigation or prosecution.”⁵⁴

While the federal government could (and still can) preempt state marijuana policies and enforce the CSA, starting in 2013, it has shifted the priority from restricting all marijuana usage to focusing on restricting criminal networks involved in illicit marijuana trade.⁵⁵ To illustrate this shift in priorities, in 1982, the percentage of individual federal drug offenders charged with marijuana violations was 40%.⁵⁶ As of 2020, that percentage is much lower, with only 7% of federal drug offenders being marijuana offenders.⁵⁷

In 2013, former Deputy Attorney General James Cole stated in a memorandum that while marijuana remained an illegal substance, the DOJ would focus its resources on the “most significant threats in the most effective, consistent, and rational way” and outlined eight enforcement priorities.⁵⁸ The eight priorities are as follows:

50. Bender, *supra* note 24, at 368.

51. Cal. Health & Saf. Code § 11362.5 (Deering 1996).

52. Martins et al., *supra* note 20, at 1.

53. Sacco, *supra* note 5, at 23.

54. David W. Ogden, *Memorandum for Selected United States Attorneys*, U.S. DEPT OF JUST. (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [https://perma.cc/7PWD-VT39] (discussing investigating and prosecutions in states authorizing the medical use of marijuana).

55. Sacco, *supra* note 5, at 2.

56. *Id.* at 8.

57. *Id.*

58. James M. Cole, *Memorandum for all United States Attorneys*, U.S. DEPT OF JUST. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

(1) [P]reventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as cover or pretest for the trafficking of other illegal drugs or illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana uses; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands, and (8) preventing marijuana possession or use on federal property.⁵⁹

Concurrent with these federal developments, in 2012 Colorado and Washington voters started the next wave of state deregulation policies when they passed ballot initiatives decriminalizing recreational marijuana.⁶⁰

While the Cole Memorandum illustrated the Cannabis enforcement priorities of the DOJ, it did not address the unique concerns of tribes. In 2014, the Department of Justice Executive Office for U.S. Attorneys issued a memorandum, referred to as the Wilkinson Memorandum, to all United States attorneys to address the impacts of the Cole Memorandum on Indian Country. The Wilkinson Memorandum stated that the Cole Memorandum did not prohibit the federal government from enforcing federal law in Indian Country and outlined eight priorities that would still apply in the event that Indian Nations sought to legalize “the cultivation or use of marijuana in Indian Country.”⁶¹

The memo further provides that U.S. Attorneys should consult with tribes on a government-to-government basis when evaluating a tribe’s marijuana enforcement activities and should inform the executive before determining how to proceed when tribal regulation does not meet the eight Cole Memorandum standards.⁶² As long as tribes abided by the eight priorities, the assumption was that the DOJ would be unlikely to

[<https://perma.cc/2D6B-UN3X>] (giving guidance on marijuana enforcement in Washington, D.C.).

59. Monty Wilkinson, *Policy Statement Regarding Marijuana Issues in Indian Country*, U.S. DEPT OF JUST. (Oct. 28, 2014), <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystate mentregardingmarijuanaissuesinindiancountry2.pdf> [<https://perma.cc/6UNQ-9UM2>].

60. Bender, *supra* note 24, at 360.

61. Wilkinson, *supra* note 59.

62. *Id.*

interrupt tribal marijuana operations. Wyn Hornbuckle, a spokesman for the DOJ at the time, stated that tribes interested in legalizing marijuana were not expected to consult with the department or federal officials, but rather would consult with them as problems arose.⁶³ Wyn stated, “American Indian tribes are sovereign governments, like states. Marijuana remains illegal under federal law, so it would not be the Justice Department’s role to work with tribes to facilitate legalization,” reiterating the federal government’s non-interference stance.⁶⁴

During the Trump administration, then Attorney General William Barr noted that he would continue to “prioritize the prosecution of significant drug traffickers, rather than drug users or low-level drug offenders.”⁶⁵ But in 2018, the DOJ took a hard turn and issued another marijuana enforcement to the U.S. Attorneys in which former Attorney General Jeff Sessions emphasized that the DOJ had “well-established principles dating back to 1980, to decide which marijuana activities to prosecute” and if “the previous DOJ memoranda were unnecessary and rescinded.”⁶⁶ While the DOJ has not issued additional memoranda since, in 2019, Attorney General Barr stated that he did not intend to target marijuana businesses that had relied on the Cole Memorandum for guidance. Further, in 2021, Attorney General Merrick Garland seemed to signal a return to only targeting large, illicit drug operations when he stated, “I do not think it the best use of the Department’s [DOJ’s] limited resources to pursue prosecutions of those who are complying with the laws in states that have legalized and are effectively regulating marijuana.”⁶⁷

Congressional spending has supported the DOJ’s federalism approach. Since 2015, Congress had attached a rider to the DOJ’s annual appropriations bill that stipulates that the DOJ cannot use appropriated funds to prevent states and tribes “implementing their own laws that authorize the use, distribution, possession, or cultivation of *medical* marijuana.”⁶⁸ Yet, this rider does not target *recreational* marijuana.

63. Steven Nelson, *Native American Tribes Take on Pot, Consider Gamble on Legalization*, U.S. NEWS (Jan. 27, 2015), <http://www.usnews.com/news/articles/2015/01/27/native-american-tribestake-on-pot-consider-gamble-on-legalization>.

64. *Id.*

65. Sacco, *supra* note 5, at 23.

66. *Id.* at 25.

67. U.S. Congress, Senate Committee on the Judiciary, *The Nomination of the Honorable Merrick Brian Garland to be Attorney General of the United States: Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, 117th Cong., 1st Sess., Feb. 2021, pp. 23–25.

68. Sara Snowden, *Playing Hot Pot-ato: Does Biden’s Presidency Signal the End of Federal Marijuana Prohibition?*, 73 MERCER L. REV. 29 (2022) (emphasis added); *see also*

However, the future is uncertain as Congress could chose to repeal the rider or, alternatively, expand it to include recreational marijuana.

III. CANNABIS IN INDIAN COUNTRY TODAY

Over time, questions of regulatory authority persist regarding on-reservation Cannabis. Whenever tribes act in ways that conflict with the neighboring state's interest, depending on the unique relationships with and policies of the surrounding state, tribes may face legal, regulatory, and economic challenges. To understand the regulatory questions for Cannabis in Indian Country, we must first examine the unique position of Native Americans in the federal system.

A. Federal, State, and Tribal Relationships

Long before the colonization of the land now known as the United States of America, American Indian tribes existed as independent nations that governed themselves and their territories.⁶⁹ Tribes had—and continue to have—their own knowledge systems comprised of cultural practices, languages, traditions, spiritual beliefs, and forms of government.⁷⁰ Use of the Cannabis plant is rooted in the cultural history of some Native nations. However, many Cannabis traditions were altered or abandoned in the early twentieth century, when the government began regulating all forms of the Cannabis plant.⁷¹ The formation of federal laws and policies, specifically those relating to Cannabis, were rarely, if ever, constructed using indigenous knowledge.⁷²

Tribes occupy a unique space in the legal system. Tribes have inherent sovereignty, which has been confirmed by the United States Constitution, two centuries of Supreme Court rulings, treaties with the

Consolidated Appropriations Act, 116 H.R. 133 (2020), <https://www.govinfo.gov/content/pkg/BILLS-116hr133enr/pdf/BILLS-116hr133enr.pdf> [<https://perma.cc/7X4Y-M5TS>].

