

Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States

LAUREN ADORNETTO†

INTRODUCTION

In March of 2016, U.S. Senator for New York Kirsten Gillibrand and U.S. Senator for New Jersey Cory Booker took to the realm of internet social media to share several videos that vigorously advocated for the need to expand research into the medical effects of marijuana. The social media news outlet, ATTN:, produced and shared a video featuring the Senators' policy positions on medical marijuana.¹ During the course of two weeks, the video racked up nearly two and one-half million views.² In the video, Senator Gillibrand proclaims that it is “outrageous that our government is standing in the way of these patients getting medicine.”³ The video interviewer posits that “acting [Drug Enforcement Agency] Chief Chuck Rosenberg called medical marijuana a joke.”⁴ Senator Gillibrand says that from her perspective, she does not “believe [Rosenberg] has done his

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1. ATTN:, *Sen. Booker and Sen. Gillibrand on Medical Marijuana*, FACEBOOK (Mar. 1, 2016), <https://www.facebook.com/attn/videos/1005410579494401/>.

2. *Id.*

3. *Id.*

4. *Id.*

homework.”⁵

The second video shared by ATTN: tallied more than one million views in a matter of days.⁶ In this video, Senator Gillibrand derides the notion that marijuana is still classified as a Schedule I drug. Senator Gillibrand describes an outmoded way of thinking about marijuana: “It’s stuck in the sixties. People wanted to demonize this as a hippie drug that had no value.”⁷ Senator Gillibrand then describes a typical response that she receives from those within the federal government who maintain that marijuana has no valid medical use: “They’ll say, ‘There’s not a body of research that shows the medical effects in U.S. literature.’”⁸ To which Senator Gillibrand ironically retorts, “Well, surprise, surprise. It’s a Schedule I drug. Of course there’s not a body of research. Because you’ve precluded that research from being done. It’s a catch-22.”⁹

Senators Gillibrand and Booker’s appearances in the videos show the clearly discordant positions within the federal government regarding marijuana policy. Even during the political tumult of 2016, a moment when bipartisanship seemed to be at its lowest ebb, a bipartisan bill, which recognized that marijuana has an accepted medical use, was introduced by Gillibrand and Booker, both Democrats, along with Rand Paul, a Republican senator from Kentucky.¹⁰

5. *Id.*

6. ATTN:, *The Federal Ban on Medical Marijuana Research Is Outrageous*, FACEBOOK (Mar. 9. 2016), <http://www.facebook.com/attn/videos/1010012409034218>.

7. *Id.*

8. *Id.*

9. *Id.*

10. Senators Gillibrand, Booker, and Paul are surely strange political bedfellows, but that speaks to the consensus building nature and good sense that attends their current position on marijuana policy. The Compassionate Access, Research Expansion and Respect States (CARERS) Act would amend the

Medical marijuana policy developments represent just a small fragment of the budding policy issues on this matter. While the federal government is still trying to warm up to the idea of medical research on the benefits of marijuana, in the state governments, particularly evidenced by the recent string of ballot measures approved by voters, there is an obvious trend toward the much more progressive policy of recreational marijuana use.¹¹ Although he has done so with great prudence, even President Obama has spoken openly about the inadequacies of the current federal marijuana policies that are being outstripped by more progressive state policies.¹² As a new administration took control in early 2017, during the Senate's attorney general confirmation hearings for Jeff Sessions, the conflict between state and federal marijuana laws arose as a topic of concern for Senators on both sides of the aisle.¹³

As if the complexities of the intersection between divergent federal and state policies were not enough to contend with, Indian tribes and Indian nations are taking actions to establish their own marijuana policies and programs. As tribal governments begin to enter the marijuana industry, the clash of jurisdictions over the legality of marijuana becomes even more complicated. First, an Indian tribe on its own territory has its own set of

Controlled Substances Act to allow for greater ease in medical marijuana financing and research. See *Medical Marijuana*, KIRSTEN GILLIBRAND, <http://www.gillibrand.senate.gov/issues/medical-marijuana> (last visited Feb. 10, 2017).

11. See *infra* Section I.A for a look at the recent measures legalizing the use of recreational marijuana in state and local governments.

12. See, e.g., David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-david-remnick>.

13. Particularly the questions posed by Senator Leahy, a Democrat from Vermont, and Senator Lee, a Republican from Utah. *Attorney General Confirmation Hearing, Day 1 Part 2*, C-SPAN (Jan. 10, 2017), <https://www.c-span.org/video/?420932-101/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing> (relevant questioning occurs between 1:18:30 and 1:25:52).

marijuana policies and concerns, and perhaps the tribe wants to pursue a medical or recreational marijuana program. Second, that Indian reservation is nestled within the boundaries of a state that has its own body of state law that addresses marijuana, which it may or may not be able to apply to the Indian territory. Its applicability depends on a variety of different factors affecting state jurisdiction in Indian country. Moreover, the state and any Indian territory in the state are both situated under the final capstone of jurisdictional complexity where the overarching federal policy makes marijuana illegal in all forms.

This Comment evaluates the current status of marijuana programs in Indian country amid the tangled nexus of governmental powers and frequently inconsistent policies regarding marijuana at the federal, state, and tribal levels. Part I sets forth federal narcotics policy as it relates to marijuana, how that federal policy has been operating in tandem with states that are ever-more-frequently legalizing marijuana at the state and local level, and how a similar set of considerations is applied in Indian country.

Part II explains common concepts relating to federal Indian law, tribal sovereignty, and how the Wilkinson Memo has been applied in relation to a variety of different tribes. Part II also offers a cursory overview of jurisdictional transfers of authority in Indian country from the federal government to the state governments. This Comment uses the tribal, state, and federal interactions surrounding the Indian gaming industry as a lens through which to view the jurisdictional complexities in Indian country, and how those complexities are reflected in the context of tribal marijuana enterprises.

Part III suggests that tribal governments ought to be able to develop marijuana programs that comply with federal enforcement priorities and that in cases of such compliance, state governments that have legalized marijuana in some form should not interfere with tribal marijuana programs

within state boundaries. I also contend that some of the structures that have been imposed on Indian tribes and Indian nations in the context of Indian gaming should not be considered as an option for managing the competing interests of the states and tribes in the development of any future marijuana programs.

I. FEDERAL POLICY CREATES A DUBIOUS FRAMEWORK FOR
MARIJUANA DEVELOPMENTS AT THE STATE, LOCAL,
AND TRIBAL LEVELS OF GOVERNMENT

A. *The Current State of Federal Policy on Marijuana*

The Controlled Substances Act (CSA) is a federal statute that sets out drug policy in the United States.¹⁴ The CSA classifies drugs into five categories, namely Schedules I-V.¹⁵ Schedule I contains the drugs that the U.S. Drug Enforcement Agency (DEA) considers to be the most dangerous types of drugs.¹⁶ Factors such as whether the drug has an acceptable medical use; and whether the drug has a great potential to be abused or to create dependence are given weight in determining the class in which a drug is placed.¹⁷ For example, the CSA contains the following criteria for Schedule I drugs:

- (1) SCHEDULE I.—
 - (A) The drug or other substance has a high potential for abuse.
 - (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
 - (C) There is a lack of accepted safety for use of the drug or other

14. 21 U.S.C. §§ 801–971 (2012).

15. *Id.* § 812.

16. *See Drug Scheduling*, DEA, <http://www.dea.gov/druginfo/ds.shtml> (last visited Mar. 9, 2016).

17. *See id.*

substance under medical supervision.¹⁸

It is surprising then to find marijuana among the list of drugs classified by the federal government as Schedule I.¹⁹ For a point of comparison, cocaine and methamphetamine are classified in a less dangerous category as Schedule II drugs.²⁰ As a foundational matter it is important to establish that, as per the CSA, marijuana is illegal everywhere in the United States until Congress acts to change the law. Nevertheless, at the state and local level, the current political and cultural trends in the United States seem to imagine marijuana as quite distinct from the characterizations associated with Schedule I drugs. In 1996, California was the first state where voters passed a medical marijuana ballot initiative.²¹ In the years since then, many states have allowed for the medical use of marijuana.²² Currently, twenty-eight states, the District of Columbia, Guam, and Puerto Rico allow medical marijuana.²³ During the 2016 election season, several states offered their voters the opportunity to weigh in on medical marijuana initiatives.

18. 21 U.S.C. § 812(b)(1).

19. *See id.* § 812(c).

20. *Id.* A Schedule II drug is categorized as such because the drug “has a high potential for abuse,” its abuse “may lead to severe psychological or physical dependence,” and “has a currently accepted medical use in treatment in the United States.” *Id.* § 812(b).

21. The ballot initiative was referred to as California Proposition 215 and was alternatively called the Compassionate Use Act of 1996. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

22. *See State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last visited Feb. 10, 2017).

23. *Id.*

Voters in Arkansas,²⁴ Florida,²⁵ Montana,²⁶ and North Dakota²⁷ chose to move medical marijuana forward in their states.²⁸

The trend toward legalization at the state level is not merely limited to medical uses of marijuana. Prior to the

24. In Arkansas, voters approved Issue 6, a ballot measure to allow patients with certain conditions to use medical cannabis with a doctor's approval. *Overview of Arkansas's Medical Marijuana Amendment*, MARIJUANA POLICY PROJECT, <https://www.mpp.org/states/arkansas/overview-arkansas-medical-marijuana-amendment> (last visited Mar. 16, 2017).

