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Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories

Katherine Florey

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MAKING IT WORK: TRIBAL INNOVATION, STATE REACTION, AND THE FUTURE OF TRIBES AS REGULATORY LABORATORIES

Katherine Florey*

Abstract: This Article examines a growing phenomenon: even as the Supreme Court has steadily contracted the scope of tribes' regulatory authority, many tribes have in recent years passed innovative laws and ordinances, often extending well beyond any comparable initiatives at the state or local level. Recently, for example, the Navajo Nation passed a comprehensive taxation scheme designed to discourage the consumption of unhealthy food items and to subsidize the purchase of healthy ones—a scheme far more ambitious than the soda tax efforts that have stalled in many cities and states. Likewise, amid national controversy over marijuana legalization, the Flandreau Santee Sioux Tribe sought to open a “marijuana resort” in a state with strict anti-marijuana policies; meanwhile, other tribes have moved in the opposite direction, banning on-reservation use of drugs and alcohol even where it would be allowable under state law.

Yet while we are accustomed to thinking of states as Brandeisian laboratories of democracy that pioneer innovations from which other jurisdictions can benefit, no ready model exists for how states and tribes should interact within the realm of regulatory experimentation. In practice, state reactions to tribal innovations have ranged from indifference to hostility to imitation, and few doctrines or practices exist to mediate issues that may arise from state-tribal regulatory conflict. Against this unsettled backdrop—which includes 2016's inconclusive Supreme Court decision in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*—this Article explores what contribution tribal regulation can and should make to the larger patchwork of regulatory innovation among states. It attempts, first, to survey some notable instances in which tribes have engaged in regulatory experimentation. It then considers the ways in which tribal innovation has affected and been affected by neighboring states, and the degree to which these effects resemble comparable dynamics in the interstate context. It closes by recommending several policies—among them tribal autonomy, clear delineation of tribal and state law's respective territorial scope, and possible federal involvement—that may serve to foster a productive climate in which states and tribes can mutually influence and learn from each other.

* Professor of Law, University of California, Davis School of Law. I wish to thank Afra Afsharipour, John Patrick Hunt, Courtney Joslin, Brian Soucek, and Rose Cuisson Villazor, and other UC Davis faculty workshop participants for their comments on this Article. I thank UC Davis School of Law, particularly Dean Kevin Johnson and Associate Dean Madhavi Sunder, for providing generous financial support for this project. Finally, I am immensely grateful to Aviva Simon for her stellar and indefatigable research assistance.

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INTRODUCTION

In November 2014, the voters of Berkeley, California, approved by an overwhelming margin¹ a one-cent-per-ounce tax on soda (the “Berkeley

1. See *City of Berkeley Sugary Beverages and Soda Tax Question, Measure D*, BALLOTPEDIA (Nov. 2014), [https://ballotpedia.org/City_of_Berkeley_Sugary_Beverages_and_Soda_Tax_Question_Measure_D_\(November_2014\)](https://ballotpedia.org/City_of_Berkeley_Sugary_Beverages_and_Soda_Tax_Question_Measure_D_(November_2014)) [https://perma.cc/D6FA-9UU4].

tax”)—a measure described in the media as “groundbreaking”² and the “nation’s first.”³ The beverage industry, which has regarded such taxes as serious threats to its business, ultimately spent more than \$2 million to defeat the measure⁴ and has campaigned vigorously to ensure that similar taxes do not pass elsewhere.⁵ Public health researchers, by contrast, have heralded the tax, arguing both that its very existence helps change norms around soda consumption and that it can serve as a model for other jurisdictions.⁶

Meanwhile, just days after the passage of the Berkeley tax, Navajo Nation President Ben Shelly signed the Healthy Diné Nation Act, establishing a comprehensive plan to encourage consumption of healthier foods and to lower diabetes rates.⁷ The Act, which went into effect in April 2015, imposes a two percent gross receipts tax on all “minimal-to-no-nutritional-value food,” which it extensively defines and catalogs.⁸ A related initiative a year earlier had removed all tribal taxes from the sale of fresh fruits and vegetables.⁹ Although the Navajo

2. See Jan Dizon, *Berkeley Defeats Big Soda, Imposes First Soda Tax in U.S.*, TECH TIMES (Nov. 6, 2014), <http://www.techtimes.com/articles/19587/20141106/berkeley-defeats-big-soda-imposes-first-soda-tax-in-u-s.htm> [https://perma.cc/W8MG-RLAP].

3. See Sam Frizell, *Nation’s First Soda Tax Passed in California City*, TIME (Nov. 5, 2014), <http://time.com/3558281/soda-tax-berkeley/> [https://perma.cc/9S6U-BZVU].

4. See Robert Reich et al., *Op-ed: The Berkeley Tax May Have Passed, But the Campaign Has Not Ended for Big Soda*, BERKELEYSIDE (Mar. 19, 2015), <http://www.berkeleyside.com/2015/03/19/the-berkeley-tax-may-have-passed-but-the-campaign-has-not-ended-for-big-soda/> [https://perma.cc/NTH2-ATDH].

5. Elizabeth Whitman, *When Soda Taxes Fail: Coca-Cola, Pepsi Spent \$100M Against Public Health Initiatives, New Analysis Shows*, INT’L BUS. TIMES (Aug. 25, 2015) <http://www.ibtimes.com/when-soda-taxes-fail-coca-cola-pepsi-spent-100m-against-public-health-initiatives-new-2067433> [https://perma.cc/WVE2-WK3R].

6. Tom Lochner, *Berkeley: First-in-Nation Soda Tax Begins to Show Results*, THE MERCURY NEWS (Nov. 19, 2015), http://www.mercurynews.com/news/ci_29137613/berkeley-first-nation-soda-tax-begins-show-results [https://perma.cc/P2VB-PGTZ].

7. See Press Release, Navajo Nation, President Shelly Signs Healthy Diné Nation Act of 2014 into Law (Nov. 21, 2014), <http://www.navajo-nsn.gov/News%20Releases/OPVP/2014/nov/Healthy%20Dine%20Nation%20Act%20of%202014.pdf> [https://perma.cc/9PWK-B9NU] [hereinafter Healthy Diné Nation].

8. See *id.*

9. See Leilani Clark, *The Navajo Nation Will Soon Have the Country’s First-Ever Junk-Food Tax*, MOTHER JONES (Mar. 25, 2015, 6:00 AM), <http://www.motherjones.com/environment/2015/03/navajo-nation-junk-food-tax> [https://perma.cc/C77M-VLL7]; *Council Supports Healthy Living By Eliminating the Sales Tax on Fresh Fruits and Vegetables*, NAAT’ÁJÍ NAHAT’Á HANE’ LEGIS. BRANCH NEWS, 2014 SPRING COUNCIL SESSION (2014), http://www.navajo-nsn.gov/PDF%20Files/2014/Naataji%20Nahat_a%20Hane%20-%202014%20Spring%20Council%20Session.pdf [https://perma.cc/KY72-45L3].

measure has received some media attention outside Indian country,¹⁰ the Berkeley tax has been touted far more often for its “first” status, with one public health advocate describing the Berkeley measure as “the policy that changed the public health world.”¹¹ Yet the Navajo initiative is more radical, targeting not just soda but the full spectrum of food consumption choices. It also affects more people: in 2010, the Navajo Nation’s population was 173,667,¹² more than fifty percent larger than Berkeley’s 2010 population of 112,580.¹³

The Navajo Nation’s decision to embark upon such a sweeping public health venture illustrates a growing phenomenon: in the past couple of decades, tribes have increasingly embraced the potential that their sovereign status offers for regulatory experimentation. Even as the Supreme Court has steadily contracted the scope of tribes’ regulatory authority over nonmembers,¹⁴ many tribes have in recent years passed innovative laws and ordinances that at times extend well beyond any comparable initiatives at the state or local level. Amid national controversy over marijuana legalization, the Flandreau Santee Sioux Tribe attempted to open a “marijuana resort” to attract tourists,¹⁵ while other tribes have moved in the opposite direction, strictly prohibiting on-reservation use of marijuana even where it is legal under the law of the surrounding state.¹⁶ In the environmental arena, Elizabeth Ann Kronk

10. See, e.g., Tristan Ahtone, *The Navajo Nation Just Passed a Junk Food Tax. Too Bad Junk Food Is All You Can Buy*, TALKING POINTS MEMO (Apr. 23, 2015), <http://talkingpointsmemo.com/theslice/navajo-nation-junk-food-tax> [https://perma.cc/XNJ4-XTX4]; Clark, *supra* note 9.

11. See Lochner, *supra* note 6.

12. See DEMOGRAPHIC ANALYSIS OF THE NAVAJO NATION USING 2010 CENSUS AND 2010 COMMUNITY SURVEY ESTIMATES 6 (2010), <http://azcia.gov/Documents/Links/DemoProfiles/Navajo%20Nation.pdf> [https://perma.cc/5JD9-3ZWC].

13. See *City of Berkeley 2000–2010*, BAY AREA CENSUS (2010), <http://www.bayareacensus.ca.gov/cities/Berkeley.htm> [https://perma.cc/WML2-U9TD]. It is also worthy of note that, because Berkeley is part of a large metropolitan area, residents likely have more opportunities than do members of the Navajo Nation to purchase soda in surrounding communities not subject to the tax (and this may further diminish the tax’s impact).

14. For an overview of this trend, see generally Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999).

15. See Sarah Sunshine Manning, *Flandreau Santee Sioux Tribe Burns Crop, Suspends Marijuana Operation*, INDIAN COUNTRY TODAY (Nov. 8, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/08/flandreau-santee-sioux-tribe-burns-crop-suspends-marijuana-operation-162363> [https://perma.cc/A9K7-SEZ3] [hereinafter *Tribe Burns Crop*]; Richard Walker, *Let It Be Pot: Two Washington State Tribes on Board*, INDIAN COUNTRY TODAY (Dec. 2, 2015), <http://indiancountrytodaymedianetwork.com/2015/12/02/let-it-be-pot-two-washington-state-tribes-board-162613> [https://perma.cc/9CEC-9QTB].

16. See Walker, *supra* note 15 (describing resistance of Yakama Nation to marijuana legalization in surrounding Washington).

Warner has extensively documented instances of tribal experimentation and has argued that tribes can exert a productive influence on states, both through offering models of specific regulatory practices¹⁷ and helping to spread broader “soft law” norms.¹⁸ Gun regulation,¹⁹ consumer protection,²⁰ and models of justice and conflict resolution²¹ are other areas in which tribes have sometimes departed from the law of surrounding states in order to pioneer innovative policies that address distinct tribal needs.

State and municipal reactions to such tribal innovations have ranged from indifference²² to hostility²³ to imitation.²⁴ But all are, in some sense, linked by a common thread: in contrast to the relationships between sister states, where we think of states as Brandeisian laboratories of democracy that can and do influence each other, neither the Constitution nor established doctrine provides a ready model of how states and tribes should interact within the realm of regulatory experimentation.

On the one hand, this is understandable. Unlike states, tribes have never signed on to any constitutional bargain and do not have the same clear position of parity with respect to states as sister states do with each other. More broadly, while tribes have responsibility to their own members, they owe nothing in particular to states or to the federalist system more generally. Meanwhile, although states owe tribes a certain degree of autonomy to run their own affairs,²⁵ the Constitution does not oblige states to defer to tribal law in the same way they must, in some

17. Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories,”* 86 U. COLO. L. REV. 789, 792 (2015).

18. See Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory,* 47 ARIZ. ST. L.J. 857 (2015).

19. See Angela R. Riley, *Indians and Guns,* 100 GEO. L.J. 1675, 1729 (2011).

20. See FIRST NATIONS DEV. INST., BUILDING TRUST: CONSUMER PROTECTION IN NATIVE COMMUNITIES 5 (2011) [hereinafter BUILDING TRUST].

21. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law,* 24 N.M. L. REV. 225, 244–52 (1994) (discussing tribal innovation in models of justice in conflict resolution).

22. The Healthy Diné Nation Act, for example, has received relatively little publicity outside Indian country. See, e.g., Lochner, *supra* note 6 (describing importance of Berkeley tax without mentioning Navajo tax).

23. See, e.g., Manning, *supra* note 15 (describing the role South Dakota’s opposition to marijuana resort played in tribe’s decision to suspend plans for the resort).

24. See Wenona T. Singel, *The First Federalists,* 62 DRAKE L. REV. 775, 838–39 (2014) (discussing influence of tribal peacemaking processes outside Indian country).

25. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[1] (2012) (discussing principles of “tribal autonomy” and federal supremacy that limit states’ role in Indian country) [hereinafter COHEN’S HANDBOOK].

situations, to sister-state law.²⁶ Finally, limits on tribal regulatory jurisdiction imposed by the Supreme Court over the past few decades may call into question the degree to which tribes may regulate anyone who does not have a close tribal affiliation, limiting both the reach and the effectiveness of tribal programs.²⁷

At the same time, as several commentators have argued, tribes are in some respects peculiarly well-positioned to engage in Brandeisian experimentation.²⁸ In many areas, tribes enjoy greater freedom to choose their own course than states. For example, tribes are not bound by the Second Amendment, meaning that tribes are able (at least in theory) to engage in more sweeping gun regulation than may be possible in the state arena.²⁹ In other areas that are subject to extensive federal regulation, such as environmental law, tribes may be permitted greater autonomy relative to states to develop their own policies.³⁰ Even where tribes do not enjoy greater formal independence, they may be in practice less likely targets than states for organized industry lobbying campaigns or other forces that may create pressure on states to not deviate from the status quo.³¹

In addition, the sheer number and diversity of tribes in the United States³² creates myriad opportunities for innovation, multiplying both the number of regulatory issues that one tribe or other will confront and the possibilities for adopting varying solutions. Furthermore, because tribes obviously have different histories from states and may have different priorities and values, they may approach issues from a perspective that

26. See *id.* § 7.07[1][a]–[b] (contrasting states’ strong obligation to enforce judgments under the Full Faith and Credit Clause with the uncertainty surrounding states’ obligations as to tribal judgments).

27. See *id.* § 6.02[2][b] (discussing limits the Supreme Court has placed on tribal regulation of nonmembers on nontribal land).

28. See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1729 (2011) (arguing that Indian nations are “self-selected laboratories for gun laws” that are “positioned to reclaim some of the local control over gun regulation that has historically marked this body of law”); Singel, *supra* note 24, at 825–26 (discussing relevance of Brandeis’s metaphor to Indian country); Valencia-Weber, *supra* note 21, at 227 (1994) (stating, in the context of restorative justice programs, that “[i]n tribal courts can be the possible laboratories for new, beneficial concepts in law”).

29. See Riley, *supra* note 28, at 1715.

30. See Singel, *supra* note 24, at 843; Warner, *Laboratories*, *supra* note 17, at 794–95.

31. For example, while the Navajo Nation was apparently subject to some lobbying by the soft-drink industry to limit the scope of its junk food tax, it was able to resist such pressures. See Nigel Duara, *Navajo Nation Sees Tax on Junk Food as Way to Combat Health Problems*, L.A. TIMES (Mar. 30, 2015), <http://www.latimes.com/nation/la-na-ff-navajo-tax-20150330-story.html> [<https://perma.cc/3TVH-5DUL>].

32. See Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005) (discussing diverse nature of tribes).

is, from the state point of view, novel and unexpected.³³ The wide range of experiences and approaches among tribes is particularly relevant because tribes in general often have, relative to states, smaller and more responsive governmental structures³⁴ that may allow them to respond more nimbly to evolving regulatory challenges.

Yet despite this evidence of tribal innovation and state reaction, little guidance exists for how tribes and states should relate to each other in the regulatory arena. In the interstate context, various doctrines of horizontal federalism—from the Full Faith and Credit Clause to choice of law to principles limiting extraterritorial regulation—mediate how states interact with each other, sheltering them from the policy choices of sister states' citizens in some instances while enabling cooperation and borrowing in others. By contrast, the pattern of state-tribal relations in the area of regulatory comity and competition is, statutorily and constitutionally speaking, for the most part a blank slate.³⁵ Moreover, the doctrines outlining the respective spheres of state and tribal regulatory authority are notoriously unclear.³⁶

For at least three reasons, this is an undesirable state of affairs. First, the blurred contours of tribal sovereignty in relation to state regulation³⁷ make it more difficult for tribes to know the areas of law over which they have authority and hence more difficult for them to engage in experimentation. Second, the prevailing uncertainty is a recipe for conflict in situations where tribal and state policy positions diverge, particularly in situations where substantial spillover effects are possible.³⁸ Finally, the absence of devices for smoothing state-tribal

33. See Valencia-Weber, *supra* note 21, at 226–27 (noting that “[t]wentieth-century American Indians are not copies of Anglo-Americans; as indigenous people they are engaged in jointly preserving and changing a cultural way of life”).

34. See Singel, *supra* note 24, at 834 (describing tribal governance as tending to be responsive to community concerns).

35. A notable exception to this general pattern is in the area of tribal gaming, where the Indian Gaming Regulatory Act (“IGRA”) both sets up various mechanisms for tribal-state negotiation and—by making the games that must be discussed partially contingent on what state law allows—sometimes provokes changes in state law in response to tribal plans. See *infra* notes 262–77 and accompanying text. Part IV of this Article will discuss IGRA’s successes and failures in surveying possible models for tribal-state interaction in this area.

36. See *infra* notes 319–31 and accompanying text.

37. See *id.*

38. See Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 100 (2015) (cataloging many instances of “conflict between tribal and state interests” in areas such as environmental regulation and taxation).

relations may impede the sort of productive borrowing of successful innovations that is common in the state context.³⁹

Against this backdrop, this Article will both explore what contribution tribal regulation can and should make to the larger patchwork of regulatory innovation among states and consider what formal and informal mechanisms might serve to enhance that contribution. While this Article is not the first to note the potential of tribes as regulatory laboratories⁴⁰ or to offer an account of how tribes might fit into the larger picture of federalism,⁴¹ it aims to fill a gap in the literature by focusing on the horizontal tribal-state relationship.

Part I of this Article discusses how the model of imitation and innovation has worked in the state context and the challenges—such as “races to the bottom” and spillover effects—that Brandeis’s ideal of policy innovation in state “laboratories” has faced over time. Part II will turn to the tribal arena, looking at several areas in which tribes are currently engaging in regulatory experimentation. Part III will discuss state-tribal regulatory interaction, including both conflict and productive borrowing, and will consider how the relationship between state and tribal regulation is both like and unlike the regulatory interactions of sister states. Part IV will close by recommending policies—including tribal autonomy, policies promoting comity between states and tribes, and possible federal involvement—that may serve to foster a productive climate in which states and tribes can mutually influence and learn from each other.

I. THE JURISDICTIONS-AS-LABORATORIES MODEL

A large literature discusses the “laboratories” model and its relationship to issues of horizontal federalism in the interstate context. The following section traces the history of the “laboratories” idea and discusses the aspects of interstate experimentation most relevant to tribes.

39. See *infra* notes 58–71 and accompanying text.

40. See, e.g., Riley, *supra* note 28, at 1729; Valencia-Weber, *supra* note 21, at 227; Warner, *Laboratories*, *supra* note 17; Warner, *Lessons*, *supra* note 18.

41. See, e.g., Singel, *supra* note 24.

A. *The Laboratories Metaphor in the Interstate Context*

In *New State Ice Co. v. Liebmann*,⁴² Justice Brandeis's dissent first put forth what has become one of the most well-worn metaphors in American legal and political thought, in noting that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory" and so "try novel social and economic experiments without risk to the rest of the country."⁴³ While the notion that states are "laboratories of democracy" has taken on a life of its own, it is worth noting the context in which Justice Brandeis made his original observation. The *Lochner*-era *New State Ice* was a case in which the majority invalidated an Oklahoma regulation requiring that ice manufacturers obtain a state license before operating,⁴⁴ finding that "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistent with the Fourteenth Amendment."⁴⁵ In response, Justice Brandeis argued that state legislatures were the best judge of local conditions and should be given wide latitude to legislate as they saw fit.⁴⁶ But in addition to arguing for the limits of judicial competence in matters of legislative judgment, Brandeis also suggested that the need for innovative economic regulation was vital to the national interest. "The people of the United States are now confronted with an emergency more serious than war [i.e., the Great Depression]," Brandeis observed,⁴⁷ a crisis that some believed, he went on to note, necessitated more stringent economic regulation.⁴⁸ Whatever the validity of this opinion, Brandeis argued, it should be tested by "the process of trial and error" that had produced "[t]he discoveries in physical science, the triumphs in invention."⁴⁹ Further, Brandeis went on to suggest, just as experimentation might yield solutions to the Depression, the limits that *Lochner*-esque jurisprudence had imposed on "experimentation in the fields of social and economic science," might even have been part of its cause.⁵⁰

42. 285 U.S. 262 (1932).

43. *Id.* at 311 (Brandeis, J., dissenting).

44. *Id.* at 271.

45. *Id.* at 278.

46. *Id.* at 287–88.

47. *Id.* at 306.

48. *Id.* at 306–08.

49. *Id.* at 310.

50. *Id.* at 310–11.

The “laboratories” metaphor thus originally surfaced in a debate about the degree to which a federal instrumentality—the Supreme Court—should meddle in local state affairs, and it is perhaps most often invoked in support of arguments that the federal government should allow states to experiment without interference.⁵¹ But outside the popular discourse in which “laboratories of democracy” may signal resistance to what is seen as overly intrusive federal regulation, Brandeisian experimentation also has implications for horizontal federalism. For example, and as discussed below, commentators have debated the implications of the permeability of state boundaries and the probability that spillover effects from one state’s regulations on neighboring states have for the laboratories model.

Despite the ubiquity with which the laboratories metaphor is invoked, there is relatively little scholarship on the extent to which it is empirically accurate—that is, whether states do in fact pioneer innovative policies that are then, if successful, adopted elsewhere.⁵² Many scholars have expressed skepticism about the “laboratories” model as a mechanism for legislative change and have identified political and structural reasons why the model may falter. In a well-known article, for example, Susan Rose-Ackerman argues that states are unlikely arenas for innovation, both because of incentives that exists for states to mimic policy initiatives first tried elsewhere rather than being the first to experiment and because of the tendency of elected officials to protect their jobs rather than engage in high-risk endeavors.⁵³ Likewise, Edward

51. In a 2003 editorial in the *New York Times*, for example, Adam Cohen noted the irony that, despite the fact that Brandeis was “fighting for progressive government” in urging states to step in where the federal government had failed to regulate, the notion of robust state powers subsequently became a “conservative rallying cry” for a hands-off federal government. See Adam Cohen, *Brandeis’s Views on States’ Rights, and Ice-Making, Have New Relevance*, N.Y. TIMES (Dec. 7, 2003), <http://www.nytimes.com/2003/12/07/opinion/editorial-observer-brandeis-s-views-states-rights-ice-making-have-new-relevance.html> [https://perma.cc/EXP3-E8KP]. Cohen went on to note that some liberal initiatives, such as the same-sex marriage movement, were increasingly enjoying more success at the state level, thus perhaps recapturing Brandeis’s original belief that states should serve as tools of progressive experimentation.

52. Most of the existing research has taken place in the field of political science, where scholars have attempted to model the ways in which policy diffusion in federal systems might operate. See, e.g., Frederick J. Boehmke, *Policy Emulation or Policy Convergence? Potential Ambiguities in the Dyadic Event History Approach to State Policy Emulation*, 71 J. POL. 1125 (2009) (posing some critiques of existing models); Fabrizio Gilardi & Katharina Füglistler, *Empirical Modeling of Policy Diffusion in Federal States: The Dyadic Approach*, 14 SWISS POL. SCI. REV. 413, 439 (2008) (developing a model of diffusion across Swiss cantons).

53. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980); see also Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovations in Decentralized Governments*, 58 EMORY L.J. 1333, 1339 (2009) (revisiting Rose-Ackerman’s work and concluding that it contains “a large grain of truth . . . State

L. Rubin and Malcolm Feeley have argued that “individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them” and further that, even if states were to agree on cost-sharing or other mechanisms to overcome this problem, they would have difficulty gathering adequate data to assess whether any particular innovation had been successful.⁵⁴

Despite such skepticism, the sheer ubiquity of the laboratories metaphor is notable. Not only is it widely cited in scholarship and case law,⁵⁵ but it is also one of the Supreme Court quotations perhaps best known to the general public, having been quoted, for example, by politicians as diverse as Ronald Reagan, who used his 1983 State of the Union address to advocate “restor[ing] to States and local governments their roles as dynamic laboratories of change in a creative society,”⁵⁶ and Ralph Nader, who argued in 2004 that progressive measures infeasible at the federal level can nonetheless “take hold in state legislatures.”⁵⁷ Further, there is at least some evidence that the ubiquitous use of the “laboratories” metaphor is not merely empty rhetoric. Numerous recent examples exist of new policies and regulations that have been adopted first by one state (or, in some cases, locality), then embraced gradually by a plurality or majority. For example, Arthur E. Wilmarth, Jr. argues that the dual banking system under which states retain some regulatory authority “has produced a continuing series of innovations,” from checking accounts to interstate electronic funds transfer, many of which were ultimately adopted both by other states and by the federal government.⁵⁸ Roberta Romano likewise contends that “[s]uccessful corporate law innovations diffuse rapidly across the states,” citing the example of allowing amendments eliminating outside director liability

and local governments do innovate. But they are unlikely to innovate in all instances at the optimal social level, or in a way that captures the true benefits of experimentation.”).

54. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 925–26 (1994).

55. To use one measure, Westlaw indicates that *New State Ice* has been cited in more than 4000 cases and articles; a quick survey reveals that the vast majority of citations are to Brandeis’s laboratories argument.

56. President Ronald Reagan, 1983 State of the Union Address (Jan. 25, 1983) (transcript available at <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/reagan-union-1983/> [<https://perma.cc/GT2N-PBFQ>]).

57. Ralph Nader, *State Legislatures as “Laboratories of Democracy,”* COMMON DREAMS (May 31, 2004), <http://www.commondreams.org/views/2004/05/31/state-legislatures-laboratories-democracy> [<https://perma.cc/DJ8J-YPJF>].

58. Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1156–57 (1990).

for negligence, which were pioneered in Delaware and then quickly copied by “the vast majority of states.”⁵⁹ Other recent, wide-ranging areas in which states have borrowed from each other include the use of state-sponsored lotteries (first adopted in New Hampshire in 1964 and subsequently imitated by a resounding majority of states);⁶⁰ so-called “academic bankruptcy laws,” designed to give either the state legislature or the governor the capacity to assume the operation of local school districts that consistently fail to meet performance criteria (first passed in Mississippi in 1982 and later adopted by at least twenty states);⁶¹ and criminal sentencing guidelines, adopted rapidly by a large number of states after being introduced in Minnesota in 1980.⁶² Notably, where laws deal with conduct that has significant cross-border effects, such as impaired driving, states may be particularly likely to embrace the policies of their neighbors.⁶³

Such examples do not mean, of course, that the laboratories model is universally successful or that the concerns of academics are unfounded. States may, to be sure, pass up opportunities for innovation even as they embrace others. Further, although states often borrow policies after they have had proven success,⁶⁴ states sometimes rush to imitate each other where there is little evidence of the efficacy of the underlying law. For example, after Pennsylvania passed a 2004 law providing incentives for grocers to offer more fresh food, twenty-two other states quickly followed with similar legislation, despite the fact that there appears little reason to believe that greater access to fresh food causes people to adopt more healthful diets.⁶⁵ Nonetheless, examples of borrowing are at least

59. Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2392 (1998).

60. Cletus C. Coughlin et al., *The Geography, Economics, and Politics of Lottery Adoption*, FED. RES. BANK OF ST. LOUIS REV. 165 (May/June 2006), <https://research.stlouisfed.org/publications/review/06/05/Coughlin.pdf> [<https://perma.cc/W9Z9-PWYX>].

61. Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RES. 521, 528 (2004).

62. After the Minnesota legislature adopted such guidelines in 1980, eighteen states followed suit between 1981 and 1994. See Grossback, *supra* note 61, at 536.

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

64. See, e.g., Romano, *supra* note 59 (arguing for such an effect in corporate law).

65. See Heather Tirado Gilligan, *Food Deserts Aren't the Problem: Getting Fresh Fruits and Vegetables into Low-Income Neighborhoods Doesn't Make Poor People Healthier*, SLATE (Feb. 10, 2014), http://www.slate.com/articles/life/food/2014/02/food_deserts_and_fresh_food_access_aren_t_the_problem_poverty_not_obesity.html [<https://perma.cc/WJ8X-QDHV>].

useful evidence that states actively look to each other for regulatory models, even if they may sometimes adopt them with excessive haste.

Further, states' (and other jurisdictions') experimentation may influence other jurisdictions in more than one way: in some cases, as with banking practices,⁶⁶ states have pioneered specific legal innovations that have then been adopted more or less wholesale in other jurisdictions. Yet, as Shanna Singh has discussed, states and municipalities sometimes use local law for advocacy purposes—to prove that a particular policy is workable or to affirm (with hopes of influencing debates elsewhere) a community's support for particular values.⁶⁷ Singh notes that cities, following the “laboratories” model at the local level, have adopted local policies implementing international treaties in areas such as climate change, and such practices may make a “mark on the national scene” by demonstrating that treaty compliance is “not only workable but also beneficial.”⁶⁸ Legal scholars often exhort states to do even more to pioneer new and different approaches to social, legal, and political issues. Daniel O. Conkle has argued that, in a decentralized era, states have a significant role to play in adopting “new and creative ways” to define religious freedom.⁶⁹ Scott J. Shackelford has suggested that states, along with firms, have served as useful arenas for “identifying and testing best practices” in internet governance and cybersecurity.⁷⁰ Finally, not only legislatures but also state courts may influence each other. Shane Gleason and Robert Howard have found, for example, in a study of the diffusion of education finance reform, that citations to the court opinions of other states “allow state courts to transmit models of policy change and implementation from one to another.”⁷¹ In short, abundant examples exist of state borrowing, whether in the form of specific legislation, the more generalized spread of certain ideas and values, or the sway that the opinions of one state's courts may have on the decisions of another.

66. See Wilmarth, *supra* note 58.

67. Shanna Singh, Note, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 552 (2005).

68. See *id.*

69. Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 CARDOZO L. REV. 493, 495 (1999).

70. Scott J. Shackelford, *Toward Cyberpeace: Managing Cyberattacks Through Polycentric Governance*, 62 AM. U. L. REV. 1273, 1340 (2013).

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

B. *Effects of State Competition and Imitation*

Many scholars have not only discussed the existence of state regulatory competition and borrowing but also mused on its consequences. Because some of these ideas are relevant to state-tribal regulatory competition as well, the following section discusses two: first, the question whether regulatory competition creates an undesirable “race to the bottom,” and second, issues relating to spillover effects and other extraterritorial consequences that jurisdiction-by-jurisdiction regulatory experimentation can create.

1. *Races to the Bottom*

Many commentators have worried that state regulatory autonomy will result in lowest-common-denominator policies, as states attempt to retain or enlarge their tax base to the detriment of their neighbors by, for example, offering relocation incentives to businesses or (even more troublingly) “diluting public welfare regulations to make themselves more hospitable to regulated entities.”⁷² These “races to the bottom,” in which each state “seeks to outdo the others’ concessions or face capital flight as a result of inaction,”⁷³ cause harm both to the participating states, which are forced to make more and more concessions to industry in order to compete with their neighbors, and the general public, which must suffer the consequences of more lax regulation.

In a dramatic and troubling example of how races to the bottom can take shape, Christopher L. Pederson describes the weakening of state usury laws following the Supreme Court’s conclusion, in *Marquette National Bank v. First of Omaha Service Corp.*,⁷⁴ that the law of the bank’s rather than the consumer’s home state applied to an interstate lending transaction.⁷⁵ Subsequently, in a “frenzied race-to-the bottom,”

72. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 525–26 (2008); see also Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL’Y 89, 96–97 (2012) (describing “race to the bottom” as a theory under which “competition will induce states to adopt ever lower levels of regulation in pursuit of capital investment and that this ‘race’ will leave all states worse off than they would have been had they not engaged in economic competition at the expense of other concerns”); Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 883 (2006) (“[R]ace to the bottom theorists assert that competition among states for charters has led to the systematic dilution of corporate law rules.”).

73. Erbsen, *supra* note 72, at 526–27.

74. 439 U.S. 299 (1978).

75. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121–22 (2008).

two states (South Dakota and Delaware) repealed usury laws, “allowing national banks headquartered there to ‘export’ the nonexistence of an interest-rate cap to consumers in other states.”⁷⁶ The remaining states, in order to safeguard the interests of local businesses, changed their laws to allow their own banks to charge any rate permissible in Delaware or South Dakota.⁷⁷ Though this loosening of restrictions did not apply to small personal lenders, it bolstered their case that they should be able to charge the same rates as large banks,⁷⁸ and resulted in the weakening of additional usury laws in a number of states.⁷⁹ Although some states have maintained stricter standards, this generally freewheeling regulatory climate has allowed predatory payday lenders to flourish.⁸⁰

While such examples appear to show that races to the bottom can and do occur, some scholars have taken a more skeptical view of the phenomenon, arguing that state regulatory competition overall is more likely to have neutral or beneficial effects. Jonathan Adler, for example, argues that empirical evidence suggests that interstate competition may be as or more likely to produce a “race to the top” than one to the bottom.⁸¹ He contends that while states “certainly compete with each other to create a more favorable climate for business investment,” they also compete “to provide the mix of goods and services that individual taxpayers and prospective business employees might want”—which may include, for example, progressive environmental regulations that will attract a highly educated workforce to the state.⁸² Further, as Stephen L. Willborn argues, the relationship between more onerous state regulation and the cost-benefit calculus of any particular employer may be

76. *See id.* at 1121.

77. *Id.*

78. *Id.* at 1123.

79. *Id.* at 1138 (finding that “[i]n virtually every measurable way usury law has become much more lax since 1965”).

80. *Id.* at 1139. Payday lending may soon be subject to federal regulation. *See* Gillian B. White, *Payday Loan Rule: Progress, But Still a Long Way to Go*, ATLANTIC (June 2, 2016), <http://www.theatlantic.com/business/archive/2016/06/cfpb-payday-loan-rule/485294/> [<https://perma.cc/Q8TF-U6EL>].

81. *See* Adler, *supra* note 72, at 97; Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233 (1992) (arguing that “there is no support in the theoretical literature on interjurisdictional competition for the claim that, without federal intervention, there will be a race to the bottom [among states] over environmental standards”); Steven L. Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369, 370 (2014) (noting that seventy percent of recent economics and political science articles have taken an at least somewhat skeptical view of the race-to-the-bottom effect).

82. *See* Adler, *supra* note 72, at 97.

“complicated[] and uncertain.”⁸³ For example, an increase in the minimum wage in one state may raise an employer’s labor costs but may also positively affect employee productivity;⁸⁴ even if the increase is a net detriment to employers, it may be more efficient and practical for them to cut costs in other ways rather than moving.⁸⁵

A further objection to an overriding fear of races to the bottom is that, at least in some areas, competition may not be the sole or even primary driver of state policies. Allen Erbsen, while not dismissing the possibility that races to the bottom may occur, argues that in contrast to earlier models of state behavior that focused on states’ tendency toward “self-aggrandizement,” more recent evidence “suggests a more nuanced approach that focuses on how politically accountable state leaders respond to constituent preferences, which sometimes but not always favor competitive policies.”⁸⁶

The degree to which races to the bottom occur thus remains a subject of debate. Certainly, interstate competition appears in some areas to have fostered regulatory laxity—particularly in areas such as consumer lending where interstate transactions are common.⁸⁷ At the same time, other literature suggests that states do not invariably engage in competition, and that some instances of interstate competition can foster regulation that promotes the public welfare.⁸⁸

2. *Spillover Effects and Extraterritoriality*

A second strain of fears about state experimentation centers on worries that states will export either their policies or those policies’ negative side effects beyond state borders. Allan Erbsen, for example, identifies numerous potential frictions that horizontal federalism may cause, several of which fall into this category. For example, states may act as “havens” by adopting more permissive laws, such as more readily granted divorces, to attract visitors; conversely, a state that wishes to adopt more restrictive policies than its neighbors (such as a higher drinking age) may be unable to stop its residents from traveling to more

83. See Willborn, *supra* note 81, at 410.

84. See *id.*

85. See *id.* at 414.

86. See Erbsen, *supra* note 72, at 525 n.108.

87. See Peterson, *supra* note 75, at 1121–22 (describing role of interstate transactions in loosening of state usury laws).

88. See *supra* note 81.

permissive states to take advantage of their laws.⁸⁹ In other cases, when large states regulate a good that is sold nationally, their market power may allow them to set the de facto national standard—as has happened with the disproportionate influence of California and Texas on textbooks used in public schools.⁹⁰ Other times, states may deliberately choose to extend state law outside state borders—by, for example, trying to regulate out-of-state conduct by local corporations⁹¹ or by applying state law on non-compete clauses or consumer privacy to transactions occurring in other jurisdictions.⁹² Finally, states may permit or even encourage in-state conduct that causes negative externalities in other jurisdictions (by, for example, allowing in-state activity that causes pollution in sister states⁹³ or by failing to discourage alcohol consumption by residents of a neighboring state that may increase the likelihood of accidents when they return home⁹⁴).

Though these examples differ from each other, they can all be seen as forms of spillovers, in which the policy choices of one state have consequences, whether unintended or deliberate, for the citizens of another. In general, scholarly commentary has tended to regard such spillovers as uniformly undesirable. Heather Gerken and Ari Holzblatt, for example, have catalogued (while somewhat departing from) the scholarly consensus that “state laws that generate spillovers are an exception to Justice Brandeis’s famous aphorism.”⁹⁵ Samuel Issacharoff and Catherine Sharkey assert that “the benefits of heterogeneity and interstate competition fail” when Brandeisian experiments have significant adverse consequences outside state borders.⁹⁶ Robert P.