69. This paper uses the term “American Indian” to refer to the indigenous peoples of the mainland United States at the time of European colonization. Given the complex and on-going narratives around indigenous identity and terminology, we chose to utilize a term found in U.S. federal Indian law for simplicity.

70. Hyojung Cho, *Conservation of Indigenous Heritage in the United States: Issues and Policy Development*, 38 J. ARTS MGMT. L. & SOC'Y. 187, 189 (2008); see also SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 14, 33 (1989) (“These governments ranged from highly centralized (Creek Nation) to highly decentralized (Yakama Nation) . . . each tribe, exercising its inherent sovereignty, structured its government according to its special needs, made and enforced its own laws, and conducted relations and trade with other tribes.”).

71. Landry, *supra* note 15.

72. See Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 848, 849 (2011).

federal government, and generations of interactions with federal and state governments on a nation-to-nation basis.⁷³ As sovereign, domestic dependent nations, the tribes have rights to self-governance, to manage tribal lands, to own and operate tribal businesses, and, in many instances, to regulate non-tribal individuals and businesses operating on their lands.⁷⁴

Federal Indian law is grounded in the concept that, because the Constitution granted plenary power over Indian affairs to Congress,⁷⁵ and treaty-making power to the President and the Senate,⁷⁶ states have no authority over tribal governments, unless expressly authorized by Congress.⁷⁷ While the United States Constitution speaks to the relationship between the federal and state governments, and between the federal government and American Indian tribal governments, it does not address the relationship between states and Indian tribes. Tribes and states are parallel sovereigns in the federal system, meaning that tribal governments are not subordinate to state governments, and state governments are not subordinate to tribal governments. As separate sovereigns with proximal geographic territories, tribes and states share common citizens, have government-to-government relations, and cooperate in areas such as taxation, education, and law enforcement.⁷⁸ Yet, questions of federal, state, and tribal jurisdiction over civil regulation, taxation, and criminal matters persist in the present day.⁷⁹

While it is clear that a tribe has authority over its members on its reservation unless a federal statute dictates otherwise, jurisdiction over non-members is less clear.⁸⁰ If a tribe asserts civil regulatory authority

73. See generally Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. 3, 3–6 (2015).

74. S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 664 (2010).

75. U.S. CONST. art. I, § 28, cl. 3.

76. U.S. CONST. art. II, § 2.

77. Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1, 1 (2011).

78. SUSAN JOHNSON ET AL., GOVERNMENT TO GOVERNMENT MODELS OF COOPERATION BETWEEN STATES AND TRIBES 1 (2d ed. 2009).

79. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 551 (1832) (describing the limits of state authority in Indian Country); see also *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (recognizing the plenary authority of the federal government in Indian Country); *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 336–37 (2008) (defining the limits of tribal jurisdiction); David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211, 227–28 (1996) (describing the shifting policies).

80. See *Montana v. United States*, 450 U.S. 544 (1981).

over non-members on the reservation, unless there is a federal statute addressing the issue, authority will be determined on a case-by-case basis, in which the individual or parties affiliation with the tribe is considered, as well as the potential effect upon essential tribal political, economic, or social interests.⁸¹ Until recently, in instances when a State and a tribe asserted the same authority over non-member interests on a reservation, the two-prong *Bracker* test was used to determine who held authority,⁸² asking: (1) is the state law preempted by a federal law; and (2) would state authority infringe upon tribal self-government?⁸³ Criminal jurisdiction has not followed the same jurisdictional scheme and is discussed in more detail below.

While states have numerous mechanisms for resolving inter-state conflicts and defining their territorial spheres, there are fewer mechanisms for negotiating tribal-state conflicts.⁸⁴ As the federal stance on Cannabis regulation has shifted, implementation at the state and tribal level has invited conflict over economic, criminal, health, and research considerations. In the following section, we examine conflicts that have emerged and the outcomes for tribal governments.

B. Regulation of Commercial Activity

Economic development is a critical issue in Indian Country. From a strictly fiscal perspective, American Indians are both the most impoverished racial group in the United States⁸⁵ and the least likely to

81. *Id.*; see also *New Mexico v. Mescalero Apache Tribe*, 426 U.S. 324, 338 (1983).

82. *White Mountain Apache v. Bracker*, 448 U.S. 136, 139 (1980). For more on Public Law 280, see *Public Law 280*, TRIBAL L. AND POLY INST., <http://www.tribal-institute.org/lists/pl280.htm> [<https://perma.cc/T6VT-ZJPB>].

83. It is worth noting, however, that in recent cases the Court appears to be trending towards upholding state authority over non-Indian activity on reservations. See *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); see also *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

84. Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 753 (2017).

85. *What Drives Native American Poverty?* NW. INST. FOR PUB. POLY RSCH. (Feb. 28, 2020), <https://www.ipr.northwestern.edu/news/2020/redbird-what-drives-native-american-poverty.html> [<https://perma.cc/789K-6Y4V>]; see also Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> [<https://perma.cc/N4CW-LN6N>]; John Koppisch, *Why Are Indian Reservations So Poor? A Look At The Bottom 1%*, FORBES (Dec. 13, 2011), <https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#19aceb123c07> [<https://perma.cc/6HJG-55F6>].

be business owners.⁸⁶ This is due in part to the forced resettlement of many indigenous people from their ancestral lands. The remote locations and fragmentation of many Indian reservations, far from potential customers and suppliers, has added to the difficulty of establishing successful tribal businesses.⁸⁷ Further, federal policies of dealing with tribes and tribal businesses have often reflected capitalist values, which may conflict with tribal cultural practices and norms, such as cultivation of Cannabis.⁸⁸

The effects of these policies and pressures affect many facets of tribal business operations. Although some reservations are rich in natural resources, outside investors are often reluctant to partner with tribal businesses to develop these resources, because the investors are often hesitant to submit themselves to tribal laws and regulations and to the jurisdiction of tribal court systems.⁸⁹ Even when tribes agree to resolve disputes in state or federal courts, tribal sovereign immunity can raise concerns for business counterparties.⁹⁰ This has led some tribes to engage in “alternative” means of economic development, such as opening gaming operations on reservations. In some instances, these operations have been largely successful in creating jobs and generating revenue for tribal governments.⁹¹ Because the legality of and attitudes toward gaming, much like toward Cannabis, vary drastically state to state, examining the policy of Indian gaming may give insight into how state governments interact with tribal governments to regulate marijuana businesses on the reservation.