25. In Florida, voters approved Amendment 2 to establish a comprehensive medical marijuana program. *Florida Medical Marijuana Legislation, Amendment 2*, BALLOTPEdia, [https://ballotpedia.org/Florida_Medical_Marijuana_Legalization_Amendment_2_\(2016\)](https://ballotpedia.org/Florida_Medical_Marijuana_Legalization_Amendment_2_(2016)) (last visited Feb. 10, 2017). The full text of Amendment 2 can be viewed online. *Constitutional Amendment Petition Form: Use of Marijuana for Debilitating Medical Conditions*, FLA. DEPT ST., (Jan. 9, 2015), <http://dos.elections.myflorida.com/initiatives/fulltext/pdf/50438-3.pdf>.

26. In Montana, medical marijuana has been legal since 2004, but voters in 2016 chose to greatly expand the medical marijuana program in the state. MONT. SECRETARY ST., <http://mtelectionresults.gov/resultsSW.aspx?type=BQ&map=CTY> (last updated Dec. 13, 2016).

27. Voters in North Dakota approved Measure 5, also known as the North Dakota Compassionate Care Act. *North Dakota Medical Marijuana: Voters Say Yes After Lawmakers Said No*, CANNABIST (Nov. 8, 2016), <http://www.thecannabist.co/2016/11/08/north-dakota-medical-marijuana-vote-measure-5-election-2016/66822/>. The full text of Measure 5 can be viewed online. *Initiated Constitutional Measure No. 5*, N.D. SECRETARY ST., <https://vip.sos.nd.gov/pdfs/Measures%20Info/2016%20General/Measure%205.pdf> (last visited Feb. 10, 2017).

28. For an overview of the marijuana related ballot initiatives in the 2016 election, see Alicia Wallace, *Definitive Guide to Marijuana on the 2016 Ballot: Recreational & Medical Initiatives*, CANNABIST (July 14, 2016), <http://www.thecannabist.co/2016/07/14/definitive-guide-us-states-voting-recreational-medical-marijuana-inovember-2016-election/58063/>.

2016 election, Alaska,²⁹ Colorado,³⁰ Oregon,³¹ and Washington³² already allowed recreational use of marijuana. At the city government level, even in the stomping grounds of our Nation's federal leaders, voters approved a 2014 ballot initiative legalizing recreational marijuana in the District of Columbia.³³ In the November 2016 election, state voters approved measures allowing for the recreational use of

29. ALASKA STAT. §§ 17.38.010–17.38.900, 43.61.010–43.61.030 (2014). The official ballot title was Ballot Measure No. 2—13PSUM An Act to Tax and Regulate the Production, Sale, and Use of Marijuana. *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEdia, [https://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_\(2014\)](https://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_(2014)) (last visited Mar. 7, 2017).

30. COLO. CONST. art. XVIII, § 16. The ballot measure was referred to as Amendment 64 and culminated in an amendment to the state Constitution. *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEdia, [https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_\(2012\)](https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_(2012)) (last visited Mar. 7, 2017).

31. *Measure 91: Text of Measure*, OREGON.GOV, <http://www.oregon.gov/olcc/marijuana/Documents/Measure91.pdf> (last visited Feb. 10, 2017). The ballot measure was known as the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act of 2014. *Oregon Legalized Marijuana Initiative, Measure 91*, BALLOTPEdia, [https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_\(2014\)](https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_(2014)) (last visited Mar. 7, 2017).

32. *Initiative Measure No. 502*, WASH. SECRETARY ST. (July 8, 2011), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf; see also *Washington Marijuana Legalization and Regulation, Initiative 502 (2012)*, BALLOTPEdia, [https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_\(2012\)](https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_(2012)) (last visited Mar. 7, 2017).

33. See Bill Chappell, *Marijuana Votes: Oregon and D.C. Legalize; Florida Says No to Medical*, NPR (Nov. 4, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/04/361533318/marijuana-on-the-ballot-d-c-voters-ok-legalization>; *Board of Elections Notice of Publication: Initiative Measure No. 71, Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014* (Mar. 25, 2014), <http://dcregs.dc.gov/Gateway/NoticeHome.aspx?NoticeID=4827610>.

marijuana in California,³⁴ Maine,³⁵ Massachusetts,³⁶ and Nevada.³⁷ All told, following the 2016 election, there are eight states that allow recreational use of marijuana, and the various election results are seen as an indication that marijuana legalization at the state level is gaining steam.³⁸

There is a clear incongruence between the federal government's continued and protracted classification of

34. California has long been a leader in marijuana policy, and voters approved Proposition 64, the Adult Use of Marijuana Act, which allows legal recreational use. CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE 12 (2016), <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf>; *Full Initiative Text, MARIJUANA POLY PROJECT CAL.*, <https://www.regulatecalifornia.com/about/full-initiative-text/> (last visited Feb. 13, 2017).

35. In a closely contested election, Maine voters said yes to Question 1, effectively ending the prohibition on marijuana and creating a regulatory scheme similar to the way the state regulates alcohol. Darren Fishell & Michael Shepherd, *Maine Voters Narrowly Endorse Legal Marijuana, but Opponents Weigh Recount*, BANGOR DAILY NEWS (Nov. 9, 2016), <http://bangordailynews.com/2016/11/09/politics/elections/maine-voters-narrowly-endorse-legal-marijuana/>. The full text of the Marijuana Legalization Act is available online. *Marijuana Legalization Act*, REGULATE ME., <http://www.regulatemaine.org/wp-content/uploads/2015/10/initiative-text.pdf> (last visited Feb. 13, 2017).

36. Voters in Massachusetts approved recreational marijuana use by voting yes to Question 4. *Ballot Questions*, SECRETARY COMMONWEALTH MASS., http://electionstats.state.ma.us/ballot_questions/search/year_from:1972/year_to:2016 (last visited Feb. 13, 2017). The full text of The Regulation and Taxation of Marijuana Act is available online. *An Initiative Petition for a Law Relative to the Regulation and Taxation of Marijuana*, MASS.GOV, <http://www.mass.gov/ago/docs/government/2015-petitions/15-27.pdf> (last visited Feb. 13, 2017).

37. Voters in Nevada approved Question 2, the Initiative to Regulate Marijuana Like Alcohol. *Nevada Voters Say 'YES' on Question 2 to Regulate Marijuana Like Alcohol*, REGULATE MARIJUANA LIKE ALCOHOL (Nov. 9, 2016), <https://www.regulatemarijuanainnevada.org/nevada-voters-say-yes-question-2-regulate-marijuana-like-alcohol/>. The full text of the Initiative to Regulate and Tax Marijuana is available online. *Full Initiative Text*, REGULATE MARIJUANA LIKE ALCOHOL, <https://www.regulatemarijuanainnevada.org/full-initiative-text/> (last visited Feb. 13, 2017).

38. See Alicia Wallace, *A Greener America: Marijuana's Big Statement in Election 2016*, CANNABIST (Nov. 8, 2016), <http://www.thecannabist.co/2016/11/08/election-2016-marijuana-results-states-recreational-medical/66994/>.

marijuana as a Schedule I substance and the now wide-ranging acceptance of marijuana, in both medical and recreational capacities, in the state and local governments.³⁹ In 2013, in response to state ballot initiatives legalizing marijuana in some form, the U.S. Department of Justice (DOJ) issued a memorandum from James M. Cole, Deputy Attorney General (Cole Memo), which offered guidance to all U.S. Attorneys about federal enforcement activity and priorities.⁴⁰ The Cole Memo carefully asserts that

Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The [DOJ] is committed to enforcement of the [Controlled Substances Act] consistent with those determinations.⁴¹

The Cole Memo explains that the DOJ is “committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.”⁴² To that end, the Cole Memo provides a series of “enforcement priorities” that the federal government considers to be important as it determines how, and to what extent, it should enforce its marijuana policy.⁴³ Namely, the enforcement priorities explain that the DOJ is most focused on the following eight factors:

[p]reventing the distribution of marijuana to minors;
[p]reventing revenue from the sale of marijuana from going to

39. As evidenced by the ATTN: videos, even within the legislative branch of the federal government, there are a great variety of opinions about the validity of marijuana use. *See supra* notes 1–9.

40. *See* U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1–2 (2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter COLE MEMO].

41. *Id.* at 1.

42. *Id.*

43. *Id.*

criminal enterprises, gangs, and cartels;
[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states;
[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
[p]reventing violence and the use of firearms in the cultivation and distribution of marijuana;
[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
[p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
[p]reventing marijuana possession or use on federal property.⁴⁴

This list of enforcement priorities serves as “guidance to [DOJ] attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities.”⁴⁵

The Cole Memo describes the federal government’s tendency to rely on state and local law to deal with marijuana activity that does not implicate any of the eight enforcement priorities.⁴⁶ Thus, a single individual who possesses a bit of marijuana for his own personal use⁴⁷ would not be a matter on which the federal government would spend its own enforcement and prosecutorial resources, but rather it would expect that state or local law would serve as the body of narcotics law that would capture and correct the behavior

44. *Id.* at 1–2.

45. *Id.* at 2.