89. See Erbsen, *supra* note 72, at 516–19; Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856 (2002) (describing the problem of “‘travel-evasion,’ which in effect gives citizens the power to choose which state’s laws are to govern them on an issue-by-issue basis”).

90. See Erbsen, *supra* note 72, at 520.

91. See *id.* at 527.

92. See Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683, 705–08 (2015).

93. See Erbsen, *supra* note 72, at 523–24.

94. See *Bernhard v. Harrah’s Club*, 546 P.2d 719, 725–26 (Cal. 1976) (applying California rather than Nevada law to Nevada conduct in a similar scenario); Florey, *Conflicts*, *supra* note 92, at 704 n.101 (discussing problems of interstate relations underlying this case). *Bernhard* is a particularly pertinent example because it involved a casino, illustrating how a gaming enterprise can deliver economic benefits to the jurisdiction in which it is located, while causing negative effects (in this case, intoxicated driving) to be felt across the border.

95. Heather K. Gerken & Ari Holzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 69–70 (2014).

96. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006).

Inman and Daniel L. Rubinfeld have argued that in federal systems, “[g]oods with negative spillovers . . . should be . . . regulated by central government laws constraining their use.”⁹⁷ Scholars have articulated a variety of concerns about spillovers: they may impose transaction costs on business required to monitor and abide by the laws of multiple jurisdictions, allow states to export costs of their own regulatory regimes to their neighbors,⁹⁸ and expose parties attempting to comply with the law to potentially inconsistent mandates.⁹⁹ Moreover, spillovers may also be problematic from a broader perspective of democratic self-determination; by subjecting conduct that takes place in one location to the law of another jurisdiction, they may in effect “allow the representatives of one state’s citizens to tell another’s what to do”¹⁰⁰ and “interfere with the sovereignty of other states.”¹⁰¹

Gerken and Holzblatt nonetheless offer a measured critique of some anti-spillover arguments. They maintain that spillovers are inevitable, an “absolutely routine phenomenon in a partially decentralized, highly integrated system like our own”¹⁰²—and that, despite their ubiquity, they have rarely caused meaningful conflicts among states or their citizens.¹⁰³ Indeed, as Gerken and Holzblatt provocatively speculate, spillovers may have positive effects. For example, because spillovers may motivate opposing sides to seek federal involvement, they can serve to “get issues on the national policymaking agenda, which is no mean feat these days.”¹⁰⁴ Further, they can stymie forces in Washington that seek to benefit from gridlock and inertia, ensuring that “blocking a policy from being enacted at the national level is only a partial victory because the state spillovers remain.”¹⁰⁵ Spillovers, the authors argue, can also nudge reluctant state politicians into action, forcing them to engage with groups

97. Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1229 (1997).

98. Gerken & Holtzblatt, *supra* note 95, at 71.

99. *Id.*

100. *Id.* at 73.

101. See Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENVER U. L. REV. 289, 328 (2003).

102. See Gerken & Holtzblatt, *supra* note 95, at 79.

103. *Id.* at 85 (noting that “even in the face of pervasive spillovers, we’ve plainly muddled through”).

104. *Id.* at 90.

105. *Id.* at 91.

holding diverse perspectives both inside and outside the state;¹⁰⁶ they can play more or less the same role for individual state citizens, who may be forced by means of spillovers to confront alternative points of view.¹⁰⁷

Although the negative aspects of spillovers may be overstated, it remains a difficult task to negotiate the balance between, on the one hand, the stasis that might result from confining states to wholly within-border activities¹⁰⁸ and, on the other, the risk that spillovers from other jurisdictions will threaten states' ability to make autonomous policy choices.¹⁰⁹ Further, even if it were possible to draw some ideal line between these two dangers, the ubiquity of spillovers of all sorts makes them difficult to prevent in practice.¹¹⁰ As the following sections will discuss, these issues are also present, in slightly different form, when tribal regulation is added to the picture.

II. A BRIEF SURVEY OF TRIBAL INNOVATION

Though states' legislative innovations have received the bulk of the attention, states are not the only entities that can act as laboratories. Local governments, for example, are often hailed for adopting cutting-edge policies that can serve as more widespread models if successful.¹¹¹ Tribes, too, have embraced the possibility of regulatory experimentation. Yet the scope of their efforts has often received little attention outside the tribal community. The following section catalogs some recent tribal regulatory efforts with the aim of demonstrating tribes' activity in areas that are also of widespread concern outside the tribal community. Because of the sheer number of tribes in the United States, any such list must invariably, of course, be illustrative rather than comprehensive; this section attempts to focus on areas in which tribes have been most active and/or areas that represent the most important policy concerns for the nation as a whole. With that caveat in mind, the following section

106. *Id.* at 93–95.

107. *Id.* at 96.

108. *See id.* at 85 (“Our claim, however, is that interstate friction engenders important democratic benefits. That’s because we worry not just about instability but stasis—not just about conflict but its absence.”).

109. *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1115 (2009).

110. *See id.* at 1090.

111. *See* Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)).

discusses tribal innovations in the following areas: food policy, marijuana regulation, consumer protection, gun regulation, restorative justice, and environmental law.

A. *Food Policy and Taxation*

As earlier discussed, the Navajo Nation currently has the most comprehensive system within U.S. borders of incentives and disincentives designed to encourage consumption of healthful foods. Almost as interesting as the fact of this regulation is the way in which it arose: as a community-based response to a persistent public health issue. The Navajo Nation, like many other tribes,¹¹² has long faced a severe diabetes problem, with diabetes rates that are two to four times greater than those in non-Hispanic whites and rising.¹¹³ Obesity is also a serious problem, described as an “epidemic” by tribal leaders.¹¹⁴

The idea of using a junk food tax as a means of addressing these issues was initially proposed and later advocated for by the Diné Community Advocacy Alliance (DCAA),¹¹⁵ a group founded in 2011 that describes itself as a “grassroots level” group intended “to raise awareness, inform, educate, and mobilize community members to combat obesity, diabetes, and other chronic health issues.”¹¹⁶ The group received assistance from the Harvard-based Food Law and Policy Clinic to address public health issues in the Navajo Nation that include high rates of obesity and diabetes and lack of access to fresh food.¹¹⁷ Yet it ultimately won support for the bill through community advocacy, including publicizing it through stories in the Navajo Times and radio and gaining support from local stakeholders.¹¹⁸

112. Dana Dabelea et al., *Diabetes in Navajo Youth: Prevalence, Incidence, and Clinical Characteristics: the SEARCH for Diabetes in Youth Study*, 32 *DIABETES CARE* (Suppl. 2) S141, S141–S147 (Mar. 2009).

113. *See id.*

114. Editorial, *Navajo Nation Looks to Combat Obesity with Tax on Junk Food*, *DESERET NEWS* (Apr. 25, 2015), <http://national.deseretnews.com/article/4233/navajo-nation-looks-to-combat-obesity-with-tax-on-junk-food.html> [<https://perma.cc/D94U-2MP3>]; *see also* HARVARD LAW SCH. FOOD LAW AND POLICY CLINIC, *GOOD LAWS, GOOD FOOD: PUTTING FOOD POLICY TO WORK IN THE NAVAJO NATION 1* (2015) [hereinafter *GOOD FOOD*] (noting that some regions of the Navajo Nation have obesity rates up to sixty percent).

115. *See* Clark, *supra* note 9.

116. *See* *Diné Community Advocacy Alliance*, FACEBOOK, <https://www.facebook.com/dineadvocacy/info/> [<https://perma.cc/YW3N-4U92>].

117. *See* Emily M. Broad Leib, *Keynote Remarks: Re-Tooling Law and Legal Education for Food System Reform: Food Law and Policy in Practice*, 38 *SEATTLE U. L. REV.* 1175, 1183–84 (2015).

118. *See* *GOOD FOOD*, *supra* note 114, at 9.

The final Act was the culmination of a long process of discussion and revision of the proposal, which Navajo President Shelly had initially vetoed, based on fears that it might harm local businesses and that insufficient funding existed for its implementation.¹¹⁹ Legislative findings note that the Act is an attempt to address the Nation's obesity and diabetes issues¹²⁰ by helping to combat the perceived "addictive" nature of junk food and the detrimental effects of consuming sugar-sweetened beverages. The Act also attempts to tackle the pervasive lack of access to healthful foods within the Navajo Nation's territory by earmarking the revenue it generates for projects such as "farming and vegetable gardens; greenhouses; farmers' markets; [and] healthy convenience stores."¹²¹

The Healthy Diné Nation Act remains the only comprehensive "junk food" tax within the borders of the United States.¹²² But it reflects a cutting-edge public health trend that is being debated in communities nationwide. Following the 2014 adoption of a soda tax in Mexico, which some academic research suggests has been successful in curbing consumption of sugary beverages,¹²³ many communities within the United States have considered analogous measures.¹²⁴ Most have been defeated following heavy spending by the American Beverage Association (which boasts of beating back forty-five such initiatives; it spent \$12.9 million to thwart a single proposal in New York in 2010).¹²⁵ Yet notable exceptions exist, including the Berkeley tax¹²⁶ and a Philadelphia tax¹²⁷ that was finalized by the City Council on June 16, 2016.

119. See Healthy Diné Nation, *supra* note 7.

120. See Resolution of the Navajo Nation Council, CN-54-14, at 1–2 (2014), <http://www.navajonnsn.gov/News%20Releases/OPVP/2014/nov/Healthy%20Dine%20Nation%20Act%20of%202014.pdf> [<https://perma.cc/8C5Y-8G6Y>].

121. *Id.* at 4–5.

122. See Clark, *supra* note 9.

123. See Anahad O'Connor, *Mexican Soda Tax Followed by Drop in Sugary Drink Sales*, N.Y. TIMES: WELL BLOG (Jan. 6, 2016, 6:30 PM) <http://well.blogs.nytimes.com/2016/01/06/mexican-soda-tax-followed-by-drop-in-sugary-drink-sales/> [<https://perma.cc/H6SE-WVZM>].

124. See Rachel Premack, *The Soda Industry Is on the Verge of Losing One of Its Biggest Battles Ever*, WASH. POST: WONKBLOG (June 14, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/14/the-soda-industry-is-about-to-lose-one-of-its-biggest-battles-ever/> [<https://perma.cc/Y7GV-29YG>].

125. See *id.*

126. See *supra* note 1.

127. See Michael Burke, *Philadelphia Becomes First Major City to Pass Soda Tax*, USA TODAY (June 16, 2016), <http://www.usatoday.com/story/news/2016/06/16/philadelphia-becomes-first-major-city-pass-soda-tax/85999128/> [<https://perma.cc/Y2GK-SJDY>].

The Navajo Nation's tax has not been free from criticism. Some public health advocates argue that it is too low to change consumption patterns,¹²⁸ while tribe members have complained about the lack of access to fresh, nutritious food on the reservation.¹²⁹ Nonetheless, some tribal advocates, such as Michael Roberts, president of the pro-food sovereignty group First Nations Development Institute, see it as being a powerful symbolic measure and a force for change. As Roberts has said on the subject of the tax, "Indian country has a lot of places where it can lead the nation in creating new ideas, new policies, even a new tax that couldn't be done anywhere else."¹³⁰

B. Marijuana Regulation

The trend toward marijuana decriminalization and legalization is another force that has driven tribal experimentation—even though those efforts have been hampered by a climate of persistent legal uncertainty. In October 2014, the U.S. Department of Justice issued guidance about the Department's priorities in enforcing federal cannabis laws on tribal lands that suggested it might not stand in the way of tribal decisions to legalize marijuana.¹³¹ Yet subsequent Justice Department actions, including raids on two California tribes' marijuana operations, have raised questions about the Department's position and left many tribes hesitant to proceed.¹³² Still, many tribes remain intrigued by the opportunity that marijuana (as well as hemp) presents, and have gone forward with legalization, cultivation, and/or sales efforts despite the unsettled federal climate.¹³³

128. See Alysa Landry, *A Junk Food Tax in a Food Desert: Navajo Nation Tries to Curb Unhealthy Snacking*, INDIAN COUNTRY MEDIA NETWORK (Apr. 2, 2015), <http://indiancountrytodaymedianetwork.com/2015/04/02/junk-food-tax-food-desert-navajo-nation-tries-curb-unhealthy-snacking-159865> [<https://perma.cc/47WG-4LM6>] (quoting Kelly Brownell, dean of the Sanford School of Public Policy at Duke University, as saying that the tax "is much too low to affect consumption" but nonetheless may have value as a revenue-generating measure).