86. *Facts for Features: American Indian and Alaska Native Heritage Month: November 2016*, U.S. CENSUS BUREAU (Nov. 2, 2016), <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> [<https://perma.cc/WH2K-DA8K>].

87. Joseph Patterson, *The Native American Struggle Between Economic Growth and Cultural, Religious, and Environmental Protection: A Corporate Solution*, 92 NOTRE DAME L. REV. ONLINE 140 (2017).

88. Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L. J. 1297, 1301 (2008).

89. *Id.* at 1313.

90. Koppisch, *supra* note 855.

91. Tribal gaming operations generated approximately \$100 billion in 2018—nearly half of all gaming revenue generated in the United States. There are more than 400 Indian gaming establishments in the United States, on reservations located across twenty-eight different states. These businesses have created approximately 676,000 jobs—an impressive feat for communities that are often geographically isolated. *The Economic Impact of Tribal Gaming: A State-By-State Analysis*, AM. GAMING ASS'N. (Nov. 8, 2018), <https://www.americangaming.org/resources/the-economic-impact-of-tribal-gaming-a-state-by-state-analysis-2/> [<https://perma.cc/PS76-BTXS>]; see also *Gaming Tribe Report*, NAT'L INDIAN GAMING COMM'N (July 6, 2011), <https://web.archive.org/web/20130220134916/http://www.nigc.gov/LinkClick.aspx?fileticket=0J7Yk1QNgX0%3d&tabid=943> [<https://perma.cc/BB7V-MKSE>].

The gaming industry, which has flourished in Indian Country for nearly forty years, can perhaps serve as a model for the nascent Cannabis industry.⁹² Yet, gaming operations were, and sometimes still are, scrutinized by the state governments in instances where tribes chose not to comply with restrictive state laws, but instead to develop their own. Intense lobbying from state governments led Congress to enact the Indian Gaming Regulatory Act⁹³ (IGRA) in 1988. The IGRA also created a federal body tasked to assist in the regulation of on-reservation tribal gaming—the National Indian Gaming Commission (NIGC) and established a three-class structure, where certain classes of games are authorized to be regulated by the state, tribe, or both.⁹⁴ The compacting process is used to create a regulatory scheme between states and tribes for types of games that may be subject to co-regulation, and places compacts under the exclusive jurisdiction of the federal courts.⁹⁵ The compact process has allowed for cooperative federalism between the federal government, states, and tribes to safeguard each parties' interests, and indeed some states and tribes have already begun to introduce compacts as a means to determine regulatory jurisdiction for on-reservation Cannabis.⁹⁶

92. Where tribal gaming was largely unpursued prior to the 1980s, now such businesses are common in Indian Country and there are more than 400 Indian gaming establishments in the United States, on reservations located across twenty-eight states. *The Economic Impact of Tribal Gaming: A State-By-State Analysis*, AM. GAMING ASS'N (Nov. 8, 2018), <https://www.americangaming.org/resources/the-economic-impact-of-tribal-gaming-a-state-by-state-analysis-2/> [<https://perma.cc/3A5L-7CX7>].

93. 25 U.S.C. § 2702(1).

94. Class I gaming includes traditional Native American games of chance that are typically low stake; these games are exclusively regulated by tribal governments. Class II applies to games like bingo, pull-tabs, and non-banked card games, like poker; these games are regulated jointly by the NIGC and tribal governments. Finally, Class III games include all other forms of gaming not mentioned in Class I or II such as blackjack and slot machines. In order to follow the IGRA, Class III games are only legal if: (1) they are authorized by the tribal government; (2) they are located in a state that permits the games for any purpose; and (3) they are performed in compliance with tribal-state gaming compacts. Indian Gaming Regulatory Act, 25 U.S.C. § 2703(6) (1992).

95. Compacts often include provisions on: (1) the application of state or tribal criminal and civil laws that relate to gaming; (2) who holds jurisdiction between the tribe and the state; (3) payments to the state for their regulation of gaming; (4) taxation by the tribe on gaming activities; (5) remedies for breach of compact; (6) standards of operation for gaming facilities; and (7) any other relevant subjects. *Id.* (“The term ‘class I gaming’ means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”).

96. Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 756 (2017).

One of the first tribes to enter the marijuana industry were the Puyallup Tribe in Washington, following compact negotiations between the state and tribe.⁹⁷ The state of Washington signaled a willingness to cooperate with the development of the industry on tribal land when it enacted House Bill 2000 in 2015, which allowed the Governor to enter into “agreements with federally recognized tribes in the State of Washington concerning marijuana.”⁹⁸ In the same year, the Puyallup successfully negotiated a compact with the Washington governor and the Washington State Liquor and Cannabis Board.⁹⁹ Amendments to the agreement in the following year allowed for the tribe to establish vertically integrated enterprises for both commercial and medicinal marijuana, giving them control over the production process, testing, and sales.¹⁰⁰

Following passage of the bill, the Confederated Tribes of Warm Springs entered into a compact with the state to grow, process, and sell marijuana on the recreational market, and became the first vertically integrated Native marijuana operation that grows on-site and sells off-site. Compact agreements between tribes and the state have created a competitive edge for the tribe, as non-tribal Cannabis operations were barred from vertical integration.¹⁰¹ However, as of 2021, tribes are still required to remit to the state a tax that is at least 100% of the marijuana excise tax.¹⁰² Still, the compact arrangements have allowed for eighteen of the state’s twenty-nine tribes to enter the Cannabis marketplace as of 2021.¹⁰³

In some instances where tribes have attempted to enter the marijuana industry through negotiations with states, it has led to both economic loss and governmental tensions. One example is that of the Flandreau Santee Sioux. Following the release of the Wilkinson Memorandum, the Flandreau Santee Sioux Tribe was the first tribe to announce plans to grow and sell both commercial and recreational marijuana on its reservation in South Dakota, where marijuana had not been legalized.¹⁰⁴ The tribal council decided in a 5–1 vote to legalize Cannabis on the reservation, and in May 2015 the tribe established a limited liability

97. Nell Kennedy, *Decolonize Cannabis: How Legal Uncertainties Can Prevent Tribes From Prospering* 9 (Ohio St. Legal Stud. Rsch. Paper No 741, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4290064 [<https://perma.cc/8XQQ-3YRN>].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 10.