46. *See id.*

47. This assumes, of course, that this individual does not use or possess marijuana while standing on the steps of the Lincoln Memorial, or offer a joint to a child, or go for a joy ride while under the influence, or enrich El Chapo’s coffers, etc., in violation of any of the Cole Memo enforcement priorities.

through state or local enforcement mechanisms.⁴⁸ Now, as many state and local governments have begun to pass ballot initiatives and other forms of legislation to allow for marijuana activity, including possession, distribution, sale, and use of marijuana, the structure that the federal government has traditionally relied on for enforcing its marijuana policy against small-time personal users is left bereft of any body of law to capture that small-time use.⁴⁹ Of course, the federal government could enforce the CSA and its marijuana policy against an individual marijuana user, but, as noted by the Cole Memo, that is not an effective or desirable use of federal enforcement, investigative, or prosecutorial resources.⁵⁰ Thus, in states where marijuana has been legalized in some form, and the state has also “implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten federal priorities set forth above.”⁵¹ The federal government will make these determinations on a case-by-case basis.⁵²

The primary inquiry in any federal enforcement action is “whether the conduct at issue implicates one or more of the enforcement priorities listed above.”⁵³ Thus, if a state legalizes marijuana and hopes to remain free from federal enforcement activity, the state should be sure to enact a rigorous regulatory scheme that ensures that the state’s marijuana policy does not (1) make it easier for kids to get their hands on marijuana; (2) fund criminals; (3) allow

48. COLE MEMO, *supra* note 40, at 2.

49. *See id.*

50. *See id.* at 2–3.

51. *Id.* at 3.

52. *Id.*

53. *Id.*

marijuana to drift into another state where it is still illegal; (4) allow more dangerous drugs to be trafficked under the guise of marijuana distribution; (5) involve the use of guns; (6) encourage drugged driving; (7) allow marijuana to grow on public lands; or (8) increase the likelihood that individuals will bring marijuana onto federal property.⁵⁴

The Cole Memo is a product of the Obama administration's DOJ marijuana policy. In the wake of the 2016 presidential election, during his senate confirmation hearings, Jeff Sessions explained that he understands that federal marijuana enforcement is a "problem of resources for the federal government."⁵⁵ Sessions described the DOJ's policy under the Cole Memo: "The Department of Justice under Lynch and Holder set forth some policies that they thought were appropriate to define what cases should be prosecuted in states that have legalized [marijuana] at least in some fashion."⁵⁶ Senator Leahy asked if Sessions agreed with the guidelines set forth by the DOJ. Sessions replied:

I think some of them are truly valuable in evaluating cases, but fundamentally the criticism I think that was legitimate is that they may not have been followed. Using good judgment about how to handle these cases will be a responsibility of mine. I know it won't be an easy decision, but I will try to do my duty in a fair and just way.⁵⁷

This statement seems to be Sessions's tepid acknowledgment that the guidelines set forth by the Cole Memo are, for now, a useful way to determine when and how the federal government should utilize its limited resources to enforce the CSA against those acting in accordance with state laws.

54. *See id.* at 1–3.

55. *Attorney General Confirmation Hearing, Day 1 Part 2, supra* note 13 (relevant questioning occurs between 1:18:30 and 1:25:52).

56. *Id.* (relevant questioning occurs between 1:18:30 and 1:25:52).

57. *Id.* (relevant questioning occurs between 1:18:30 and 1:25:52).

B. *What Do the CSA, the Cole Memo, and State Marijuana Laws Have to Do with Indian Country?*

Shortly after the Cole Memo set forth the eight enforcement priorities for state and local governments, tribal governments asked the DOJ whether those same priorities applied to the DOJ's enforcement of marijuana activity on tribal lands.⁵⁸ In response to those inquiries, the DOJ released a policy statement from Monty Wilkinson, Director of the Executive Office for U.S. Attorneys entitled "Policy Statement Regarding Marijuana Issues in Indian Country" (Wilkinson Memo).⁵⁹ The Wilkinson Memo provides "guidance on the enforcement of the [CSA] on tribal lands by the United States Attorneys' offices."⁶⁰ The Wilkinson Memo takes the eight enforcement priorities listed in the Cole Memo and makes them applicable to federal enforcement actions regarding marijuana activity in Indian country.⁶¹ The technical definition of Indian country is:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been

58. U.S. DEPT OF JUSTICE, EXEC. OFFICE OF THE DIR., MEMORANDUM: POLICY STATEMENT REGARDING MARIJUANA ISSUES IN INDIAN COUNTRY (Oct. 28, 2014) <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf> [hereinafter WILKINSON MEMO].

59. *Id.*

60. *Id.* at 1–2.

61. *See id.* at 2 ("The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country.").

extinguished, including rights-of-way running through the same.⁶²

More simply, the term Indian country means “the territory set aside for the operation of special rules allocating governmental power among Indian tribes, the federal government, and the states.”⁶³ As tribal governments move forward with efforts to develop their own bodies of law in relation to marijuana, they are subject to the CSA and the DOJ’s discretion the same way that a state or local government would be.

The Cole and Wilkinson Memos do offer some guidance regarding the federal government’s marijuana policy. However, even though both Memos explain that the federal government will focus its attention by first considering whether any of the eight enforcement priorities are implicated, the final sentence of the Cole Memo carefully preserves the federal government’s prerogative to enforce or prosecute at its discretion: “nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”⁶⁴ This portion of the Cole Memo is quoted and reasserted in its entirety in the Wilkinson Memo.⁶⁵ The important takeaway from the Memos is that the CSA is still controlling federal law and marijuana is still illegal under federal law. Therefore, the DOJ and U.S. Attorney’s Office may interpret the eight enforcement priorities and determine at their own discretion whether a particular marijuana activity warrants federal action.

Now that the groundwork for the federal enforcement priorities of marijuana policy in Indian country is set forth,

62. 18 U.S.C. § 1151 (2012).

63. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

64. COLE MEMO, *supra* note 40, at 4.

65. WILKINSON MEMO, *supra* note 58, at 2.

it is appropriate to examine the impact that concepts like tribal sovereignty, state jurisdiction in Indian country, and federal prosecutorial discretion have had in Indian country.

II. THE HIGHS AND LOWS OF FEDERAL AND STATE INTERACTIONS WITH INDIAN COUNTRY AND TRIBAL EFFORTS TO DEVELOP SOUND MARIJUANA PROGRAMS

This Part offers an introduction to common concepts in federal Indian law—such as tribal sovereignty and the exercise of state jurisdiction in Indian country. This Part also examines how federal and state governments have applied the Wilkinson Memo’s policies in relation to several different tribal marijuana programs. The latter portions of this Part amount to several case studies of the ways that tribes have handled the development of marijuana activities and the federal and state governments’ enforcement efforts in relation to that tribal marijuana activity.

A. *The Foundations of Federal and State Joint Jurisdiction over Indian Country*

Indian tribes have a distinct place in the political and governmental system of the United States. The term “Indian tribe” means a group, indigenous to North America, “with which the United States has established a legal relationship.”⁶⁶ Under federal Indian law, Indian tribes are “domestic[,] dependent nations.”⁶⁷ “They are denominated domestic because they are within the United States and dependent because they are subject to federal power. They are nations because they exercise sovereign powers over the people, property, and events within their borders.”⁶⁸

66. COHEN’S HANDBOOK, *supra* note 63, § 3.01.

67. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). However flawed this rationale is, it is, for better or worse, the current state of federal Indian law.

68. COHEN’S HANDBOOK, *supra* note 63, at 1.

Congressional power over Indian affairs is plenary.⁶⁹ As is the case with much of federal Indian law, there are several different conceptions of what plenary power means.⁷⁰ Gregory Ablavsky offers an apt description of the bifurcated meaning of the concept:

For over a century, the Supreme Court has interpreted the Constitution to grant the federal government “plenary” power over “Indian Affairs” Plenary Power, as used by the Court, has two distinct meanings. Sometimes the Court uses the term interchangeably with “exclusive,” to describe federal power over Indian affairs to the exclusion of states. But the Court also uses the term to describe the doctrine that the federal government has unchecked authority *over* Indian tribes, including their internal affairs.⁷¹

The conception of plenary power over Indian affairs necessarily has a tenuous relationship with the concept of tribal sovereignty. For example, the Supreme Court generally recognizes that “Congress possesses plenary power over Indian affairs, including the power to modify or

69. The authority for the proposition that federal authority is exclusive and plenary over Indian affairs has been found by the Supreme Court to be grounded in the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and in the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 559–61 (1832) (clarifying that the Constitution makes tribes subject to federal power, not state power). Accordingly, the Court claims that Congress has the right to pass legislation that governs Indians and their affairs. *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–68 (1903). Congress’ power to regulate commerce with Indian tribes “provides the legal rationale for implementing [federal] power” over Indians. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 58 (S. Ill. Univ. Press, 3d ed. 2002) (1983). Despite that legal rationale, Pevar also contends that “[t]he ultimate source of the federal government’s power over Indians is its military strength.” *Id.*; *cf.* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012, 1015 (2015) (questioning the validity of the traditional sources of authority for Congressional plenary power of Indian affairs, and noting recent trends toward a change in the doctrine).