129. See Ahtone, *supra* note 10 (noting that, because of the long distances tribe members must drive to grocery stores selling fresh food, it is impractical for many tribe members to shop anywhere other than convenience stores that sell processed food).

130. See Landry, *supra* note 128.

131. See *Cannabis Comes to Tribal Lands*, CANNABIS WIRE, <https://cannabiswire.com/reservation> [<https://perma.cc/L4EV-TFP3>].

132. See *After Federal Raids, U.S. Tribes Cautioned About Marijuana*, CBS NEWS (Nov. 18, 2015), <http://www.cbsnews.com/news/after-federal-raids-u-s-tribes-cautioned-about-marijuana/> [<https://perma.cc/2UEF-VUST>] [hereinafter *Raids*].

133. See *id.*; *Judge Rejects Menominee's Hemp Arguments*, MINNEAPOLIS STAR-TRIB. (May 24, 2016), <http://www.startribune.com/judge-rejects-menominee-s-hemp-arguments/380624701/> [<https://>

In one abortive but widely publicized experiment, the Flandreau Santee Sioux Tribe in South Dakota planned to open the nation's first "marijuana resort," which would have offered a "marijuana lounge" in which guests would be able to purchase and smoke product cultivated in the tribe's own grow facility, along with lockers to store pipes and a shuttle service so that guests would not have to drive under the influence.¹³⁴ Notably, tribal council members described the idea not just as a potentially profitable venture but as an affirmation of tribal self-government, particularly given that marijuana was illegal in South Dakota, the surrounding state.¹³⁵ As tribal council member Kenny Weston put it, "[w]e have sovereignty and we have to assert it."¹³⁶ Weston saw the resort as part of a larger movement to change attitudes about marijuana consumption imposed on tribes by outsiders: "[d]uring boarding schools [intended to force the assimilation of Indian children], our way of life was outlawed, and so many of our own people assumed [marijuana] was bad. When marijuana is decriminalized, that stigma will also fall away."¹³⁷ The tribe's plans reached an advanced stage, including construction of the grow facility and initial planting, as well as the beginning of efforts to convert a bowling alley into the future lounge.¹³⁸ However, following threats by state authorities to prosecute nonmembers who patronized the resort, as well as news of a possible federal raid, the tribe was forced to suspend its plans.¹³⁹

Tribal leaders and advocates have also seen promise in the seemingly less-controversial cultivation of hemp.¹⁴⁰ Traditionally employed by some tribes for nets, bags, and ceremonial calendars, hemp can also be used in the manufacture of many products sold commercially today and thus offers considerable promise for tribes.¹⁴¹

perma.cc/UEV8-V96W] [hereinafter *Judge Rejects*] (describing Menominee Tribe's lawsuit to allow the tribe to grow hemp).

134. Sarah Sunshine Manning, *Santee Sioux Assert Tribal Sovereignty, Open First Marijuana Resort*, INDIAN COUNTRY TODAY (Oct. 6, 2015), <http://indiancountrytodaymedianetwork.com/2015/10/06/santee-sioux-assert-tribal-sovereignty-open-first-marijuana-resort-161976> [https://perma.cc/S824-MHKZ].

135. *See id.*

136. *See id.*

137. *See id.*

138. *See Manning, supra* note 15.

139. *See id.*

140. Alys Landry, *What Does Marijuana Memo Mean for Hemp Production and Traditional Uses?*, INDIAN COUNTRY TODAY (Dec. 18, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/18/what-does-marijuana-memo-mean-hemp-production-and-traditional-uses-158336> [https://perma.cc/5BGZ-7YD2].

141. *Id.*

In the past few years, many states have authorized hemp production, many of them in response to a 2014 federal law that legalized research and pilot programs in hemp cultivation.¹⁴² In keeping with this trend, the Menominee Indian Tribe of Wisconsin legalized industrial hemp in May 2015 in order to embark upon research, conducted in partnership with the College of the Menominee Nation, on the possibility of growing industrial hemp.¹⁴³ As part of this research, the tribe planted hemp on tribal lands.¹⁴⁴ Though the tribe maintains that it carefully monitored the hemp to ensure that it stayed under the industrial THC limit of 0.3 percent, federal agents nonetheless raided the reservation in October 2015, destroying the tribe's crops¹⁴⁵ in an unpleasant surprise for the tribe and advocates for tribal hemp cultivation more generally.¹⁴⁶ The tribe fought back by filing a lawsuit arguing that it was not bound by Wisconsin law prohibiting hemp cultivation, but a federal court dismissed the suit and the tribe's future course is now unclear.¹⁴⁷ Despite this setback for tribal hemp efforts, another tribe, the Oglala Sioux Tribe, has plans to experiment with hemp cultivation and hopes to obtain the cooperation of federal and state prosecutors.¹⁴⁸

Tribes appear to have been most successful in cannabis-related initiatives when they are located in states that have themselves followed trends toward liberalizing marijuana law.¹⁴⁹ For example, subsequent to Washington State's decriminalization of recreational marijuana use, some tribes located within the state also embraced new policies toward cannabis. Among them were the Squaxin and Suquamish Tribes, which

142. See Laura Peters, *Hemp: Could It Be the Future of Farming?*, STAUNTON NEWS LEADER (Jan. 23, 2017), <http://www.newsleader.com/story/news/local/2017/01/19/hemp-could-future-farming/96113934/> [<https://perma.cc/42F3-PYNA>].

143. See *Menominee Indian Tribe of Wisconsin v. Drug Enforcement Administration*, 190 F. Supp. 3d 843, 846 (E.D. Wis. 2016).

144. See *id.*

145. See *id.*

146. See Steven Nelson, *DEA Raid on Tribe's Cannabis Crop Infuriates and Confuses Reformers*, U.S. NEWS AND WORLD REP. (Oct. 26, 2015), <http://www.usnews.com/news/articles/2015/10/26/dea-raid-on-wisconsin-tribes-cannabis-crop-infuriates-and-confuses-reformers> [<https://perma.cc/K8FL-KXK5>].

147. See *Menominee Indian Tribe*, 190 F. Supp. 3d at 854 (finding that the Controlled Substances Act permits growing hemp "only if the laws of the State in which the hemp is grown allow the growing and cultivation of hemp"); *Judge Rejects, supra* note 133.

148. Talli Nauman, *OST Recognizes Legality of Growing Hemp*, NATIVE SUN NEWS (June 15, 2016), http://www.nsweekly.com/news/2016-06-15/Top_News/OST_recognizes_legality_of_growing_hemp.html [<https://perma.cc/Y6UP-YY2L>].

149. See *Raids, supra* note 132 (noting that tribes in states that permit marijuana use may "face fewer legal challenges" to their own plans to legalize or sell the drug).

legalized the substance and entered into arrangements with the state to sell marijuana on tribal lands.¹⁵⁰ At least in the case of the Suquamish, state policy strongly influenced the change, which was “brought to our doorstep by a neighboring government,” in the words of Suquamish Chairman Leonard Forsman.¹⁵¹

It is worth noting, however, that tribes have not uniformly moved in the direction of liberalization. Some tribes, concerned about the harmful effects of marijuana and other narcotics on reservations, have sought to regulate marijuana *more* strictly than does the surrounding state. In Washington, some tribes have seen the state’s legalization as a chance to affirm tribal values that condemn the use of marijuana. The remote Port Gamble S’Klallam Reservation, located within Washington’s boundaries, has so far declined to legalize marijuana; Kelly Sullivan, its executive director, explained that “[s]o much of our energy is put toward healthy lifestyles . . . [W]e’re not going to do something just because we can.”¹⁵² Meanwhile, the Yakama Nation—which more than a decade ago clashed with Washington State over the tribe’s complete ban on alcohol¹⁵³—has also banned the growing or use of marijuana, both on the reservation and (despite legal uncertainty over its power to do so) on lands historically occupied by the tribe.¹⁵⁴ From the Yakama Nation’s perspective, marijuana is, in the words of the tribe’s attorney, the “biggest problem” facing young people, warranting this decisive act.¹⁵⁵

150. See Walker, *supra* note 15.

151. See *id.*

152. See *id.*

153. *Indians and Washington State Are at Odds Over Alcohol Ban*, N.Y. TIMES (Oct. 10, 2000), <http://www.nytimes.com/2000/10/10/us/indians-and-washington-state-are-at-odds-over-alcohol-ban.html> [https://perma.cc/9KF9-B6MY]. Because of the ravages alcoholism has caused in Indian country, a number of tribes historically have banned alcohol, although some tribes are reconsidering such bans amid evidence that they are ineffective in reducing alcohol consumption. See Scott Neuman, *Pine Ridge Reservation Lifts Century-Old Alcohol Ban*, THE TWO-WAY: BREAKING NEWS FROM NPR (Aug. 15, 2013), <http://www.npr.org/sections/thetwo-way/2013/08/15/212272144/south-dakota-reservation-lifts-century-old-alcohol-ban> [https://perma.cc/DH92-8SZY]; Tony Newman, *Alcohol Prohibition Not Helping Native Americans Deal with Harms of Alcohol*, HUFFINGTON POST (May 8, 2012), http://www.huffingtonpost.com/tony-newman/alcohol-prohibition-not-h_b_1500462.html [https://perma.cc/6KKJ-G354].

154. See Walker, *supra* note 15.

155. See Jonathan Kaminsky, *Indian Tribe Seeks Pot Business Ban in Part of Washington State*, REUTERS (Mar. 24, 2014), <http://www.reuters.com/article/us-usa-marijuana-tribe-idUSBREA2N12J20140324> [https://perma.cc/T345-CDQH].

C. Consumer Protection

Tribes have taken approaches to consumer protection that vary substantially both from those adopted by other tribes and from those of states. On the one hand, some tribes regulate lending practices less strictly than do surrounding states, enabling lenders to offer high-interest, short-term loans nationwide through their partnerships with tribes.¹⁵⁶ This phenomenon, which has been criticized by some states but vehemently defended by some tribes, is explored in greater detail in Part III, which discusses tribes and spillover effects.

At the same time, other tribes have enacted sweeping consumer protection laws that are more stringent in some respects than those of surrounding states. As of 2011, the First Nations Development Institute published a report noting that seven tribes had incorporated consumer protection provisions into their codes, and calling upon tribes to do more.¹⁵⁷ One of the seven tribes is the Navajo Nation, which in 1999 passed comprehensive consumer protection laws that “codify unconscionable, unfair and deceptive trade business practices and set forth regulatory and remediation systems for motor vehicle transactions, pyramid schemes, door-to-door sales, rental-purchase agreements, repossession requirements, advertisement disclosures and pawn transactions.”¹⁵⁸ Bolstering the Nation’s ability to apply these laws, the Navajo Nation Long-Arm Jurisdiction and Service of Process Act provides for tribal court jurisdiction over off-reservation activities by tribe members that affect other Navajos as well as over nonmembers that enter into consensual relationships with tribe members that cause them injury.¹⁵⁹ The First Nations Development Institute has praised the Navajo measures for their “comprehensive and strong language” and integration of tribal development goals.¹⁶⁰ Notably, at least one state court has expressed willingness to enforce Navajo consumer protections under relevant state choice-of-law principles.¹⁶¹

156. See *infra* notes 282–84 and accompanying text.

157. See BUILDING TRUST, *supra* note 20.

158. *Id.* at 9; see also Robert Rosette & Saba Bazzazieh, *Arizona’s Win-Win Short-Term Credit Solution: Assisting Arizona’s Unbanked and Underbanked While Supporting Tribal Self-Determination*, 45 ARIZ. ST. L.J. 781 (2013).

159. See BUILDING TRUST, *supra* note 20, at 10.

160. *Id.* at 13.

161. See *Tempest Recovery Servs. v. Belone*, 74 P.3d 67, 71 (N.M. 2003) (remanding case for trial court to determine whether Navajo law regarding judicial process prior to repossession of goods should apply).