103. *Id.*

104. Kim & Roberts, *supra* note 48, at 268.

corporation for the purposes of opening a growing facility and marijuana resort.¹⁰⁵ However, the tribe received pushback on their development plans from the South Dakota Attorney General Marty Jackley.¹⁰⁶

The Flandreau Santee Sioux and the South Dakota state government authorities entered three weeks of discussion over the future of the tribe's Cannabis industry, which ultimately culminated in a meeting with United States Justice Department and then attorney for South Dakota, Randolph Seiler.¹⁰⁷ Tribal leadership was told that a raid of the Cannabis operation was not imminent, but that one was possible if the state government's concerns were not addressed.¹⁰⁸ This sparked the tribe's decision to burn one million dollars' worth of Cannabis crop. The tribe's President indicated that the move was an attempt at collaboration with the state, and that the tribe "felt it would be best to go in with a clean slate to look for answers on how to proceed that all sides are comfortable with."¹⁰⁹

Despite this sign of good faith, negotiations between the tribe and the state continued to be tenuous and South Dakota Attorney General Jackley announced plans for a state investigation into whether the tribe destroyed the crop.¹¹⁰ Further, Jackley prosecuted two non-Indian consultants for their role in the start-up of the Flandreau operation, on charges of conspiracy to possess, possession, and attempted possession of marijuana.¹¹¹ Deliberately charging two non-Indian consultants allowed the state to demonstrate its jurisdictional authority to influence tribal operations, while avoiding questions of indigenous sovereign immunity. The case of the Flandreau Santee Sioux tribe illustrated that successful development of tribal Cannabis industries were highly dependent on state policies that reflected similar interests.¹¹²

105. *Id.* at 268–69.

106. *Id.* at 269.

107. Regina Garcia Cano, *Flandreau Santee Sioux Tribe Burned Pot Crop*, ARGUS LEADER (Nov. 9, 2015), <https://www.argusleader.com/story/news/2015/11/09/flandreau-santee-siouxtribe-burned-pot-crop-fear-federal-raid/75479902/> [<https://perma.cc/5642-4RN8>].

108. *Id.*

109. *Id.*

110. Corey Allen Heidelberger, & A.G. Jackley, *Indians Didn't Really Burn the Tribal Marijuana Crop*, DAKOTA FREE PRESS (Apr. 12, 2016), <https://dakotafreepress.com/2016/04/12/a-g-jackley-suspectsflandreau-indians-didnt-really-burn-the-tribal-marijuana-crop/> [<https://perma.cc/Z4XX-5UNT>].

111. *Id.*

112. As of June 2021, the Flandreau Santee Sioux were able to open the first legal Cannabis business in the state of South Dakota following shifts in public support for Cannabis in the state. Stephen Groves, *South Dakota Judge Rejects Amendment Legalizing Marijuana*, AP NEWS (Feb. 8, 2021), apnews.com/article/constitutions-south-dakota-

C. Criminal Laws Regarding Cannabis in Indian Country

There are several challenges for regulating criminal activity involving Cannabis in any jurisdiction—from preventing the distribution of marijuana to minors, to preventing authorized marijuana activity from being used as a cover for the trafficking of other drugs or illegal activity, to preventing drugged driving and other public health and safety concerns associated with marijuana usage.¹¹³ Yet, determining who should be tasked with enforcing these criminal laws is not easy. The jurisdictional authority of state and tribal governments on reservation land is often unclear, making it difficult to discern which authority can prosecute and which court has jurisdiction.¹¹⁴

To effectively address the implications of criminal jurisdiction over Cannabis-related crimes, it is necessary to provide some background on the legal history of jurisdiction over Indian Country. Federal criminal laws are generally applicable in Indian Country, and a few federal criminal laws are specifically applicable only in Indian Country. Federal jurisdiction over criminal activity in Indian Country is largely conferred by three statutes: the General Crimes Act¹¹⁵ (also known as the Indian Country Crimes Act), the (Indian) Major Crimes Act,¹¹⁶ and Public Law 280.¹¹⁷

The General Crimes Act extends general criminal laws of the United States over any offense committed in Indian Country. The act contains three notable exceptions: (1) crimes committed by Indians against other Indians; (2) crimes committed by Indians against anyone if such Indian perpetrator has already been punished under the laws of the tribe; and (3) any case whereby treaty stipulations, the exclusive jurisdiction over such has been reserved to the Indian tribe.¹¹⁸ The Major Crimes Act was passed in 1968 as a follow-up to the General Crimes Act, under the pretense of protecting tribal courts from the expenses and burdens associated with major criminal trials, and enumerated fourteen major crimes that would be under the exclusive jurisdiction of the federal

recreational-marijuana-marijuana-kristi-noem-c990e08307ca5016d789f7504cb6e7e6
[<https://perma.cc/BC4M-4WX8>].

113. Kennedy, *supra* note 977, at 4.

114. Tyler Kennedy, *Expanding Jurisdiction: Increasing Tribal Ability to Prosecute Criminal Behavior on Native American Land*, 15 SEATTLE J. FOR SOC. JUST. 465 (2016).

115. 18 U.S.C. § 1152.

116. 18 U.S.C. § 1153.

117. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

118. The General Crimes Act was enacted in its current form in 1954. *See* Indian Country Crimes Act, 18 U.S.C. § 1152.

courts.¹¹⁹ In 1953, Congress passed Public Law 280, which transferred to six states all federal jurisdiction over crimes committed on specific tribal lands.¹²⁰ In effect, Public Law 280 split criminal jurisdiction in some areas between tribes and states, rather than tribes and the federal government.

While federal jurisdiction over crimes committed in Indian Country has been defined in a series of statutes and case law, state and tribal jurisdiction over Indian Country have not been as clearly defined. In 2010, of the 4.6 million individuals living on reservation land, 3.5 million were not enrolled members of the tribe, and this number has only grown following the Supreme Court's 2020 decision in *McGirt v. Oklahoma*,¹²¹ which held that large portions of the state of Oklahoma were considered tribal land for the purposes of the Major Crimes Act.¹²² Given the disproportionate number of non-tribal members on reservation land, there are sweeping implications for how state and tribal jurisdictional authority over marijuana crimes on Indian land will be prosecuted and adjudicated.

The first case adjudicated on tribal and state jurisdictional authority over Indian Country was the third in a series of decisions that serves as the basis for federal Indian law—the Marshall Trilogy.¹²³ The 1832 case, *Worcester v. Georgia*,¹²⁴ arose from a Georgia State Court case related to state professional licensure requirements and their application on American Indian lands. In this case, a non-Indian minister, Reverend Worcester, was convicted for ministering without a license. Worcester challenged the conviction on the basis that he was operating solely within the Cherokee Nation lands, and therefore was not bound by the Georgia state licensing requirement.¹²⁵ The Supreme Court of the United States agreed. The Court held that “the guardian-ward relationship did not

119. The Major Crimes Act (MCA) may have also been borne out of misplaced skepticism that of court's to properly handle more serious cases. The MCA also limits tribal criminal sentencing to one year in jail and a \$5,000 fine. Kennedy, *supra* note 1144, at 481.

120. The Act further allowed for other Indian tribes to elect to transfer jurisdictional authority to states—and since then, seven other states have assumed some jurisdiction over criminal activity on tribal lands. Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 932 (2012); *see also* 25 U.S.C. §§ 1321–1326.

121. 140 S. Ct. 2452 (2020).

122. Kennedy, *supra* note 1144, at 465.

123. *Id.* at 472. The Marshall Trilogy is made up of three cases that, historically, formed the basis of federal Indian law: *Johnson v. M'Intosh* 21 U.S. 543 (1823), *Cherokee Nation v. Georgia* 30 U.S. 1 (1831), *Worcester v. Georgia* 313 U.S. 515 (1832).