70. Justice Thomas summed up this sentiment when he wrote that “[f]ederal Indian policy is, to say the least, schizophrenic.” *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

71. Ablavsky, *supra* note 69, at 1014 (emphasis in original).

eliminate tribal rights.”⁷² Even though Indian tribes are sovereigns that predate the formation of the United States and the Constitution,⁷³ the federal government claims exclusive and complete power over Indian affairs. This notion of plenary federal power over Indian affairs necessarily inhibits tribal governments from exercising a genuine and total sovereignty. Although the federal government has exclusive “federal power over Indian affairs to the exclusion of states,”⁷⁴ Congress has, by statute, actually authorized states to exercise jurisdiction in Indian country under certain circumstances.⁷⁵ State law “can have no force” in Indian country without Congress’ consent.⁷⁶ “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”⁷⁷ Nevertheless, Congress can, and has, in some circumstances, granted states jurisdiction and control over Indians and activities in Indian country. One example of the federal government using a statute to grant states jurisdiction over

72. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress’ power to limit or extinguish tribal rights is a longstanding principle in federal Indian law. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

73. Book Discussion on *Indian Gaming and Tribal Sovereignty: The Casino Compromise*, by Steven Andrew Light & Kathryn R.L. Rand, C-SPAN (Feb. 3, 2006), <http://www.c-span.org/video/?191152-1/book-discussion-indian-gaming-tribal-sovereignty-casino-compromise> (Twenty-two minutes into the discussion, Professor Rand refers to the status of tribes as “pre-constitutional and extra-constitutional” as it relates to the body of federal Indian law that interacts with that unique status.).

74. *Ablavsky*, *supra* note 69, at 1014.

75. COHEN’S HANDBOOK, *supra* note 63, § 6.04. Without a federal grant of civil or criminal jurisdiction, states generally lack such jurisdiction over Indians in Indian country. *See id.* § 6.03.

76. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

77. *Rice v. Olson*, 324 U.S. 786, 789 (1945). This oft-cited principle is continually reaffirmed in the Supreme Court’s opinions. *See, e.g., McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973).

Indian country is Public Law 280.⁷⁸ Congress enacted Public Law 280, which granted several states legal authority over Indian country.⁷⁹ Public Law 280 effectively conferred extensive criminal jurisdiction and a very limited civil jurisdiction over tribal lands within state borders to six states, specifically: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.⁸⁰ With respect to civil jurisdiction, states were only granted jurisdiction as it may be relevant to private civil litigation in a state court.⁸¹ Apart from the six states specifically granted jurisdiction through Public Law 280, the statute also provided a method for other states to assume jurisdiction over Indian country within their state borders if the state chose to assume such jurisdiction.⁸² Public Law 280 is only one example of the federal government transferring by statute its otherwise exclusive power over Indian affairs to state governments. Another example of a jurisdictional transfer appears in New York where a different set of federal statutes operate to give the state partial criminal⁸³ and civil⁸⁴ jurisdiction on the Indian

78. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360 (2016)).

79. *Id.*

80. *See* 18 U.S.C. § 1162, 28 U.S.C. § 1360. These states are often referred to as “mandatory Public Law 280” jurisdictions because in these jurisdictions the statute has removed most federal jurisdiction over Indian country crimes and transferred it to the states.

81. 28 U.S.C. § 1360.

82. *Id.*

83. *See* 25 U.S.C. § 232 (2016) (“The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State.”).

84. 25 U.S.C. § 233 (2016) (establishes that the courts of New York State “shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and

reservations and territories within New York State.

B. *How Do Statutory Transfers of Jurisdiction Actually Play Out with Real World Events?*

Bryan v. Itasca County, Minnesota was one of the initial cases that determined how Public Law 280's grant of civil jurisdiction would operate.⁸⁵ In *Bryan*, a state county contended that, in addition to granting the state broad criminal jurisdiction, Public Law 280 also granted broad civil regulatory powers, including the power to impose a personal property tax, over the Indians in any part of Indian country that was located within Minnesota's borders.⁸⁶ The Supreme Court rejected that contention and clarified that the civil jurisdiction conferred by Public Law 280 was intended only to allow state courts to settle private civil suits involving Indians by applying "those laws which have to do with private rights and status," such as contract, tort, and divorce law.⁸⁷ *Bryan* established that although states that have jurisdiction over Indian country pursuant to Public Law 280 have wide latitude regarding criminal jurisdiction, the application of state civil laws in Indian country is much narrower in scope.⁸⁸

A decade later, in the landmark case *California v. Cabazon Band of Mission Indians*, the Supreme Court addressed the reach of state jurisdiction in Indian country, particularly as it relates to tribal gaming enterprises.⁸⁹ Within reservation boundaries in the State of California, the

proceedings").

85. See *Bryan v. Itasca Cty.*, 426 U.S. 373 (1976).

86. *Id.* at 375-81.

87. *Id.* at 384 n.10 (quoting Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. REV. 267, 292 (1973) (internal quotation marks omitted)).

88. *Id.* at 380-81, 384 n.10.

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

Cabazon and Morongo Bands of Mission Indians operated bingo games, and the Cabazon Band also operated a card club that offered poker and other card games.⁹⁰ California sought to apply a state statute that strictly controlled the operation of bingo games,⁹¹ and the county government sought to force compliance with an ordinance that prohibited card games.⁹² The Tribes sued in federal court, contending that neither the state nor the county had authority to enforce gambling laws within the reservations.⁹³ California argued that Public Law 280 authorized the state to regulate bingo and card games on the reservations.⁹⁴ The Supreme Court rejected California's contention that Public Law 280 conferred the requisite authority, and held that the gambling laws could not be applied in Indian country.⁹⁵

The Court's reasoning in reaching its conclusion is worth careful attention because it can be useful for determining how tribes might succeed in crafting marijuana programs that are free from state interference.⁹⁶ The Court reasserted the long held principle that "Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" and that sovereignty is subordinate exclusively to the federal government and not to the states.⁹⁷ The Court recognized

90. *Id.* at 206.

91. The statute in question, CAL. PENAL CODE § 326.5 (West 1987), did not entirely prohibit bingo games within California; rather, it permitted the bingo games when they were operated for and by charitable organizations, the profits were used only to benefit charitable purposes, and prizes were limited to under \$250.00 per game. *Cabazon*, 480 U.S. at 205.

92. *Id.* at 206.

93. *Id.*

94. *Id.* at 207.

95. *Id.* at 207, 221–22.

96. *See infra* Section III.B.

97. *Cabazon*, 480 U.S. at 207 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

that state laws may apply to tribal Indians on reservations only where Congress has expressly transferred that authority to the states, as in the case of Public Law 280.⁹⁸ The Court noted that Public Law 280 was enacted to “combat[] lawlessness on reservations” but it was clearly not intended to “grant to States [a] general civil regulatory power over Indian reservations [because that] would result in the destruction of tribal institutions and values.”⁹⁹ In so stating, the Court clarified that an important dichotomy exists between laws that are “criminal in nature, and thus fully applicable to the reservation[s]” and laws that are “civil in nature, and applicable only as it may be relevant to private civil litigation.”¹⁰⁰ The Court determined that state “criminal/prohibitory” laws were fully applicable to reservations, but that state “civil/regulatory” laws were not generally applicable to reservations.¹⁰¹ The Court outlined the contours of this dichotomy:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law 280’s] grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law 280] does not authorize its enforcement on an Indian reservation.¹⁰²

For the *Cabazon* Court, the “shorthand test is whether the conduct at issue violates the State’s public policy.”¹⁰³

The Court next examined the laws that California sought to impose on the reservations to determine whether the laws were criminal/prohibitory or civil/regulatory.¹⁰⁴ California

98. *Id.*

99. *Id.* at 208.

100. *Id.*

101. *Id.* at 209–10.

102. *Id.* at 209.

103. *Id.*

104. Unlike in *Bryan*, where the imposition of a personal property tax was

contended that its restrictions on high stakes bingo were in fact prohibitory laws that could be enforced on reservations.¹⁰⁵ The Court determined that the gambling laws were civil/regulatory because California did not prohibit all forms of gambling, and in fact California operated its own state lottery and “daily encourage[d] its citizens to participate in this state-run gambling.”¹⁰⁶ Ultimately, the Court determined that “[i]n light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.”¹⁰⁷

With respect to whether the county ordinance prohibiting card games could be applied on the reservations, the Court noted that it was “doubtful that [Public Law 280] authorize[d] the application of any local laws to Indian reservations” because Public Law 280 “provides that the criminal laws of the ‘State’ shall have the same force and effect within Indian country as they have elsewhere.”¹⁰⁸ However, the Court did not expressly decide this issue, instead determining that the county card and game ordinances, which allowed two municipalities within county

unquestionably a civil law, in *Cabazon* it was less clear whether California’s bingo restrictions were civil or criminal in nature. *Id.* at 208.

105. The California bingo regulations made it a misdemeanor to conduct high stakes bingo under the theory that those games attracted organized crime, and because the bingo restrictions were enforced by imposing a criminal charge, they should be enforceable as such under Public Law 280. *See id.* at 211. The Court refused to accept this theory, and noted that despite the fact “that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of [Public Law 280].” *Id.*

106. *Id.* at 210.

107. *Id.* at 211.