Other tribes have engaged in similarly far-reaching efforts, including the Blackfeet Nation (located within Montana), which in 1999 enacted a Consumer Protection Code that covers consumer credit, consumer sales practices, equal credit opportunity, and truth in lending.¹⁶² The Blackfeet Code includes a twenty-one percent annual percentage rate (APR) cap, a more stringent restriction than exists in the surrounding state of Montana.¹⁶³ Although implementation of the cap has not been free of glitches, including the existence of tribal lending products that exceed it, it appears to have been influential.¹⁶⁴ Notably, tribal and nontribal citizens of Montana joined forces in 2010 to pass a statewide annual interest rate cap of thirty-six percent; advocates for the measure engaged in extensive outreach to tribe members as well as discussions with tribal leaders about “the need to develop effective laws and infrastructure to combat predatory lending within their own nations.”¹⁶⁵

D. Gun Regulation

The desirability of regulating firearms continues to spark debate at the national level in the United States. Meanwhile, although many states have moved to regulate guns stringently, movement of guns across borders has posed a serious threat to such regulations’ effectiveness.¹⁶⁶ Against this backdrop, tribes occupy a unique position with respect to guns in the era following the Supreme Court’s decision in *District of Columbia v. Heller*,¹⁶⁷ which recognized an individual Second Amendment right to possess a firearm for “traditionally lawful” purposes and invalidated a District of Columbia ban on handguns and other firearms.¹⁶⁸ Two years later, *McDonald v. City of Chicago*¹⁶⁹ extended Second Amendment constraints by holding that the Second Amendment was incorporated via the Fourteenth Amendment against

162. See BUILDING TRUST, *supra* note 20, at 10–11.

163. See *id.* at 11.

164. See *id.* (noting that the Blackfeet experience “represent[s] a lesson learned while implementing progressive consumer protection legislation”).

165. See *id.* at 12.

166. See Gregor Aisch & Josh Keller, *How Gun Traffickers Get Around State Gun Laws*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/interactive/2015/11/12/us/gun-traffickers-smuggling-state-gun-laws.html> [https://perma.cc/F7PS-7UJR] (noting that “the effect of [some states’ tougher gun] laws has been significantly diluted by a thriving underground market for firearms brought from states with few restrictions”).

167. 554 U.S. 570 (2008).

168. *Id.* at 577.

169. 561 U.S. 742 (2010).

states.¹⁷⁰ By contrast, the Second Amendment does not apply to tribes¹⁷¹ either by way of the Constitution itself or through the Indian Civil Rights Act, which applies most of the Bill of Rights statutorily to tribes and their members but omits the Second Amendment.¹⁷² Thus, at least in theory, tribes enjoy complete latitude to ban firearms of any type if they so choose. As Angela Riley has noted, this makes tribes “self-selected laboratories for gun laws” that are “positioned to reclaim some of the local control over gun regulation that has historically marked this body of law.”¹⁷³

Despite this potential, however, the complicated history of guns in Indian country means that few tribes have fully availed themselves of that possibility. Sometimes this is a deliberate policy choice. A “wide consensus” of scholars suggests that a motivating force behind the Second Amendment was the desire to arm whites in conflicts with Indians.¹⁷⁴ As a result, some tribes are less concerned with exercising their ability to limit guns than with ensuring that tribe members’ access to guns is not unreasonably limited.¹⁷⁵

Nonetheless, even if tribes generally have not enacted sweeping bans, many do restrict ownership, possession, or use of guns in some way, through both criminal and civil provisions. Through their criminal codes, many tribes limit the carrying of concealed weapons, require a tribally

170. *Id.* at 749.

171. *See* Riley, *supra* note 28, at 1715 (observing that Indian tribes remain “outside the polity in regards to gun ownership, firmly established in a post-*Heller*, post-*McDonald* world as the only governments within the United States that may entirely restrict or prohibit those rights guaranteed by the Constitution’s Second Amendment”); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALBANY L. REV. 885, 885 (2015) (noting that tribes “appear to have the greatest freedom to experiment with gun laws of any sovereign in the United States,” although there are obstacles to their making use of it).

172. *See* 25 U.S.C. §§ 1301–04 (2012).

173. *See* Riley, *supra* note 28, at 1729.

174. *See id.* at 1681.

175. As Riley notes, a small but growing number of tribal constitutions expressly protect the individual right to bear arms. *Id.* at 1722. Some such provisions directly mirror the Second Amendment (for example, the Zuni Pueblo’s constitution provides that “no member shall be . . . denied the right to bear arms”), while others offer more limited protection (the Little River Band of Ottawa Indians’s Constitution specifies that the tribe “in exercising the powers of self-government shall not . . . [m]ake or enforce any law unreasonably infringing the right of tribal members to keep and bear arms”). *Id.* at 1723. The majority of tribal constitutions do not include a right to bear arms; these tribes are “free to choose amongst a variety of gun control options.” *Id.* at 1725. Riley notes that even a right-to-bear-arms provision very similar to the wording of the Second Amendment would be interpreted in tribal court according to tribal law and traditions. A tribal-court approach could thus potentially be different from the one that the Supreme Court has adopted in *Heller* and *McDonald*. *Id.* at 1725.

issued permit for a concealed weapon, or limit the places where guns may be carried.¹⁷⁶ Some tribes have sought to combat the problem of domestic violence by permitting police seizure of guns from any home in which domestic violence has occurred.¹⁷⁷ Tribes also regulate gun rights through their civil codes, which include regulation of gun transportation and use. These may include restrictions on the use of guns in hunting, in demonstrations, and in casinos and tribal government buildings.¹⁷⁸

Notably, numerous tribes do in fact regulate guns more strictly or in different ways than do surrounding states. For example, Arizona permits licensed concealed carrying of firearms,¹⁷⁹ while the laws of the Navajo Nation ban most carrying of firearms in public places,¹⁸⁰ as do those of other, smaller tribes within the state.¹⁸¹ The Rincon Band of Luiseño Indians, which spans both Arizona and California, makes possession of a firearm in public by anyone other than a law enforcement officer a civil infraction—a stricter rule than exists in either surrounding state.¹⁸² In contrast to Minnesota, which allows licensed concealed carry as well as open carry of some firearms,¹⁸³ the Prairie Island Indian Community not only prohibits concealed carrying but bans law enforcement officers from issuing firearm permits.¹⁸⁴ The Mohegan Tribe requires that, to carry a firearm within the reservation, a person must not only have a valid Connecticut or federal permit but a “legitimate business need,” as

176. *Id.* at 1726.

177. *Id.* at 1726–27.

178. *Id.* at 1728.

179. *See* ARIZ. REV. STAT. ANN. § 13-3102(C)(4) (2016).

180. *See* NAVAJO NATION CODE ANN. tit. 17, § 320 (2010) (making it illegal to carry a loaded firearm on the reservation unless one of five exceptions is present: the firearm is carried by police, by people traveling through the reservation in a private vehicle who have stored the gun in a closed compartment, by people on their own residence or property, for traditional Navajo religious or ceremonial use, or for hunting).

181. For example, the Tohono O’odham Nation makes it illegal to fire a gun within a quarter-mile of an occupied home. *See* TOHONO O’ODHAM CODE tit. 7, § 14.1 (2015). The Pascua Yaqui Tribe prohibits any person from “go[ing] about” in a public place armed with a dangerous or deadly weapon, including guns and pistols, concealed or unconcealed, with the exception of peace officers and persons participating in events involving the use of such a weapon that is sanctioned by the Pascua Yaqui Police Department. *See* 4 PASCUA YAQUI TRIBAL CODE § 1-490 (2016).

182. *See* CAL. PENAL CODE § 25655 (West 2016) (authorizing licensed concealed carry); ARIZ. REV. STAT. ANN. § 13-3102(C)(4) (2016); RINCON BAND OF LUISEÑO INDIANS PEACE AND SECURITY ORDINANCE § 2.2 (2008).

183. *See* MINN. STAT. § 624.714 & § 624.7181 (2016).

184. *See* PRAIRIE ISLAND INDIAN COMMUNITY FIREARM ORDINANCE § 1.5(C) & (F).

determined by the tribe's Department of Public Safety, for the weapon.¹⁸⁵

To the extent tribes seek to go further than state law, however, they run into jurisdictional problems. Under the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*,¹⁸⁶ tribes lack criminal jurisdiction over non-Indians in almost all circumstances.¹⁸⁷ As Ann Tweedy has noted, this makes complete criminal bans on guns problematic; if such a ban were in place, tribe members would be prohibited from arming themselves, while armed non-Indian criminals might be attracted to the reservation.¹⁸⁸ Despite this issue, at least one tribe, the Oneida Nation, has made it a criminal offense to possess a firearm (along with a variety of other weapons); notably, the language of the law restricts its scope to "Native Americans."¹⁸⁹

Compared with criminal law, civil regulations may be more broadly enforceable against nonmembers. Under *Montana v. United States*,¹⁹⁰ which sets the governing standard in this area, tribes have a limited ability to regulate the actions of nonmembers who enter into consensual relationships with the tribe or pose a severe threat to tribal health and welfare; a tribe's power over nonmembers may be still greater when they are acting on tribal land. Even in this area, however, uncertainty reigns. *Montana's* exceptions are notoriously narrow and difficult to apply, and the Supreme Court has been unpredictable in the degree of sovereign regulation it has found that *Montana* allows.¹⁹¹ Indeed, the two scholars who have written at length about *Montana's* applicability to

185. See MOHEGAN TRIBE OF INDIANS CODE § 6-121 (2016).

186. 435 U.S. 191 (1978).

187. *Oliphant* initially barred tribes from exercising criminal jurisdiction over all non-Indians; in *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court extended the prohibition to nonmember Indians. Congress restored tribes' ability to prosecute nonmember Indians, however, through the so-called *Duro* fix. For discussion of the "fix" and its subsequent legal treatment, see *United States v. Lara*, 541 U.S. 193 (2004). More recently, provisions in the renewal of the Violence Against Women Act allow tribes to exercise limited criminal jurisdiction over domestic violence and "dating violence" offenders who are non-Indians. See 25 U.S.C. § 1304 (2012).

188. See Tweedy, *supra* note 171, at 901.

189. See ONEIDA NATION PENAL CODE, § 4M-808 (1997).

190. See 450 U.S. 544, 565–66 (1981).

191. For example, the Court has found *Montana's* "health and welfare" exception to apply in only a single case that produced a highly fractured opinion. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). In that case, the Court affirmed a tribe's authority under *Montana* to apply its zoning laws to nonmember fee land within a "closed area" consisting predominantly of forested tribal land, but not to an "open area" where land was predominantly owned in fee by nonmembers. See *id.* at 438 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

gun regulations have taken different views. Riley suggests that such laws would “clearly fit within *Montana*’s ‘health or welfare’ exception.”¹⁹² Tweedy, however, argues that “in fact it is nearly impossible to predict whether a law [such as a gun restriction] will be held to pass the [*Montana*] test.”¹⁹³ Largely because of such jurisdictional uncertainty, tribes have been somewhat constrained in their ability to use their civil codes to explore new approaches to gun regulation.¹⁹⁴

E. Restorative Justice

Tribes and tribal courts have long been pioneers in creating new models of criminal justice; indeed, this is one of the few areas where tribal examples have been widely influential in shaping policies outside the tribal realm.¹⁹⁵ Many tribes have justice systems that contain a peacemaking element, a system of justice that “differs both from the adversarial system and from conventional non-Indian mediation”¹⁹⁶ and focuses on objectives such as “balance, harmony, and healing” that are often closely entwined with religious beliefs.¹⁹⁷ The Navajo Nation’s Peacemaker Courts, established in 1982 as part of “an ongoing effort to learn about, collect and use Navajo wisdom, methods and customs in resolving disputes,”¹⁹⁸ are perhaps the most well-known example,¹⁹⁹ but numerous other tribes in various parts of the United States have

192. See Riley, *supra* note 28, at 1739.

193. See Tweedy, *supra* note 171, at 898.

194. Tweedy argues that in the context of gun regulation, tribes may be reluctant to engage in experimentation because it may be more likely to attract the notice of a post-*Heller* Supreme Court and thus have the potential to result in negative legal precedent. See Tweedy, *supra* note 171, at 902–04.

195. See Singel, *supra* note 24, at 839–40 (noting acclaim for tribal restorative justice policies by former Attorney General Janet Reno and retired Justice Sandra Day O’Connor and observing that “[s]everal non-Indian jurisdictions have already adapted Indian peacemaking and related principles of restorative justice with remarkable success”). Carol E. Goldberg, however, has expressed skepticism about the transferability of tribal peacemaking models in the nontribal context, arguing that “[t]he operation of tribal peacemaking presupposes certain socio-cultural conditions, such as religious homogeneity and strong kinship networks, that cannot be replicated in most of contemporary non-Indian America.” See Carol E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1005 (1997).