124. 31 U.S. 515 (1832).

125. *Id.* at 538.

extinguish tribal sovereignty, but the federal government's assumption of fiduciary obligation towards tribes necessarily requires that tribal powers of self-government are limited by federal statutes, by terms of treaties, and by restraints implicit within the protectorate relationship.¹²⁶ The holding in *Worcester* supported that tribal nations have jurisdiction over all people within their territories, and for over 100 years, the principles of the Marshall Trilogy served as the basis of understanding for criminal jurisdiction in Indian Country.

Yet a series of cases reshaped the understanding of tribal jurisdiction over time, making criminal enforcement on reservation lands a jurisdictional maze. As these cases illustrate, tribal jurisdiction is highly dependent on whether a plaintiff or defendant is a member of the tribe. Because many living on tribal land are not enrolled members, tribes may struggle to enforce criminal laws involving Cannabis on reservation. One 1978 Supreme Court case that shaped modern understanding of the scope of criminal jurisdiction on reservation land was *Oliphant v. Suquamish Tribe*.¹²⁷ In *Oliphant*, a non-Indian man, Oliphant, was arrested and charged for assaulting a tribal police officer and resisting arrest.¹²⁸ Oliphant filed a writ of habeas corpus in federal court, claiming that the Suquamish Tribe had no authority to hear his case, and challenged whether Indian tribal courts have criminal jurisdiction over non-Indians.¹²⁹ The Supreme Court held that unless expressly authorized by Congress, tribal courts had no jurisdiction over criminal cases involving a non-Indian defendant.¹³⁰

The majority in the opinion classified tribes as “quasi-sovereign” entities dependent on the federal government, and concluded that tribes “necessarily g[ave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”¹³¹ The holding in *Oliphant* had a striking impact on tribal jurisdiction, as tribes could no longer assert criminal jurisdiction over non-Indian offenders, excluding limited cases where Congress has expressly authorized their authority to do so.¹³² Simultaneously, the reach of state jurisdictional authority was expanded and the scope of tribal jurisdiction was minimized.

126. Philip J. Smith, *Indian Sovereignty and Self-Determination: Is Moral Economy Possible*, 36 S.D. L. REV. 299, 311 (1991).

127. 435 U.S. 191, 194 (1978).

128. *Id.* at 194.

129. *Id.* at 194–95.

130. *Id.* at 195.

131. *Id.* at 210.

132. Kennedy, *supra* note 1144, at 466.

Over the years, the reach of tribal jurisdiction over crimes committed in tribal boundaries has undergone many evolutions. Following the determination in *Oliphant* that tribes do not maintain jurisdictional authority over all criminal offenders, subsequent holdings would further complicate the jurisdictional scheme on tribal lands. In a 1989 case, *Duro v. Reina*,¹³³ the Supreme Court restricted tribal jurisdiction when it held that Native American tribes could not assert criminal jurisdiction over Native American offenders of a different tribal affiliation.¹³⁴ The decision created a “jurisdictional void” where neither tribal, state, or federal prosecutors held authority to charge Native Americans for misdemeanor crimes committed on reservations of which the defendant was not a member.¹³⁵ To address the gap, in 1990 Congress amended the definitions section of the Indian Civil Rights Act of 1968¹³⁶ to recognize and affirm the power of American Indian tribes to “exercise criminal jurisdiction over *all* Indians,” regardless of their tribal affiliation.¹³⁷

The interplay of tribal and federal jurisdiction was addressed again in the 2004 case, *United States v. Lara*.¹³⁸ At issue in *Lara* was the arrest of a member of the Turtle Mountain Band of Chippewa Indians by the Spirit Lake Santee Tribe for alleged violence against a policeman.¹³⁹ The officer was a Bureau of Indian Affairs officer, who was considered both a federal and tribal official. Lara was then charged under both tribal and federal jurisdiction. Lara plead guilty to the tribal charges, but claimed double jeopardy regarding the federal charges.¹⁴⁰ The Court in *Lara* determined that the tribe’s ability to prosecute lies in its inherent sovereignty, rather than through delegation by federal authority and as such double jeopardy could not apply.¹⁴¹ As a result, Native American offenders can be rightfully prosecuted under both tribal and federal law.¹⁴²

At the end of the 2021–2022 the Supreme Court term, it issued a controversial decision in the case *Oklahoma v. Castro-Huerta*.¹⁴³ In *Castro-Huerta*, the state of Oklahoma convicted Castro-Huerta, a non-

133. 495 U.S. 676 (1990).

134. *Id.* at 676.

135. Kennedy, *supra* note 1144, at 476.

136. 25 U.S.C. §§ 1301–1304.

137. *Id.* (emphasis added).

138. 541 U.S. 193, 196 (2004).

139. *Id.* at 196–97.

140. *Id.* at 197.

141. *Id.*

142. Kennedy, *supra* note 1144, at 478.

143. 142 S. Ct. 2486 (2022).

Indian, for child neglect of a citizen of the Eastern Band of Cherokee Indians within the boundaries of the Cherokee Nation reservation.¹⁴⁴ The conviction happened prior to the ruling in the 2020 case *McGirt v. Oklahoma*, which ruled that the Muscogee Nation reservation had not been disestablished when Oklahoma was granted statehood in 1908.¹⁴⁵ Following *McGirt*, other reservations in the state, including the Cherokee Nation reservation, were considered Indian Country for the purposes of the Major Crimes Act.¹⁴⁶ In *Castro-Huerta*, the Court reversed the presumption against state jurisdiction.¹⁴⁷ The majority held that the General Crimes Act does not preempt state authority to prosecute, and concluded that by 1948, the territorial separation between Indian Country and states was no longer relevant, due to historical trends and a series of precedence.¹⁴⁸ The majority further asserted that the holding was applicable throughout the United States, seemingly authorizing any state—not just Oklahoma—to assert criminal jurisdiction over any non-Indian in Indian Country.¹⁴⁹

This may complicate the matter of criminal Cannabis regulation in Indian Country, as the jurisdictional reach now extends into Indian Country, allowing for state laws to be imposed. While the federal government could enact policies that set the threshold for the criminal punishments for illicit Cannabis activity, there is nothing that would prevent the state from imposing stricter restrictions and the tribe may become subject to litigation based on the tribe's involvement. As explained by one legal scholar:

Imagine if a non-Tribal member is involved in a hit and run while on the reservation after driving impaired from smoking marijuana obtain [sic] legally on the land. The Tribe could potentially be sanctioned or held liable for its sell [sic]. If the victim of the hit and run was a Tribal member, the Tribe would be unable to bring the offender to its own court for justice.¹⁵⁰

144. *Id.* at 2486.