108. *Id.* at 212 n.11.

borders to permit gambling on card games, were civil/regulatory in nature and thus would not be within the purview of Public Law 280's grant of criminal jurisdiction even in the event that county laws could be enforced on the reservations.¹⁰⁹

The Tribes' victory in *Cabazon* was widely touted as a grand success because the Court formally recognized that Indian tribes had an inherent right, by virtue of tribal sovereignty, to pursue Indian gaming as a means of economic development, self-sufficiency, and independence.¹¹⁰ However, just one year after the decision in *Cabazon*, Congress superseded the effects of the decision by enacting the Indian Gaming Regulatory Act (IGRA).¹¹¹ IGRA is an act of Congress "which gives the states the power to regulate certain aspects of Indian gaming but which also allows substantial tribal autonomy."¹¹² IGRA is a "complex and comprehensive federal statutory scheme governing the regulation of tribal gaming at three levels of government—tribal, state, and federal."¹¹³ IGRA creates three classes of gaming, namely Classes I-III.¹¹⁴ In its most elemental form, IGRA provides that: (1) tribes have exclusive control over

109. *Id.*

110. See RALPH A. ROSSUM, THE SUPREME COURT AND TRIBAL GAMING 145–47 (2011); *but cf.* PEVAR, *supra* note 69, at 320.

111. 25 U.S.C. §§ 2701–2721 (2012). Pevar suggests that IGRA was enacted in response to the *Cabazon* decision. PEVAR, *supra* note 69, at 320. *But see* STEPHEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING & TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 41 (2005) ("Congress already was considering exercising its authority to regulate Indian gaming at the federal level."). Rossum contends that describing IGRA as a response to *Cabazon* is an exaggeration, and that it would be more accurate to say that congressional regulation of Indian gaming was an ongoing project years before the *Cabazon* decision. ROSSUM, *supra* note 110, at 149–51.

112. PEVAR, *supra* note 69, at 320.

113. LIGHT & RAND, *supra* note 111, at 6.

114. PEVAR, *supra* note 69, at 320–21.

Class I gaming; (2) tribes are required to share authority over Class II gaming with the state under enumerated circumstances; and (3) Class III gaming, which incidentally is the most lucrative form of gaming, is subject to extensive state regulation.¹¹⁵ The regulatory scheme that controls Class III gaming requires tribes to enter into a gaming “compact” with the state whereby the “tribe receives the state’s express consent to engage in the gaming activity.”¹¹⁶

A gaming compact is essentially a mechanism devised in IGRA that commands the tribe and the state to reach a negotiated agreement about the regulatory structure of Class III gaming on the tribe’s territory.¹¹⁷ IGRA’s compact requirement creates an “active role for states in regulating casino-style gaming.”¹¹⁸ States have “considerable leverage” over tribes when it comes to negotiating the terms contained in the gaming compacts.¹¹⁹ IGRA only requires that the state negotiate in “good faith” to reach an agreement with the tribe.¹²⁰ However, in practice, if a state refuses to negotiate in good faith, the tribe often has little recourse.¹²¹

C. What Does Indian Gaming Have to Do with Marijuana in Indian Country?

Examining the policies of Indian gaming shows how federal and state governments interact with tribal

115. *Id.*

116. *Id.* at 321. For a discussion that is beyond the scope of this Comment but touches on the important deficiencies in the tribal state compact model, see LIGHT & RAND, *supra* note 111, at 150, 157–61.

117. *Id.* at 43.

118. *Id.* at 46.

119. PEVAR, *supra* note 69, at 322.

120. 25 U.S.C. § 2710(d)(3)(A) (2012).

121. See LIGHT & RAND, *supra* note 111, at 49 (explaining that the enforcement mechanism that IGRA provides to ensure that states negotiate in good faith “lack[s] teeth”).

governments. There are several parallels between Indian gaming and tribal marijuana enterprises. For example, the legality of each industry varies greatly from state to state. Also, Indian gaming has always been seen as a source of great economic benefit to tribes,¹²² and tribal marijuana is garnering much attention for its potential to generate revenue for tribal economies.¹²³ Most importantly, for purposes of this Comment, Indian gaming offers many lessons about how federal and state authority can place tribal sovereignty in a precarious position.

Stephen Light and Kathryn Rand are federal Indian law scholars and experts in Indian gaming policy. They argue that IGRA severely compromises tribal sovereignty because it creates a federal and state regulatory structure that serves to subjugate an Indian tribe's ability to exercise its sovereign authority to create and maintain Indian gaming operations.¹²⁴ Particularly with respect to IGRA's requirement that tribes enter into tribal/state compacts to pursue Class III gaming, Light and Rand have noted that the compact structure compromises a tribe's inherent right to exercise tribal sovereignty.¹²⁵ After all, a tribe's right to conduct Indian gaming is grounded in the exercise of tribal

122. The *Cabazon* Court made much of the fact that tribal gaming provided employment on the reservation and that gaming profits provided a revenue stream for the Tribes in that case. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987); see also LIGHT & RAND, *supra* note 111, at 7 (describing Indian gaming as a multi-billion dollar "big business").

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

124. LIGHT & RAND, *supra* note 111, at 6–7.

125. *Id.* at 36 (Through the "process of negotiating tribal-state compacts . . . [t]ribes have been placed in the position of abrogating aspects of their inherent sovereignty in order to exercise the sovereign right to open gaming establishments.").

sovereignty.¹²⁶ Compacts infringe on tribal sovereignty because the tribe's decision to engage in gaming as a way to generate revenue to fund tribal self-government and self-determination should be an unimpeded exercise of a sovereign right, but instead, under IGRA's compact requirement, tribes are forced to seek the express consent of the state to pursue Class III gaming.¹²⁷

To make sense of the complicated structure of IGRA and its interactions with Indian country, it is helpful to examine Light and Rand's unique definition of tribal sovereignty. For Light and Rand, the "heart" of tribal sovereignty is a tribe's "inherent right of self-determination."¹²⁸ They also characterize tribal sovereignty as encompassing two related but distinct concepts.¹²⁹ First, they separate out the concept of "indigenous perspectives" on tribal sovereignty, from a second and distinct concept, which they refer to specifically as the "federal legal doctrine of tribal sovereignty."¹³⁰ From an indigenous perspective, "[t]ribal sovereignty stems from tribes' status as self-governing indigenous nations with legal, political, cultural, and spiritual authority."¹³¹ From this indigenous perspective, an Indian tribe's inherent right of self-determination is respected and provides the very basis of every Indian tribe's "authority to determine membership, establish and enforce laws, provide for the health and welfare of members, protect and nurture tribal traditions

126. IGRA is often mistakenly understood to be the source of an Indian tribe's authority to engage in gaming operations, but in reality, IGRA is a constraint on that authority. *Id.* at 6–7. *Cabazon* is widely understood to have recognized the proposition that Indian tribes have an inherent right to engage in gaming on their territory. *See, e.g.,* PEVAR, *supra* note 69, at 320.

127. PEVAR, *supra* note 69, at 321.

128. LIGHT & RAND, *supra* note 111, at 5.

129. *Id.*

130. *Id.*

131. *Id.*

and culture, and interact with federal and state governments.”¹³²

“The federal legal doctrine of tribal sovereignty” cabins away the inherent indigenous aspects of sovereignty and instead “reflects a much narrower view of tribal sovereignty embedded in more than two hundred years of byzantine federal Indian law and policy.”¹³³ The earlier portion of this Comment describes how the “much narrower view”¹³⁴ of tribal sovereignty has been exercised by the federal government. The federal legal doctrine of tribal sovereignty is marked by the notion that “tribal sovereignty may be limited or extinguished by Congress” and thus this definition “compromises tribal self-determination.”¹³⁵

These two different conceptions of tribal sovereignty are especially poignant when considering the recent efforts that Indian tribes and nations have made to utilize marijuana for potential economic benefits. Economic development considerations are of central importance to any consideration of an Indian government’s right to pursue a marijuana program because the economic conditions in Indian country are startlingly unsatisfactory. It is worth noting that the *Cabazon* Court gave much attention to economic factors in Indian country when it decided that tribes had a right to pursue gaming free from the interference of state regulations.¹³⁶

132. *Id.*

133. *Id.* See generally COHEN’S HANDBOOK, *supra* note 63, at § 5.02[1].

134. LIGHT & RAND, *supra* note 111, at 5.

135. *Id.*; see also *United States v. Lara*, 541 U.S. 193, 214–15, 224–25 (2004) (Thomas, J., concurring) (questioning whether inherent tribal sovereignty and congressional plenary power can even exist together or whether they might be mutually exclusive concepts). *Lara* also asserts the principle that the federal government can even abolish tribal sovereignty at will. See 541 U.S. at 199–203.

136. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–19 (1987).

Indians face poverty at an alarmingly high rate.¹³⁷ In 2012, approximately one in four American Indians or Alaska Natives were living in poverty.¹³⁸ In 2014, the U.S. Census Bureau recorded that 28.3% of American Indians and Alaska Natives were living in poverty.¹³⁹ That is the highest rate of poverty of any race group in the United States, and the percentage of American Indians and Alaska Natives living in poverty is nearly twice the rate for the nation as a whole.¹⁴⁰ Residents of reservations are generally among the most impoverished in the nation.¹⁴¹

Indian tribes and nations are now attempting to utilize the recent trends in marijuana legalization for economic development that is so desperately needed.¹⁴² In the last

137. In 2014, in advance of a visit to the Standing Rock Sioux Tribe reservation in North Dakota, then president Obama authored an op-ed wherein he referenced many of the economic struggles facing Indian country and pointed out that the rates of poverty, unemployment, and lack of education are disproportionately high for Native Americans when compared with national averages. See Barack Obama, *On My Upcoming Trip to Indian Country*, INDIAN COUNTRY MEDIA NETWORK (June 5, 2014), <https://indiancountrytodaymedianetwork.com/2014/06/05/my-upcoming-trip-indian-country>.

138. Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty>.

139. *American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html>.

140. *Id.* (28.3% of single-race American Indians and Alaska Natives live in poverty compared to the national poverty rate of 15.5%).

141. LIGHT & RAND, *supra* note 111, at 98. The extreme rates of poverty on reservations are accompanied by all the social and public health problems attendant in impoverished communities, such as: substance abuse, mental health problems, domestic violence, infant mortality, suicide, obesity, and high rates of other illnesses like diabetes, tuberculosis, and alcoholism. *Id.*

142. There is no doubt that the Wilkinson Memo and the prospect of developing marijuana related industries is seen as a potential economic boon for Indian tribes and Indian nations in much the same way that Indian gaming has

several decades, Indian gaming has functioned as a major economic driver in Indian country.¹⁴³ Just as IGRA and state law have acted as constraints on Indian gaming, so too have federal and state marijuana policies acted as constraints on the development of tribal marijuana programs. The general interest in tapping into a marijuana marketplace to rejuvenate tribal economies is likely to be tempered by the federal government's malleable position on its enforcement priorities. While the Cole and Wilkinson Memos clearly set forth the eight enforcement priorities, the Memos also make clear that the DOJ and U.S. Attorney's Office still have complete discretion to enforce the CSA as they see fit.¹⁴⁴ That means any investment into tribal marijuana activity is a risky proposition subject to the discretion and plenary authority of the federal government, and in some circumstances, subject also to state jurisdiction. For example, if a newly elected administration sets forth a different, more stringent, DOJ policy regarding marijuana activity in Indian country, then any investments in the marijuana industry could be a complete wash for Indian tribes and Indian nations who eagerly established marijuana industries under the current set of guidelines.

evolved into a multibillion dollar industry. *See, e.g.,* Carly Schwartz, *More Than 100 Native American Tribes Consider Growing Marijuana*, HUFFINGTON POST (Feb. 3, 2015), http://www.huffingtonpost.com/2015/02/03/native-americans-marijuana_n_6599984.html.

143. Indian Gaming set an industry record in 2012 with over \$27 billion in revenues. RUBINBROWN LLP, *COMMERCIAL & TRIBAL GAMING STATS 1*, 14 (2014), http://www.rubinbrown.com/RubinBrown_2014_Gaming_Stats.pdf. For example, the Oneida Nation of New York runs the highly successful Turning Stone Casino Resort, which employs a large number of people, and has created revenue that has improved the Oneida's housing, health care, education, and other essential government services. LIGHT & RAND, *supra* note 111, at 99.

144. *See* COLE MEMO, *supra* note 40, at 4; WILKINSON MEMO, *supra* note 58, at 2.

D. *How Have Marijuana Developments Played Out in Indian Country Under the Wilkinson Memo?*

The Squaxin and Suquamish Tribes in Washington have entered into marijuana compacts with Washington State.¹⁴⁵ The marijuana compacts govern the production, processing, and sale of marijuana on tribal land.¹⁴⁶ Washington has a very progressive policy regarding marijuana use, including legal recreational use.¹⁴⁷ Washington's broad acceptance of marijuana use inevitably makes it more accommodating to tribal marijuana programs than states with more restrictive marijuana laws. The compact model is of course familiar because of its use within the Indian gaming industry under IGRA, but the use of the compact model is a brand new introduction to the emerging tribal marijuana industry.¹⁴⁸ In the context of Indian gaming, Light and Rand have criticized this tribal/state compact model because it compromises a tribe's inherent right to exercise tribal sovereignty.¹⁴⁹ Under the marijuana compacts in Washington, the Tribes "shall impose and maintain a Tribal Tax that is equal to at least 100 percent of the State Tax on all sales of marijuana products in Indian country" to non-tribal members, and the

145. *Squaxin Island Tribe Enters Marijuana Compact in Washington*, INDIANZ.COM (Sept. 24, 2015), <http://www.indianz.com/News/2015/019025.asp>. For the text of the compact signed between the Suquamish Tribe and Washington State, see STATE OF WASH. & SUQUAMISH TRIBE, MARIJUANA COMPACT BETWEEN THE SUQUAMISH TRIBE AND THE STATE OF WASHINGTON (2015), <http://lcb.wa.gov/publications/Marijuana/Compact-9-14-15.pdf>.

146. *Id.* at 4.

147. See *Initiative Measure No. 502*, *supra* note 32.

148. See Hilary Bricken, *Smoke Signals: Washington State and Suquamish Tribe Ink First Ever Marijuana Compact*, ABOVE L. (Sept. 21, 2015), <http://abovethelaw.com/2015/09/smoke-signals-washington-state-and-suquamish-tribe-ink-first-ever-marijuana-compact/>.

149. LIGHT & RAND, *supra* note 111, at 36 ("The process of negotiating tribal-state compacts epitomizes this phenomenon. Tribes have been placed in the position of abrogating aspects of their inherent sovereignty in order to exercise the sovereign right to open gaming establishments.").

“Tribe agrees to use the proceeds of the Tribal Tax for Essential Government Services.”¹⁵⁰ While the circumstances of this arrangement seem mutually beneficial, the taxing and spending terms of this compact are an intrusion into an area that would generally be regarded as entirely within the province of the tribe’s inherent sovereignty. However, unlike the gaming compacts imposed by IGRA, these marijuana compacts are not as likely to compromise tribal sovereignty. Where IGRA imposes the compact requirement if tribes want to pursue Class III gaming, there is no such governing statute for the marijuana industry in Indian country. Thus, by choosing to enter into a marijuana compact with Washington, the Squaxin and Suquamish Tribes have not had to compromise their inherent sovereignty to the same extent as would be required by a gaming compact under IGRA.

In New York, members of the Seneca Nation of Indians approved, by voter referendum, a plan for the Nation to proceed with the adoption of a medical cannabis ordinance.¹⁵¹ New York has a highly restrictive medical cannabis law.¹⁵² Thus, the Nation is subject to a *de facto* limit on how far the Seneca Nation can move on its own marijuana policy because it must conform to New York’s highly

150. STATE OF WASH. & SUQUAMISH TRIBE, *supra* note 145, at 7–8. Under the compact, “Essential Government Services” means services provided by the Tribe including, but not limited to, administration, public facilities, fire, police, health, education, elder care, social services, sewer, water, environmental and land use, transportation, utility services, community development, and economic development.” *Id.* at 3.

151. Dale Anderson, *Seneca Nation Votes to Explore Business of Medical Marijuana*, BUFF. NEWS (Nov. 3 2015), <http://www.buffalonews.com/city-region/politics/seneca-nation-votes-to-explore-business-of-medical-marijuana-20151103>.

152. See N.Y. PUB. HEALTH LAW §§ 3360–3369 (McKinney 2016). The law is colloquially referred to as the Compassionate Care Act of 2014.

restrictive marijuana policies¹⁵³ if it hopes to avoid the troubles that have befallen the tribes discussed below.¹⁵⁴

The Alturas Indian Rancheria and Pit River Tribes, which are considered separate federally recognized tribes but share common ancestry, each legalized marijuana following the Wilkinson Memo.¹⁵⁵ Each tribe set up a separate grow operation on separate sites near Alturas, California.¹⁵⁶ In July 2015, the Tribes' marijuana operations were raided and the U.S. Attorney's Office for the Eastern District of California included the following in its press release:

[S]pecial agents with the Bureau of Indian Affairs (BIA) and the Drug Enforcement Agency (DEA), assisted by other federal and state agencies and the Modoc County Sheriff's Office, conducted a search of two large-scale marijuana cultivation facilities located on federally recognized tribal lands. . . . At both sites, law enforcement seized a total of at least 12,000 marijuana plants and over 100 pounds of processed marijuana. . . . [N]o [other] tribal property was seized, and no federal charges are pending.¹⁵⁷

In the press release, the U.S. Attorney's Office identified the problems with the tribal marijuana operations that

153. *See id.* For example, New York does not permit smoked marijuana, and the list of conditions qualifying for medical use is restrictive and includes only those conditions defined as "serious" in § 3360(7).

154. In New York, under 25 U.S.C. § 232, both the federal and state governments have concurrent criminal jurisdiction over Indian country, thus allowing either the federal or state governments, under appropriate circumstances, to bring enforcement actions against the Seneca Nation for its marijuana policy. *See* 25 U.S.C. § 232 (2012).

155. Julian Brave NoiseCat, *These Native American Tribes Legalized Weed, but That Didn't Stop Them from Getting Raided by the Feds*, HUFFINGTON POST (July 18, 2015), http://www.huffingtonpost.com/entry/pit-river-marijuana-raid_us_55a938cfe4b0f904bebf52a.