196. See Goldberg, *supra* note 195, at 1011.

197. See *id.* at 1011–12.

198. See Howard L. Brown, *The Navajo Nation’s Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 301 (2000).

199. See Goldberg, *supra* note 195, at 1008 (“Most commentators [on tribal peacemaking] have in mind some image of the Navajo Peacemaker Court, even though several other tribes have established peacemaking systems.”).

incorporated peacemaking practices into their justice systems.²⁰⁰ Tribes have often gone to considerable effort to ensure their peacemaking processes are based in historical and empirical research, using methods ranging from interviews with elders to focus groups.²⁰¹

Tribal peacemaking itself differs across tribes, although it tends to contain some common elements.²⁰² In general, peacemaking is a nonadversarial process in which parties participate themselves rather than through representatives²⁰³ and that relies on oral rather than written communication of community norms, promoting flexibility.²⁰⁴ It is “concerned with justice as it relates to the benefit of the community, and not just for the benefit of individual members.”²⁰⁵ Tribal peacemakers are generally respected community members who often know the parties to a dispute,²⁰⁶ enabling them to use their standing in the community to articulate and enforce societal norms.²⁰⁷ Peacemaking is perhaps most frequently used in minor criminal matters, but it has also been employed for a variety of non-criminal purposes, including child custody, civil disputes, and even “issues relating to environmental protection.”²⁰⁸

Several studies have found that participants in tribal peacemaking tend to be satisfied with the process, perceiving it as a fair method of dispute resolution that promotes positive outcomes.²⁰⁹ Peacemaking “has legitimacy within the community” and provides an alternative to federal prosecution of tribal crimes, which may be both difficult to bring about because of overstretched federal resources and regarded as alien and unfair by the tribal community.²¹⁰ It should be noted, however, that peacemaking reflects distinctive tribal norms, which may include a

200. See Robert V. Wolf, *Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?*, CTR. FOR COURT INNOVATION 3 (2012), http://www.courtinnovation.org/sites/default/files/documents/Widening_Circle.pdf [<https://perma.cc/7LCV-S4V7>] (cataloging at least fifteen tribes other than the Navajo Nation that make use of peacemaking).

201. See *id.* at 3.

202. See *id.* at 3–4.

203. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 253 (1997).

204. See *id.* (noting that oral transmission of norms enables them to “be utilized by the parties as more of a guide to achieving substantial justice, rather than as an additional source of rigidity that might prevent the parties from adjusting their positions towards a point of compromise”).

205. See *id.* at 252.

206. See *id.* at 253.

207. See *id.* at 252–53.

208. See Wolf, *supra* note 200, at 5.

209. See *id.* at 10 (describing several studies).

210. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1096 (2007).

strong relationship between religion and law, and may lack many of the procedures, such as rules of evidence or openness to the public, that the Anglo justice system associates with due process.²¹¹ Some commentators have argued that these features make the peacemaking model unsuitable outside the tribal arena.²¹² Nonetheless, adoption of peacemaking processes in non-Indian justice systems has continued apace in several nontribal communities.²¹³

F. Tribal Environmental Regulation

Elizabeth Ann Kronk Warner has extensively chronicled novel tribal environmental regulations and policies, arguing that tribal forays into environmental-law innovation are valuable precisely because of the ability of tribes to act as state-like “laboratories” to pioneer new ways of thinking about environmental issues.²¹⁴ As Warner notes, tribes may be uniquely positioned to model environmental regulation both because of their relative autonomy from federal law and because care for the environment is a core value of many tribal communities.²¹⁵

Warner describes many circumstances in which tribal law has expanded upon environmental protections enacted by the federal government or surrounding states, sometimes creating effects in nontribal communities as well. For example, the Isleta Pueblo, downstream from the city of Albuquerque, enacted exacting water quality standards that required Albuquerque to take additional pollution control measures; the Tenth Circuit upheld the standards against legal challenge.²¹⁶ Likewise, many tribes have adopted regulations that both go beyond what federal law requires and contain provisions intended to apply outside the tribal community.²¹⁷ In some cases, tribal regulation has exceeded federal law in ways that highlight distinctive tribal values; for example, the White Mountain Apache Tribe has adopted water regulations that, while mirroring federal law in many regards, incorporate concerns for the cultural, scenic, and religious significance

211. *See id.* at 1097–98.

212. *See* Goldberg, *supra* note 195, at 1018–19.

213. *See* Wolf, *supra* note 200.

214. *See* Warner, *supra* note 17, at 792 (2015) (“Considering sources of tribal experimentation is particularly timely, as environmental regulatory innovation is needed now.”).

215. *Id.* at 794.

216. *See id.* at 803–04.

217. *See id.* at 823 (noting that the Hualapai Tribe has indicated its intent to apply its water standards to non-Indians as well as Indians by “incorporating language similar to the second *Montana* exception”).

of certain bodies of water.²¹⁸ Warner sees the tribal trend toward recognizing such concerns as “an example of how tribes are truly innovating within the field of environmental law, as the federal equivalents do not contain anything similar to . . . stringent [tribal] cultural, religious, and spiritual protections.”²¹⁹ Tribes have also been active in the area of climate change. Several tribes inhabiting the Confederated Salish and Kootenai Tribes (“CSKT”) Flathead Reservation in Montana have developed a comprehensive plan to assess and respond to climate change risks, in many cases drawing on traditional tribal knowledge such as fostering the growth of native plants.²²⁰

In a more recent article, Warner argues that, even where tribal codes have not engaged in such specific innovations, tribes have experimented in the area of “soft law”—non-code and not necessarily binding²²¹ legal principles found in tribal “constitutional provisions, vision statements, customary law, tribal court decisions,” and participation in intertribal organizations.²²² Ultimately, Warner concludes that “[i]n the realm of tribal environmental law, there is much to learn from the tribal ‘laboratory’”²²³ in terms of both specific code provisions²²⁴ and soft-law innovation, which can be especially useful to other sovereigns because this type of law “easily fills existing regulatory gaps and traverses different regulatory jurisdictions.”²²⁵

III. HORIZONTAL FEDERALISM DOCTRINES AND THE TRIBAL CONTEXT

Tribes are thus currently engaged in active policy experimentation of the sort that the “laboratories” model would appear to value. Given this fact, how well do our current models of experimentation, imitation, and competition developed in the interstate context apply to tribes? More precisely, is it possible for tribes and states to engage in the same sort of productive borrowing and influence that often occurs in the state context? At the same time, as tribes stake out bold policies that

218. *See id.* at 824–25.

219. *See id.* at 833.

220. *See id.* at 839–42.

221. *See Warner, supra* note 18, at 889.

222. *See id.* at 859.

223. *See Warner, supra* note 17, at 846.

224. *See id.*

225. *See Warner, supra* note 18, at 860.

sometimes diverge from surrounding state law, how likely are such differences to create races to the bottom, spillovers, and other negative effects of horizontal federalism? The following section explores these issues, arguing that tribes are in many ways ideally positioned to serve as regulatory laboratories. It then goes on to consider obstacles to smooth operation of the laboratories model in the tribal-state context: first, pressures on tribes not to depart too radically from surrounding state law, and second, the issue of tribal spillovers in a realm of jurisdictional uncertainty.

A. *The Potential of Tribal Laboratories*

As the preceding section has argued, tribes have engaged in innovation in many notable areas. But what does it mean, exactly, to expand the Brandeisian model to encompass tribes, and is it appropriate to do so? The following section addresses this question, looking first at the qualities of tribes that make them likely to be regulatory trailblazers, and then considering the degree to which tribal models may be applicable or useful to nontribal governments.

1. *Tribes as Innovators*

Although tribal regulatory experimentation often receives less publicity than comparable state initiatives,²²⁶ both tribes and commentators have long understood tribes' potential as regulatory pioneers. As early as 1965, Vine Deloria, Jr., then-executive director of the National Congress on American Indians, described tribes as "laboratories of the future" in making the case for tribal sovereignty before a Senate subcommittee.²²⁷ Academic discussions of innovative tribal policies frequently invoke the "laboratories" concept,²²⁸ and tribes

226. See *supra* notes 6, 10 and accompanying text (calling attention to disparity in media coverage of Berkeley soda tax and Navajo junk food tax).

227. See *To Protect the Constitutional Rights of American Indians, 1965: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 194–95 (1965)* (statement of Vine Deloria, Jr., Executive Director of the National Congress of American Indians); Valencia-Weber, *supra* note 21, at 261 (discussing significance of Deloria's statement).

228. See Riley, *supra* note 28, at 1729 (describing tribes as "self-selected laboratories for gun laws"); Singel, *supra* note 24, at 825–26 (arguing that the ability of tribes to serve as Brandeisian laboratories is one of the many benefits of an expanded view of federalism that includes tribes); Valencia-Weber, *supra* note 21, at 261 (arguing that "[t]ribal court innovation is akin to the American political concept that states are the laboratories for national political change"); Warner, *supra* note 17 (devoting article to premise that tribes can serve as environmental-law laboratories).

have received outside recognition for their often cutting-edge regulations and policies.²²⁹

Many distinct features of tribes in the United States support their potential as policy laboratories. To begin with, the variegated tribal landscape provides abundant opportunities to test a variety of regulations in a multiplicity of settings. As of 2016, there were 566 federally recognized tribes in the United States,²³⁰ as well as many additional tribes that, while recognized only by states, nonetheless function as cohesive governments.²³¹ Tribes are not just numerous but extremely diverse. Tribes are differently situated in important ways: their degree of wealth or poverty, the characteristics of the land they occupy, the demographics of their members, and virtually any other quality that might be relevant to choosing governmental policies.²³² Tribal governments vary as well, with tribes choosing different governmental structures based on cultural tradition and economic need. As Wenona Singel has argued, “tribal governance represents authentic pluralism.”²³³ The combination of tribal diversity and responsive government means that tribal regulation can be closely targeted to specific populations and their particular challenges. The Navajo Nation’s soda and junk food tax, for example, was driven in large part by concerns by citizens and tribal leaders about the Nation’s high diabetes and obesity rates.²³⁴

Moreover, even though tribes are different from each other, they tend to share some characteristics that make them, on the whole, better suited in some ways to innovation than states. Tribal governance is often flexible and community-based,²³⁵ enabling tribes to respond to evolving social and political conditions perhaps more nimbly than larger and slower-moving state governments. Tribes also tend to have a governmental culture responsive to change. Because of tribes’ long historical experience of having to adapt to Anglo-American legal and

229. See Singel, *supra* note 24, at 838–39 (discussing disproportionate representation of tribes as recipients of the Harvard University Ash Center for Democratic Governance and Innovation awards for government programs).

230. See NAT’L CONFERENCE OF STATE LEGISLATURES, FEDERAL AND STATE RECOGNIZED TRIBES (2016), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [<https://perma.cc/YV4H-KSKB>].

231. See *id.* (listing state-recognized tribes).

232. See Minzner, *supra* note 32, at 89 (noting, among other differences, that tribes “range in size from tremendous to tiny” and that some have economic profiles that “rival the richest towns in the United States” while others are “some of the poorest communities in the country”).

233. See Singel, *supra* note 24, at 838.

234. See *supra* note 114.

235. See Singel, *supra* note 24, at 834.

political norms, they have developed, in the words of Gloria Valencia-Weber, the “pervasive characteristic” of having the “capacity to change as an evolving culture” by incorporating elements of both tradition and innovation.²³⁶ As Wenona Singel notes, tribal governments also tend to have extensive experience with intergovernmental cooperation, which is often a necessity because of limits on tribal jurisdiction.²³⁷ Finally, the desperate economic need of many tribes has forced tribal governments to be creative in formulating new strategies for economic development.²³⁸ Many of these factors make tribes ideal pioneers of new legislative ideas.

In some cases, tribes can also be more independent of the forces that impede innovation at the state or local level. Many commentators have expressed concern that the effectiveness of state “laboratories” may be inhibited by external pressures on elected officials to reaffirm the status quo.²³⁹ To take one example, the beverage industry has spent enormous sums that have succeeded in derailing soda tax efforts in many areas.²⁴⁰ Tribes may, in contrast, be too small or too far below media radar to attract similar lobbying campaigns; further, the long tradition of robust citizen participation in many tribal governments²⁴¹ may create a countervailing force to lobbying efforts not present in the state or local context.

Finally, tribes have greater freedom to experiment in certain areas because, while they are bound by the Indian Civil Rights Act, which statutorily requires tribes to recognize most U.S. constitutional rights, they are not bound by the Constitution itself. This gives tribes additional freedom to regulate, not only in the areas in which the Indian Civil Rights Act (“ICRA”) does not mirror the Constitution (such as gun regulation),²⁴² but also, to a lesser extent, in the situations in which ICRA does directly incorporate the language of the Bill of Rights, because tribes have some latitude to develop their own interpretations of ICRA that may not precisely map nontribal courts’ views of equivalent

236. See Valencia-Weber, *supra* note 21, at 256–57.

237. See Singel, *supra* note 24, at 842–43.

238. See *id.* at 838, 855.

239. See Rose-Ackerman, *supra* note 53.

240. See Premack, *supra* note 124.

241. See Singel, *supra* note 24, at 835.

242. See Riley, *supra* note 28, at 1715.

rights outside the tribal context.²⁴³ Arguably, this makes for a desirable balance: while tribes must pay heed to core constitutional rights, they have some space to interpret them more flexibly and in more culture-specific ways, allowing them to test a greater variety of policies and ideas.