145. Matthew Fletcher, *In 5–4 ruling, court dramatically expands the power of states to prosecute crimes on reservations*, SCOTUSBLOG (Jun. 29, 2022), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/> [https://perma.cc/9D5A-SSUJ].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Teresa Hawkinson, *Can A Sioux Be Sued for Embracing Mary Jane?: Tribal Sovereign Immunity Concerns Arising from the Legalized Marijuana Trade on Indian Land*, 3 ST. THOMAS J. COMPLEX LITIG. 44, 55 (2016).

Given the many variances in jurisdiction over tribal lands, prosecution of criminal marijuana offenses is complicated, making tribal lands an attractive location for illicit drug activity. Until clear criminal jurisdictional authority over marijuana crimes is established, the criminal activity on many Indian reservations, including drug and human trafficking, may be exacerbated should marijuana become federally legal. As crops of marijuana increase throughout the United States, and with fear of being prosecuted now minimized for some individuals, these individuals may choose to continue to buy marijuana illegally to circumvent high retail prices in authorized dispensaries, leaving the Cannabis black market, as well as the associated social dangers of such markets, a continued issue in Indian Country.

D. Regulations Regarding Cannabis Research in Indian Country

Despite rapid expansion of Cannabis products and cultivation methods, federal restriction on clinical Cannabis research has limited available data on the subject. Regulatory barriers may burden researchers who wish to conduct Cannabis research, as they may need to obtain a number of approvals from a range of federal, state, or local agencies, institutions, and organizations.¹⁵¹ Further, the Cannabis used for federally approved research in the United States is available through the NIDA Drug Supply Program, which is cultivated through the University of Mississippi.¹⁵² As a result, there may be issues of limited supply of research and limitations to the data that can be collected, as the Cannabis supplied may fail to reflect the diversity of Cannabis products which are available to consumers.¹⁵³ Finally, funding institutions have often prioritized spending on addiction and dependency studies, rather than the potential therapeutic and health benefits of the plant.¹⁵⁴ These restrictions have amounted to limited data on Cannabis—data which could potentially shape the public health and safety measures adopted by the federal government, states, and tribes.¹⁵⁵

Specifically for tribes, regulations surrounding Cannabis have limited the ability to engage in culturally resonant research practices that consider how tribes' unique social, political, and historical contexts may

151. NATIONAL ACADEMY OF SCIENCES, *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS* 378 (Nat'l Academies Press, 2017), <https://www.ncbi.nlm.nih.gov/books/NBK425757/> [<https://perma.cc/3M4G-QAVL>].

152. See Hawkinson, *supra* note 15050, at 55. NATIONAL ACADEMY OF SCIENCES, *supra* note 151, at 378.

153. NATIONAL ACADEMY OF SCIENCES, *supra* note 151, at 378.

154. *Id.*

155. *Id.*

shape their experiences and health outcomes.¹⁵⁶ When research is carried out by non-Indian researchers, it may fail to include cultural knowledge and priorities.¹⁵⁷ Indeed, some tribes have attempted to engage in Cannabis research, but were barred by the laws of the surrounding states.

In May 2015, the Menominee Indian Tribe of Wisconsin passed an ordinance legalizing the cultivation of industrial hemp on the Menominee Reservation with approved licensees from the tribe.¹⁵⁸ The ordinance was passed in what the tribe believed to be accordance with federal law, which dictates that while marijuana is a Schedule I Controlled Substance, mature stalks of the Cannabis plant (hemp) are excluded from the substance definition.¹⁵⁹ 7 U.S.C. § 5490¹⁶⁰ defines industrial hemp as “the plant *Cannabis sativa* L. and any parts of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent.”¹⁶¹

The tribe entered into an agreement with the College of Menominee Nation to research the viability of industrial hemp and issued a license to the college.¹⁶² The tribe cooperated with the DOJ and DEA to secure the testing of the industrial hemp and ensure that THC levels did not exceed 0.3 percent, and agreed to destroy any industrial hemp above this limit, in accordance with the tribal ordinance. Despite this cooperative agreement, in October 2015, agents from Drug Enforcement Administration seized and destroyed 30,000 hemp plants from the Menominee Indian tribe of Wisconsin. The raid proceeded, despite no known THC test indicating any crops contained more than 0.3 percent THC levels.¹⁶³

In November 2015, the tribe filed action for declaratory relief in the United States District Court for the Eastern District of Wisconsin, under the legal theory that the cultivation of Cannabis was permissible for academic research in conjunction with the College of Menominee Nation.¹⁶⁴ Specifically, the tribe’s complaint included three claims for

156. Teresa N. Brockie et al., *Strategies for culturally safe research with Native American communities: an integrative review*, 58 CONTEMPORARY NURSE 8, 9 (2022), <https://pubmed.ncbi.nlm.nih.gov/34907854/> [<https://perma.cc/LHL4-JR6U>].

157. *Id.* at 9.

158. *Menominee Indian Tribe of Wis. v. D.E.A.*, 190 F.Supp.3d 843, 845 (E.D. Wis. 2016).

159. *Id.* at 845.

160. 7 U.S.C. § 5490 (repealed).

161. *Menominee Indian Tribe of Wis.*, 190 F.Supp.3d at 846.

162. *Id.*

163. *Id.*

164. *Id.* at 847.

declaratory relief corresponding to the statutory requirements for exception:

(1) [T]hat in passing a tribal law legalizing the cultivation of industrial hemp on the Menominee Reservation, the Tribe acted as a “State,” as required under § 5490; or alternatively (2) that the Cannabis laws of the State of Wisconsin have no application to industrial hemp cultivation by the Tribe within the exterior boundaries of the Menominee Reservation, and that the cultivation of industrial hemp on the Menominee Reservation is therefore “allowed” under the laws of the State of Wisconsin, as required under § 5490, and (3) that the College of Menominee Nation is an “institution of higher education” under § 5490.¹⁶⁵

The tribe’s motion for summary judgment was dismissed on the grounds that the tribe did not fit the definition of a “State.” While the court acknowledged that the word “State” means peoples politically organized as sovereigns, and that Indian tribes are considered sovereigns under federal law, it ruled that Congress’s use of the word “State” in 7 U.S.C. § 5490 without further definition simply means one of the fifty states.¹⁶⁶ The court rejected the tribe’s theory that it acted as a “State” when it enacted its own laws allowing hemp cultivation.¹⁶⁷ At the time of writing, marijuana is illegal for both recreational and medical use in Wisconsin, and no formal research on Cannabis has occurred on the Menominee reservation.¹⁶⁸

IV. THE HAZY FUTURE

A. Statement from President Biden on Marijuana Reform

On October 6, 2022, President Joe Biden issued a statement on marijuana policy reform, as well as a proclamation to pardon individuals prosecuted for simple possession of marijuana in violation of the Controlled Substances Act (CSA).¹⁶⁹ The announcement outlined three priorities. The first of the three priorities outlined was that all

165. *Id.*

166. *Id.* at 852.

167. *Id.*

168. Solcyre Burga, *Why Marijuana Had a Terrible Night in the 2022 Midterm Elections*, TIME (Nov. 9, 2022), time.com/6231201/marijuana-legal-elections-2022/ [<https://perma.cc/V9DT-7RHB>].