156. *Id.*

157. *Federal and Local Law Enforcement Execute Search Warrants at Large Scale Commercial Marijuana Cultivation Facilities on Tribal Lands*, U.S. DEP'T JUST. (July 8, 2015), <http://www.justice.gov/usao-edca/pr/federal-and-local-law-enforcement-execute-search-warrants-large-scale-commercial>.

warranted the raids on sovereign tribal land.¹⁵⁸ First, one of the grow sites was located next to an interstate highway and the Pit River.¹⁵⁹ Second, both of the grow operations far exceeded the grow cultivation limits applicable to county land.¹⁶⁰ Lastly, tribal representatives said that the marijuana was to be distributed off tribal land but it was unclear, specifically, where the vast amount of marijuana was going to be distributed.¹⁶¹ The press release explains which of the eight Cole Memo enforcement priorities were implicated by the Tribes' activities: "the diversion of marijuana to places where it is not authorized and potential threats to public safety, both of which are listed priorities in Department of Justice guidelines."¹⁶² According to the press release, the U.S. Attorney's Office tried to consult with the tribal representatives before resorting to the raid.¹⁶³ In the case of the Alturas Indian Rancheria and Pit River Tribes, a failure to accommodate the discretionary list of enforcement priorities and a failure to communicate with federal agents, coupled with a grow operation that exceeded state strictures, yielded a massive raid.

Perhaps the most well-advertised marijuana plans in Indian country in the year following the Wilkinson Memo were to be undertaken by the Flandreau Santee Sioux Tribe. In June 2015, the Tribe legalized marijuana.¹⁶⁴ The Tribe had plans to open a marijuana resort on its reservation lands that would include a smoking lounge with a nightclub, bar

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Bridget Bennett, *Flandreau Santee Sioux Reservation Legalizes Marijuana*, KSFY (June 15, 2015), <http://www.ksfy.com/home/headlines/Flandreau-Santee-Sioux-Reservation-legalizes-marijuana-307470861.html>.

and food service, and more.¹⁶⁵ The plan was to have a New Year's Eve party to launch the new business venture, and in September 2015, the Tribal President Anthony Reider was quoted saying, "[w]e want it to be an adult playground."¹⁶⁶ The Tribe, whose reservation is located in South Dakota,¹⁶⁷ partnered with Monarch America, a Colorado-based consulting firm that offered assurances that the Tribe's marijuana operation was clean, efficient, proficient, safe, and secure.¹⁶⁸ Nevertheless, by November 2015 the Tribal Council¹⁶⁹ voted to temporarily suspend the marijuana operation and set the entire marijuana crop ablaze.¹⁷⁰

The shocking aspect of this tribal action is that it seems to have been prompted as part of the Tribe's ongoing relationship with state and federal governments. Tribal officials were in consultation with federal officials at the time that the Tribal Council voted to suspend the marijuana operation. The Tribe's attorney, Seth Pearman, said in a statement:

After government-to-government consultation with the United States, the Flandreau Santee Sioux Tribe is temporarily suspending

165. Regina Garcia Cano, *South Dakota Tribe to Open Nation's 1st Marijuana Resort*, SEATTLE TIMES (Sept. 29, 2015), <http://www.seattletimes.com/seattle-news/marijuana/south-dakota-tribe-to-open-nations-1st-marijuana-resort/>.

166. *Id.*

167. Marijuana is illegal in South Dakota. S.D. CODIFIED LAWS §§ 22-42-6 to -7 (2016).

168. Cano, *supra* note 165.

169. "Tribal Councils are the elected lawmaking bodies of tribal governments," and generally have broad authority over a wide range of subjects. COHEN'S HANDBOOK, *supra* note 63, at § 4.04[3][c][ii].

170. Sarah Sunshine Manning, *Flandreau Santee Sioux Tribe Burns Crop, Suspends Marijuana Operation*, INDIAN COUNTRY MEDIA NETWORK (Nov. 8, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/08/flandreau-santee-sioux-tribe-burns-crop-suspends-marijuana-operation-162363>. Let us not miss the opportunity to enjoy the irony in this solution to a marijuana enforcement problem.

its marijuana cultivation and distribution facilities. This suspension is pivotal to the continued success of the marijuana venture, and Tribal leadership is confident that after seeking clarification from the United States Department of Justice, it will be better suited to succeed. The Tribe will continue to consult with the federal and state governments, and hopes to be granted parity with states that have legalized marijuana. The Tribe intends to successfully participate in the marijuana industry, and Tribal leadership is undaunted by this brief sidestep.¹⁷¹

This statement reveals that the current state of the law promotes stagnation rather than progress. The Tribe's options were so constrained by federal and state policy that the only way to prevent total loss of the investment in the marijuana business was to suspend the current marijuana operation and destroy the existing product to prevent a more comprehensive loss brought on by a federal or state raid. Tribal Councilmember¹⁷² Kenny Weston is quoted as saying, "[w]e made an investment, and we have to continue to protect that investment while legislation catches up to the current times."¹⁷³ Councilmember Weston's statement perfectly captures the problematic state of the law on marijuana activity in Indian country; despite guidance offered by the Cole and Wilkinson Memos, federal law is in fact perpetually playing catch up with the smaller jurisdictions within our national borders.

This tribal reaction shows what an untenable holding pattern Indian country is in with regard to the potential investment benefits and economic development opportunities associated with the marijuana industry. With respect to the Santee Sioux Tribe's predicament, the Office of the South Dakota Attorney General released a statement:

171. *Id.*

172. Tribal Councilmembers are the individual members who are elected to sit on the Tribal Councils. See COHEN'S HANDBOOK, *supra* note 63, at § 4.04[3][c][ii].

173. Manning, *supra* note 170.

The possession, distribution and manufacture of marijuana is a violation of both federal and state law. Unfortunately, the federal government has created confusion in relation to marijuana jurisdiction in Indian Country with recent inconsistencies. . . . “I want to encourage Tribal leaders to continue to work with state authorities to better ensure our respective laws are followed . . . and that both Indian and non-Indian persons are not put in harm’s way by the jurisdiction complexities being created by our federal government,” said [South Dakota] Attorney General Jackley.¹⁷⁴

In this statement, the South Dakota Attorney General quite squarely rebuffs the federal government’s policy position on marijuana in Indian country. In this scenario, a tribe made an investment in response to the Wilkinson Memo, hired viable consultants, and was responsive to federal and state cautions. The result, however, was a stalled investment, a wasted product, and a lost opportunity. The Santee Sioux Tribe, in this instance, was unable to capitalize on the promising investment opportunity associated with a vibrant marijuana industry. Even though the complex concept of tribal sovereignty ought to grant some right of self-determination,¹⁷⁵ Indian tribes are nevertheless subject to the plenary power of the federal government, the discretionary guidance of the eight enforcement priorities in the Wilkinson Memo, and the capricious flux in the law that comes as a result of the federal government’s inability to craft a stable and viable marijuana policy.

174. *Jurisdiction over Marijuana in South Dakota and Our Reservations*, OFF. S.D. ATT’Y GEN., <https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=1377> (last visited Feb. 21, 2017).

175. LIGHT & RAND, *supra* note 111, at 5.

III. TOKEN SUGGESTIONS ON HOW THE FEDERAL, STATE, AND TRIBAL GOVERNMENTS CAN BEST APPROACH THE INTRICACIES OF MARIJUANA PROGRAM DEVELOPMENTS IN INDIAN COUNTRY

A. *The Times They Are A-Changin'*¹⁷⁶

Congress should act to reschedule marijuana. In the bygone days of 2009, then President Obama joked during a town hall meeting about the massive number of questions he had received from young people who wanted him to address the notion that legalizing marijuana might act as a viable economic stimulus policy.¹⁷⁷ Well, today, it is not just young cannabis-crazy hipsters who are proposing that the federal government ought to reconsider its marijuana policies. Now it is U.S. Senators like Kirsten Gillibrand and Cory Booker who are calling on the federal government to act to update its anachronistic marijuana laws and policies.¹⁷⁸ During his senate confirmation hearings, Jeff Sessions made remarks that indicated the need for Congress to change the CSA to better conform to the realities of marijuana activities in the United States. A Republican Senator from Utah, Mike Lee, asked Sessions to comment on the incongruence between marijuana policies at the state level compared with the federal government's complete prohibition of marijuana at the federal level. In reply, Sessions explained that "one obvious concern is that the United States Congress has made the possession of marijuana in every state and distribution of it an illegal act . . . if that something is not desired any longer, Congress should pass a law to change the rule."¹⁷⁹

176. BOB DYLAN, *The Times They Are A-Changin'*, on *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964).

177. Sam Stein, *Obama Takes Pot Legalization Question During Townhall*, HUFFINGTON POST (Apr. 26, 2009), http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat_n_179563.html.

178. See *supra* notes 1–9.

179. *Attorney General Confirmation Hearing, Day 1 Part 2*, *supra* note 13 (relevant questioning occurs between 1:21:11 and 1:25:50).

Here, at least, Sessions offers good advice. Congress must recognize that the slew of ballot measures and legislation approving legal marijuana at the state level is evidence of a nationwide desire to allow for legal use and effective regulation of marijuana. Senators from both sides of the aisle have called on Congress to change federal law, and as such, Congress should act to change the CSA's position on marijuana so that the nation's laws more closely approximate the realities of marijuana activities in the United States today.