169. Joseph R. Biden, *Statement from President Biden on Marijuana Reform*, THE WHITE HOUSE (Oct. 6, 2022), www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ [<https://perma.cc/D8UB-NVMF>].

individuals charged or convicted of federal offense for simple possession of marijuana be pardoned.¹⁷⁰ To accomplish this priority, the President also directed the Attorney General to develop an administrative process for the issuance of these pardons.¹⁷¹ While this announcement is significant, it has limited effect, as the pardon will not apply to those convicted of selling or distributing marijuana. The pardon will apply only to United States citizens convicted pursuant to federal law 21 U.S.C. § 844,¹⁷² of which there were an estimated 6,500 convicted between 1992 and 2021.¹⁷³ According to Udi Ofer, the former deputy national political director of the American Civil Liberties Union, simple possession of marijuana is a crime “almost entirely prosecuted by the states.”¹⁷⁴ Officials say that there are no people currently serving time in federal prison for simple marijuana possession, but that the pardons will help enable those seeking employment, housing, or federal benefits.¹⁷⁵

The second priority in the statement was a call for action to state governors to pardon simple marijuana possession offenses at the state level.¹⁷⁶ On November 21, 2022, Oregon Governor Kate Brown announced a plan to pardon some 45,000 individuals across the state for simple marijuana possession and to forgive more than \$14,000,000 in associated fines and fees.¹⁷⁷ Other states were not as amenable to President Biden’s call for pardons.¹⁷⁸ Idaho Governor Brad Little responded with the following statement, criticizing the move as political theater,

It is clear President Biden issued this blanket pardon for show, setting a bad precedent when cases should be reviewed on their individual

170. *Id.*

171. *Id.*

172. 21 U.S.C. § 844.

173. Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, N.Y. TIMES (Oct. 6, 2022), www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html [<https://perma.cc/23GJ-45LH>].

174. *Id.*

175. *Id.*

176. Biden, *supra* note 169.

177. *Governor Kate Brown Grants Pardon for Oregon Marijuana Offenses*, ST. OF OR. NEWSROOM (Nov. 21, 2022), www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=76442 [<https://perma.cc/897V-4ZA7>].

178. *Gov. Little Responds to Biden’s Pardon for Marijuana Offenders*, IDAHO.GOV (Oct. 6, 2022), gov.idaho.gov/pressrelease/gov-little-responds-to-bidens-pardon-for-marijuana-offenders/ [<https://perma.cc/7P5N-2T74>]; *see also* Sebastian Murdock, *Texas Gov. Greg Abbott: No Pardons For Marijuana Convictions*, HUFFINGTON POST (Oct. 8, 2022), www.huffpost.com/entry/texas-gov-greg-abbott-no-pardons-for-marijuana-convictions_n_6341a106e4b03e8038c9c674 [<https://perma.cc/8KP5-9GHR>].

merits. But what's not clear is whether Biden really understands that individuals incarcerated for possession of small amounts of marijuana almost always have accompanying offenses, making his blanket pardon basically pointless.¹⁷⁹

Indeed, the statement does not compel individual states to comply with pardoning simple marijuana possession offenses, and an act of Congress would need to be passed to ensure expungement. In July 2022, the Cannabis Administration and Opportunity Act¹⁸⁰ was introduced in the Senate, “[t]o decriminalize and deschedule Cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain Cannabis offenses, and for other purposes,” but remains in referral to the Senate Committee on Finance.¹⁸¹

The third priority of the statement was a request to begin the administrative process of reclassifying how marijuana is scheduled under federal law.¹⁸² Currently, marijuana is classified as a most dangerous substance, having the “highest potential for abuse” and with “no currently accepted medical use in treatment in the United States.”¹⁸³ This classification conflicts with the thirty-seven states that currently permit medical Cannabis products, as well as the twenty states that permit some form of recreational use.¹⁸⁴ The policy gap between the Federal and state governments has led to a litany of issues for state-legal marijuana industries, including banking restrictions, medical research prohibitions, and contradictory criminal enforcement.¹⁸⁵

Today, most states allow some form of cultivation, possession, or distribution. At the time President Biden issued the statement, thirty-six states had decriminalized Cannabis in some form, with eighteen states allowing recreational Cannabis for adults aged twenty-one or older.¹⁸⁶ Marijuana has also been decriminalized in numerous tribal jurisdictions.¹⁸⁷ In the 2022 midterm elections, five states—Arkansas,

179. IDAHO.GOV, *supra* note 178.

180. Cannabis Administration and Opportunity Act, S. 4591 (July 21, 2022).

181. *Id.*

182. Biden, *supra* note 169.

183. 21 U.S.C. § 812(b)(1).

184. Lauren P. Carboni, *Takeaways from President Biden's Announcement on Marijuana Policy Reform*, NAT'L L. REV. (Oct. 12, 2022), www.natlawreview.com/article/takeaways-president-biden-s-announcement-marijuana-policy-reform [<https://perma.cc/2CZH-7DBM>].

185. *Id.*

186. Martins, *supra* note 20, at 1.

187. Florey, *supra* note 96, at 735.

Maryland, Missouri, North Dakota, and South Dakota—had ballots introducing decriminalized recreational marijuana.¹⁸⁸ The measures passed in Missouri and Maryland, bringing the total number of states with recreational Cannabis to twenty today.¹⁸⁹

B. Current Congressional Activities

At the time of writing, both the Senate and the House have passed the Medical Marijuana and Cannabidiol Research Expansion Act,¹⁹⁰ which would make it easier for scientists to conduct medical marijuana research and protect doctors who discuss the benefits and risks of using the drug with patients.¹⁹¹ In addition, congressional leaders have called for the passage of the Safe Banking Act,¹⁹² which would prohibit federal banking regulators from penalizing depository institutions for providing services to Cannabis businesses.¹⁹³ The measure passed in the House, and is currently under referral to the Senate Committee on Banking, Housing, and Urban Affairs.¹⁹⁴ Should marijuana be de-classified, this would remove fear of federal prosecution for Cannabis businesses.

In a meeting of the Senate Appropriations Committee to review the FY 2023 Budget Request for the Department of Interior, New Mexico Senator Martin Heinrich questioned Secretary of the Interior Deb Haaland on the use of departmental funds to interfere in tribal marijuana programs, rather than violent crimes and human trafficking crises.¹⁹⁵ In response, Secretary Haaland stated that she believes “very strongly that we should respect Tribal laws and work in partnership with tribes on their public safety priorities,” but also acknowledged that “this question also involves the authority and policy of the Department of Justice, and I respect that we have to have an administrative approach to this.”¹⁹⁶ Although acknowledgement by federal officials on the need for clarification on Cannabis regulation is promising, there are many emerging issues to be considered as Cannabis policy is reconsidered.