B. *The Cabazon Concepts Should Control*

Whenever a state government or law enforcement agency considers bringing a marijuana enforcement action in Indian country, the state should, at the very least, consider the Court's reasoning in *Cabazon*. Where the state has legalized marijuana subject to regulation, the state should not interfere with tribal governments that do the same. As was the case with Indian gaming, there is a general buzz surrounding Indian country's efforts to develop marijuana programs and the potential economic development benefits that could abound. The *Cabazon* Court made clear that for tribes, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."¹⁸⁰ If, as those like Light and Rand suggest, tribal sovereignty is a tribe's inherent right of self-determination, then once a tribe has determined that its members will benefit from pursuing a marijuana program, the state should not act to interfere with that program unless it represents a flagrant violation of the state's public policy.¹⁸¹

Additionally, in *Cabazon* the Court noted that the

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

181. *See id.* at 209.

federal government had encouraged Indian gaming as a means of developing tribal economies.¹⁸² The Court explained that it is important to consider “traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.”¹⁸³ With these concepts in mind, the Wilkinson Memo can act as a guidepost to any state that considers bringing an enforcement action in Indian country. If a tribal marijuana program complies with the Cole Memo, then the federal government is not likely to exercise its discretion to pursue marijuana enforcement efforts. Even where Congress has granted a statutory basis for a state to exercise jurisdiction in Indian country, the state should heed the federal government’s enforcement priorities, regardless of the state’s own position, because the traditional “policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”¹⁸⁴ Thus, if the DOJ, under the Cole factors, would be unlikely to bring an enforcement action against a tribal marijuana activity, then the state should not exercise any of its jurisdiction in Indian country.

Ultimately, *Cabazon* held that states do not have a civil/regulatory authority over Indian country.¹⁸⁵ *Cabazon*, as it can be construed to apply to tribal marijuana programs, should stand for the proposition that if a state chooses to permit marijuana activity, subject to state regulatory

182. The federal government helped finance the development of tribal gaming enterprises, helped approve tribal gaming ordinances, and reviewed management contracts for gaming enterprises. *Id.* at 218.

183. *Id.* at 216 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983)).

184. *Rice v. Olson*, 324 U.S. 786, 789 (1945). This is an oft-cited principle continually reaffirmed in the Supreme Court’s opinions. *See, e.g., McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973) (quoting *Rice*, 324 U.S. at 789).

185. *Cabazon*, 480 U.S. at 209–10.

authority, then it does not have the power to criminalize or regulate marijuana activity on tribal lands.

Allowing *Cabazon* to control the effects of state marijuana policy over Indian country does not resolve all the tenuous issues. For example, when a reservation is located within a state that has criminal jurisdiction over that reservation, the tribe cannot freely pursue marijuana legalization if the state has not yet done so, or at least not without fear of being the subject of an enforcement action by the state. Essentially, the tribe must first wait for a state to decriminalize marijuana before the tribe can take haven in *Cabazon's* civil/regulatory and criminal/prohibitory dichotomy. And so, in those cases, tribes are subject to the public policy determinations of the state. That inherently usurps some of the tribe's sovereignty. For example, in South Dakota, where marijuana is still illegal under state law,¹⁸⁶ tribes within that boundary are not able to pursue marijuana programs as freely as they might be in a state with more progressive marijuana policy. At this moment, when the nation's marijuana policy is so fragmented, the concepts set forth in *Cabazon* function as a useful starting point for determining when states ought not to interfere with tribal marijuana programs.

C. *The Trouble with the Cole Factors in Indian Country*

Another problem that needs to be addressed is the operation of the third Cole factor in Indian country. The Cole Memo makes it a federal enforcement priority to prevent "the diversion of marijuana from states where it is legal under state law in some form to other states."¹⁸⁷ Presumably, the Cole factors were not written in consideration of the geographic realities of Indian country, where the Indian

186. S.D. CODIFIED LAWS §§ 22-42-6 to -7 (2016).

187. COLE MEMO, *supra* note 40, at 1.

territory at issue is essentially an island of Indian country situated within the greater state boundaries.¹⁸⁸ The Wilkinson Memo simply re-appropriated the existing set of priorities and made them applicable in Indian country.¹⁸⁹ As stated above, the third Cole factor makes it an enforcement priority to prevent the diversion of marijuana from a place where it is legal to places where it is illegal. Does that mean that the factor will automatically be triggered if a marijuana program operated in Indian country is legal under tribal law, but the tribe's territory is surrounded by a state that prohibits marijuana?¹⁹⁰ This risk constrains tribes and interferes with the tribal right to self-determination. The DOJ should issue a clarification that more adequately addresses the features of an on-territory tribal marijuana program where the tribe's territory is subsumed within a state where marijuana is illegal.

D. *Nip IGRA in the Bud*

As this Comment suggests, there are some similarities between the Indian gaming industry and the development of tribal marijuana enterprises. Those similarities should not lead the federal government to create a regulatory scheme for tribal marijuana that duplicates IGRA's grant of state regulatory control over Indian gaming. The federal government could someday act to reschedule, legalize, or regulate marijuana. If that does occur, the federal government should maintain its plenary power over Indian country to the exclusion of the states. The tribal/state gaming compact provisions under IGRA should not be

188. I borrowed this idea of the problems of "legalization on an island" from a prominent Indian law blog. Lael Echo-Hawk, *Cannabis in Indian Country—A Year Later...*, SMOKE SIGNALS (Jan. 28, 2016), <http://www.smokesignalsindianlaw.com/2016/01/28/cannabis-in-indian-country-a-year-later/>.

189. WILKINSON MEMO, *supra* note 58, at 2.

190. See COLE MEMO, *supra* note 40, at 1.

replicated in the context of tribal marijuana development because gaming compacts effectively granted the states an “active role” in regulating the gaming industry in Indian country.¹⁹¹ The federal government should not enact a statutory scheme that allows states to have the considerable regulatory leverage that the gaming compact model has wrought under the reign of IGRA. After all, *Cabazon* asserts “a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.”¹⁹² Furthermore, “[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”¹⁹³ As Light and Rand argue, a federal statute that requires tribes to submit to compact negotiations with a state government is a debasement of tribal sovereignty. The federal government’s plenary authority over Indian affairs already subjects tribes to the strictures of the Cole Memo or any subsequent federal marijuana policy. The federal government should not further infringe on the tribal right of self-determination by granting state jurisdiction over Indian marijuana activity as it did with Indian gaming under IGRA. Rather, if tribal governments determine that a compact relationship with the state makes good political or economic sense, the tribe may pursue that avenue of its own accord. The examples of the marijuana compacts in Washington demonstrate how a tribe can autonomously pursue a compact arrangement.

191. LIGHT & RAND, *supra* note 111, at 44.

192. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

193. *Rice v. Olson*, 324 U.S. 786, 789 (1945).

E. *Tribal Governments: Be Cautious and Promote Marijuana Development as an Exercise of Tribal Sovereignty*

The takeaways from the experiences of tribes that are already operating marijuana activities is that a great deal depends on the legal status of marijuana in the state in which the tribe is located. As in the case of the Santee Sioux Tribe,¹⁹⁴ moving ahead of South Dakota's prosaic marijuana law, and in the case of the Alturas Indian Rancheria and Pit River Tribes,¹⁹⁵ moving ahead of even county law, can have consequences. Tribes risk a total loss of investment resources and product if a marijuana operation is the subject of a federal or state enforcement action. An ongoing dialogue and transparent discourse with the U.S. Attorney's Office in the area, and with state and local prosecutors and law enforcement, is a necessary ingredient if tribes wish to succeed in the marijuana trade. However, such a dialogue is no guarantee that a tribe's investment is secure against enforcement from federal, state, or local authorities.

The indigenous perspectives on tribal sovereignty and self-determination provide a genuine and authoritative foundation from which to engage in marijuana production. As tribes pursue marijuana developments, the tribes effectively embody their inherent status as self-governing indigenous nations that have legal, political, cultural, and economic authority to determine their own futures and the future of marijuana in Indian country.

CONCLUSION

The slow burn of the marijuana policy debates at the federal and state level reaches a fever pitch when those debates begin to take into account the marijuana

194. *See supra* Section II.D.

195. *See id.*

developments occurring in Indian country. As the laws stand now, tribes seeking to minimize the risk of federal prosecution can craft regulations that advance the eight enforcement priorities of the Cole and Wilkinson Memos. Furthermore, Light and Rand's concepts and suggestions for preserving and prioritizing the indigenous perspectives on tribal sovereignty as tribes' inherent right of self-determination should be allowed to govern the foundations of marijuana activity in Indian country. Crucially, the federal government should take action to establish a viable marijuana policy that effectively recognizes and addresses the virtual legality of marijuana activity, rather than the nascent state of the discretionary guidelines offered in the Cole and Wilkinson Memos. Traditional notions of federal Indian law and policy generally encourage the states to refrain from exercising jurisdiction over tribal marijuana operations.

Tribal marijuana programs will proceed most successfully when the federal and state marijuana laws are more unified and more fully clarified for application in Indian country. Finally, the development of marijuana activity in Indian country offers an opportunity for the federal and state governments to respect indigenous perspectives on tribal sovereignty so that marijuana development in Indian country can act as a conduit for tribal self-sufficiency, independence, and economic prosperity.