188. Burga, *supra* note 168.

189. *Id.*

190. Medical Marijuana and Cannabidiol Research Expansion Act, H.R. 8454.

191. *Id.*

192. SAFE Banking Act of 2021, H.R. 1996.

193. *Id.*

194. Carboni, *supra* note 184.

195. Kyle Jaeger, *Federal Marijuana Enforcement On Tribal Lands Is ‘Horrible Misappropriation’ Of Resources, Senator Tells Interior Secretary*, MARIJUANA MOMENT (July 15, 2022), www.marijuanamoment.net/federal-marijuana-enforcement-on-tribal-lands-is-horrible-misappropriation-of-resources-senator-tells-interior-secretary/ [<https://perma.cc/HX62-VL76>].

196. *Id.*

In light of the statement from President Biden regarding marijuana policy reform, Ohio Congressman Dave Joyce and Florida Congressman and Co-Chair of the Congressional Cannabis Caucus, Brian Mast, formally called on the President to address the treatment of tribal communities by federal authorities in matters involving Cannabis.¹⁹⁷ More specifically, the congressmen requested that the President use his authority to keep the Bureau of Indian Affairs and related agencies, like the National Indian Gaming Commission, focused on “more pressing public safety and justice needs, including Missing and Murdered Indigenous Women and human trafficking, and require such agencies respect Tribal sovereignty moving forward.”¹⁹⁸ At the time of writing, the Biden administration has yet to issue any guidance on the impact of the statement for tribes.

In the letter, the Congressmen also expressed that enforcing federal Cannabis laws on Tribal land, especially in cases where the Tribe and State have legalized Cannabis use, is wrong, calling it discriminatory. To illustrate their concerns, the Congressmen pointed to the highly publicized raid of Charles Farden, a Picuris Pueblo man whose nine medical marijuana plants were confiscated and destroyed by Bureau of Indian Affairs officers in September 2021.¹⁹⁹ Indeed, significant media attention has circulated the issue of Cannabis in Indian Country—perhaps more than would accompany other on-reservation industries, such as petroleum or gaming. Perhaps this reflects public opinion that Cannabis provides a social or economic benefit to those involved; but directly or indirectly, it has drawn attention to this issue of upholding the sovereignty of tribes to make their own decisions over their economy, public health, research, and criminal regulation.

C. Issues to Watch

As federal policy towards Cannabis may shift following the Biden statement, it is critical to remember how such policies will affect the

197. Congressman Dave Joyce, *Joyce, Mast Call on POTUS to Protect Tribes from Unjust, Misguided Enforcement of Federal Cannabis Laws*, HOUSE.GOV (Oct. 10, 2022) [joyce.house.gov/posts/joyce-mast-call-on-potus-to-protect-tribes-from-unjust-misguided-enforcement-of-federal-cannabis-laws](https://www.house.gov/posts/joyce-mast-call-on-potus-to-protect-tribes-from-unjust-misguided-enforcement-of-federal-cannabis-laws) [<https://perma.cc/3DXB-U8AT>].

198. *Id.* Missing and Murdered Indigenous Women (MMIW) is the name given to the epidemic of Indigenous women who disappear from reservations. For more on this topic, see Skylar A. Joseph, *A Modern Trail of Tears: The Missing and Murdered Indigenous Women (MMIW) Crisis in the U.S.*, 79 J. FORENSIC & LEGAL MED. (2021).

199. Candelaria Law, *Medical Marijuana Patient Plans To Sue Feds For \$3.5 Million Over ‘Discriminatory’ Cannabis Raid On Tribal Land*, MARIJUANA MOMENT (Sept. 27, 2022), [jacobcandelaria.com/medical-marijuana-patient-plans-to-sue-feds/](https://www.jacobcandelaria.com/medical-marijuana-patient-plans-to-sue-feds/) [<https://perma.cc/Z2S4-VUX6>].

Indian tribes who hold a unique position in the federal system. Previous cases have illustrated that tribal sovereignty may be undermined by the state or federal government when tribal Cannabis does not fit into the civil or criminal regulatory scheme of the surrounding state. While drawing attention to the issue of Cannabis in Indian Country by both federal officials and the media is promising, proactive efforts need to be taken to ensure that tribes are not left out of policy considerations.

For Cannabis industries to become economically viable on reservations, it may be necessary that a federal body like the IGRA be created to assist in mapping out the jurisdictional authority of tribes and states over on-reservation Cannabis. Compacts are able to provide clear guidance on how negotiations can be reached and disputes be resolved. Still, compacts are not a perfect solution as they may subject tribes to taxation and licensing requirements in order to reach an agreement with the state. Further, should legislation like the IGRA be created to regulate compacts between states and tribes, it would be essential that a provision be included requiring that disputes be resolved in the federal courts. Given the expanded jurisdictional authority of state courts following *Castro-Huerta*, it would be possible for criminal disputes involving non-members to be adjudicated in the state court system rather than the federal courts. Including in the legislation a provision that these matters must be adjudicated in the federal court may aid in the prevention of stricter state laws on tribal lands.

As future considerations are taken towards Cannabis research in the United States, considerations may need to be taken to ensure that tribes are able to conduct their own studies in ways that are resonant for their social, historical, and political experiences. Recommendation for best practices in American Indian research have stressed the need for projects that are community-driven and adhere to community-developed research standards, allowing tribal control and ownership over information relating to native peoples and their lands, and the building of meaningful relationships when non-tribal researchers are involved in such projects. As the potential rescheduling of marijuana may lead to increased research studies, considerations should be given that allow tribes to engage in such research in spite of state regulations. Further, non-tribal researchers should attempt to adhere to research practices that are resonant with indigenous communities.

Finally, as Cannabis-related crimes could potentially create jurisdictional questions based on the membership of the parties involved, it is vital that a federal office, such as the Department of Justice, issue guidance for determining jurisdictional authority. Without clear guidance, the ongoing epidemic of drug and human trafficking occurring on reservations may only be exacerbated should the supply and demand

for Cannabis products on the reservation increase following changes in federal policy. As Cannabis policy in the United States undergoes major shifts, it is critical that tribes are not left out of the conversation, and that the effects of such policies do not leave them in a haze.

V. CONCLUSION

Tribes have inherent sovereignty, and the federal government recognizes them as domestic, dependent nations in the federal system. Tribes have used their sovereignty and rights to self-determination to manage tribal lands, to own and operate tribal businesses, and to establish policies that are socially and politically resonant with the values and cultures of their members. As the reformation of Cannabis laws and policies is an issue being addressed by both the federal and state governments, it is critical that tribal governments not be forgotten in the development, regulation, and enforcement of these laws and policies. It should not be the responsibility of tribes to advocate for their voices to be heard in conversations of Cannabis reformation, nor should they have to retroactively fight for their rights once disputes have already arisen. Rather, a proactive approach needs to be taken by both the federal and state governments to make sure that tribes are considered and included in Cannabis law and policy reformation. If the United States is committed to upholding the sovereignty and self-determination of tribes, the reformation and enforcement of Cannabis must be a joint effort.