Of course, one could take the contrary position as well. In some cases, tribes have adopted policies that are at odds with Supreme Court precedent and the values of many U.S. citizens; not all tribes recognize same-sex marriages, for example.²⁴⁴ Tribal policies that depart too far from generally accepted U.S. norms may not only make borrowing impossible, but create more skepticism in the non-Indian community about the value of distinctive tribal regulation more generally. Nonetheless, in other areas, tribal regulation can depart from mainstream federal or state policy while causing less controversy. A notable area where this might be possible is firearms, where commentators have urged greater use of tribal laboratories' potential.²⁴⁵ Since tribes are not bound by the Second Amendment, such experimentation would have no effect on the contested issue of the scope of the constitutional right to bear arms.²⁴⁶ At the same time, the ability to assess the experience of tribes that regulate guns more strictly than the Second Amendment might allow would be a valuable contribution to the national debate, and one that both advocates and foes of more extensive gun regulation might find useful.

2. *Tribal Models and Wider Applicability*

The fact of widespread tribal innovation offers the potential for a productive interchange of influence between tribal models and those of state and local governments. Tribes inhabit territory side by side with

243. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998) (noting that several tribal courts have found that ICRA does not require them to follow the U.S. Supreme Court "jot for jot").

244. See Steve Russell, *The Headlines Are Wrong! Same-Sex Marriage Not Banned Across Indian Country*, INDIAN COUNTRY TODAY (Apr. 23, 2015), <http://indiancountrytodaymedia.network.com/2015/04/23/headlines-are-wrong-same-sex-marriage-not-banned-across-indian-country-160091> [<https://perma.cc/S6KZ-6C7B>] (noting that, while tribes are increasingly recognizing same-sex marriage, not all tribes have done so).

245. See Riley, *supra* note 28, at 1729 ("Thinking of Indian nations as self-selected laboratories for gun laws presents unique and uncharted opportunities for tribes.").

246. Ann Tweedy, however, has suggested that federal courts might be more skeptical of tribal regulation that departs substantially from the Second Amendment. See Tweedy, *supra* note 171, at 902 (noting possibility that "a federal appellate court or the Supreme Court could be alarmed by a tribe's ability to make law that contradicts the current interpretation of the Second Amendment").

nontribal governments in the United States and confront many of the same issues. For example, the problems of diabetes, obesity, and lack of access to fresh food that motivated the Navajo Nation's junk food tax are ubiquitous in nontribal communities throughout the United States.²⁴⁷

The idea that tribes may contribute ideas and models to other jurisdictions within the United States is in keeping with a wider view of federalism—one that looks beyond states and even municipalities for broader models of governance. Michael W. McConnell has argued that local governments are particularly likely to “depart from established consensus” and thus produce greater innovation.²⁴⁸ More recently, Heather Gerken has advocated for “federalism all the way down”—a greater attention to how local institutions (including not just cities but “juries, school committees, zoning boards, local prosecutors’ offices, state administrative agencies”) govern and interact with each other.²⁴⁹ As she notes, the actions of such institutions may “catalyze national debate” or enhance our understanding of how governmental processes work.²⁵⁰ Further, because of their diversity, such institutions may provide minorities excluded from states and national governments the chance to exercise power.²⁵¹

Similar arguments apply to the tribal context. Like local institutions, tribes can provide alternative models of governance and offer a forum for interests and coalitions that have little influence at the national level. At the same time, because tribes possess elements of sovereignty that local governments do not, the examples they offer may be more directly transferable to states. Wenona Singel argues that tribes’ “diligent, persistent work of governance . . . generate[s] benefits that extend well beyond tribal communities.”²⁵² Tribes have a long tradition both of local autonomy and responsiveness²⁵³ and of the ability to govern effectively

247. For a description of how these problems manifest themselves in nontribal, high-poverty households and communities, see, e.g., Adam Drewnowski & S.E. Specter, *Poverty and Obesity: The Role of Energy Density and Energy Costs*, 79 AM. J. OF CLINICAL NUTRITION 6–16 (2004).

248. See McConnell, *supra* note 111, at 1498.

249. See Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–22 (2010) (arguing for a “broad-gauged, democratic account of how these nested governmental structures ought to interact”).

250. See *id.* at 24.

251. See *id.* at 27.

252. See Singel, *supra* note 24, at 830.

253. See *id.* at 840–41 (“Tribal governance and response to social problems has allowed Native leaders to apply their knowledge of local context to produce policies that are often more successful than centralized management under federal control.”).

under challenging conditions.²⁵⁴ Moreover, as Singel notes, tribes in some circumstances face particularly high exposure to problems such as climate change, giving them an incentive to develop cutting-edge solutions that other governments can adopt.²⁵⁵

It is worth noting, however, that at least one commentator has expressed skepticism about the relevance of tribal models, at least in some areas, to nontribal governments. Carole L. Goldberg has argued that tribal restorative justice models, for example, are difficult to transfer to the nontribal context. While recognizing that interest in tribal peacemaking processes represents “romantic yearnings for a different way of life”—one that is “less adversarial and more effective in resolving conflict”—Goldberg argues that tribal peacemaking practices are simply too deeply rooted in distinctive tribal attributes, including attitudes toward religion and kinship, to lend themselves to borrowing by other communities.²⁵⁶ As a result, Goldberg finds the prospect of importation to be “treacherous at best, and altogether futile at worst,” and urges proponents of more cooperative dispute resolution to find solutions within non-tribal culture.²⁵⁷

Goldberg’s arguments have some force; in some cases, the very aspects of tribal governments that make them more likely to try innovative policies, such as cultural distinctiveness and responsiveness to local concerns, may also reflect real differences that make it difficult for states to easily transpose the models they provide. At the same time, even in an area such as restorative justice that is replete with challenges for cross-cultural translation, some tribal institutions and practices appear to have had a productive influence on states.²⁵⁸ Further, other areas of regulation, such as marijuana legalization or incentive systems for food purchases, may reflect needs and values less inherently specific to the tribal context and thus more easily transposed to states.

254. See LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM 201–02 (2011); Singel, *supra* note 24, at 830–31.

255. See Singel, *supra* note 24, at 841.

256. See Goldberg, *supra* note 195, at 1005.

257. See *id.*

258. See Susan J. Butterwick et al., *Tribal Court Peacemaking: A Model for the Michigan State Court System?*, 94 MICH. BAR J. 34 (June 2015) (describing positive experiences of Washtenaw Country Peacemaking Court, a nontribal court in Michigan modeled on tribal court peacemaking principles); Singel, *supra* note 24, at 840 (“Several non-Indian jurisdictions have already adapted Indian peacemaking and related principles of restorative justice with remarkable success.”); Wolf, *supra* note 200, at 11 (“Programs based on peacemaking and similar Native American justice practices have already been developed in a number of U.S. jurisdictions.”).

B. Potential Negative Aspects of Tribal-State Interaction

Tribal innovation thus holds promise as a way of testing innovations that may ultimately be adopted outside of Indian country. Yet two negative types of state-tribal interaction are also possible. First, states may resist tribal policies that differ from state law. If tribes lack full autonomy to govern themselves, they may be limited in their ability to depart from surrounding state policies, thus inhibiting their ability to test new ideas. Second, tribal policies may have unwanted effects outside of Indian country that can be difficult to address without tribal-state cooperation. These two problems can interact: fear of spillovers can cause states to seek more control over tribal policies, thus restricting tribes' freedom to experiment.

1. State-Imposed Obstacles to Tribal Experimentation

Tribal experimentation may be hindered by the policies of the surrounding state in a few different ways. Sometimes these situations resemble "race to the bottom" and spillover problems that are familiar from the state context. For example, the Squaxin and Suquamish Tribes, located within Washington State, appear to have been influenced by state marijuana legalization efforts in formulating tribal marijuana policies.²⁵⁹ The underlying dynamic of such influence is clear: tribes that do not want to lose business opportunities may feel pressure to change their law to be at least as liberal as that of the surrounding state. While the fragile state of some tribes' finances may make such pressures particularly acute, they do not differ greatly in kind from similar forces at work in the state context, such as those, for example, that drove the relaxation of state interest rate restrictions.²⁶⁰

In other circumstances, the policies of surrounding states have disproportionate influence on tribes because of problems unique to Indian country. All jurisdictions within the United States that wish to regulate guns, for example, must confront the problem of firearms that are transported into the area from jurisdictions with more lax policies. Yet while tribes in theory have more power to regulate guns than do states, they face an issue states do not: not only can tribes not stop guns from being brought onto reservations, they lack meaningful ability to enforce their regulations against nonmembers living on or visiting the

259. *See supra* notes 149–51 and accompanying text.

260. *See supra* notes 75–80 and accompanying text.

reservation.²⁶¹ With respect to guns, it is particularly apparent why tribes might not want to take away or restrict ownership rights from their own members while leaving them vulnerable to nonmembers over whom the tribe has no power. Even where there is no such obvious safety issue, however, tribes may be reluctant to impose burdens on their members that nonmember residents of the reservation can avoid. Further, to the extent that a regulation requires fairly uniform compliance to be effective, tribal laws that apply to only a fraction of the population may simply be of little value.

In some cases, then, circumstances may make it difficult or unappealing for tribes to depart substantially from state law. In addition, states may dislike the regulatory choices tribes make and may act in ways that undermine tribal autonomy. One readily available case study for this process is the effect of the Indian Gaming Regulatory Act (IGRA) on state law. IGRA, which the next section will explore in greater depth, directly pegs tribal law to state law by using state law to define the types of games over which states must negotiate.²⁶² Notably, this linkage, when first enacted, represented a new statutory limitation on tribal power because prior to IGRA, tribes were free to allow whatever games they chose so long as they conformed to federal law.²⁶³

In some cases, states have allowed tribes to pursue a gaming policy radically different from the one that prevails in the surrounding state; Kevin Washburn has observed that, in many states, tribal casinos are “islands of gaming permissiveness in an ocean of gaming intolerance.”²⁶⁴ He attributes this phenomenon to an unlikely collaboration between legislators influenced by pro-tribal interests and those who are simply committed to limiting gaming as much as possible (and thus do not want it to spread outside reservations).²⁶⁵

261. See *supra* note 188 and accompanying text.

262. With respect to Class II games such as bingo and pulltabs, states must negotiate as to all games if any are permissible to any degree under state law. See 25 U.S.C. §§ 2703(6)–(8), 2710(d) (2012). With respect to lucrative Class III games, such as blackjack and roulette, the Second Circuit takes a similar position (if the state allows any for any purpose, it must negotiate with respect to all), but the Eighth and Ninth Circuits have adopted a more restrictive one, holding that states must negotiate only with respect to the particular games they allow. Compare *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d. Cir. 1990) (adopting broader view of Class III gaming), with *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250 (9th Cir. 1994) (taking more restrictive position), and *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993).

263. See COHEN’S HANDBOOK, *supra* note 25, § 12.02, at 881 (“Before IGRA was enacted, states played a very limited role in Indian gaming.”).

264. See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294 (2003).

265. See *id.* at 295.

In other cases, however, hostility to tribal gaming can result in changes in state law intended to limit tribes' freedom to set their own gaming policy. In Wisconsin, for example, after a federal court interpreted Wisconsin law as permitting casino-style games (thus requiring such games to be on the table in compact negotiations),²⁶⁶ voters amended the state constitution in 1993 to include an express ban on casino-style games.²⁶⁷ Although then-Governor Tommy Thompson did not immediately attempt to halt tribal casino gaming, the amendment was recognized as giving him the power to "issue the death penalty" for such gaming if he so chose,²⁶⁸ and the deal he ultimately brokered with Wisconsin tribes exacted large concessions in return for their ability to continue offering casino games.²⁶⁹ The Wisconsin Supreme Court, however, subsequently held that the governor lacked the power to negotiate with respect to games barred under Wisconsin law,²⁷⁰ although it later clarified that compacts negotiated pre-amendment must remain in effect.²⁷¹ Nonetheless, because the Wisconsin Supreme Court declined to decide whether compacts to which changes were negotiated post-2003 remained valid,²⁷² these decisions continue to create legal uncertainty for tribes.

States have also used the IGRA compact process as a means of forcing changes in tribal policy that often appear to go well beyond IGRA's originally envisioned reach.²⁷³ For example, as a condition of allowing certain tribes to be the exclusive venues within the state for casino gaming, California required the tribes to share revenue with non-gaming tribes, make payments to a state fund to offset gaming-related costs, and adopt a tribally approved labor ordinance.²⁷⁴ Although the Ninth Circuit found these provisions to be consistent with IGRA's

266. See *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 483 (W.D. Wis. 1991).

267. See Kathryn R. L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 MARQ. L. REV. 971, 991 (2007).

268. See *id.* at 992.

269. See *id.* at 993.

270. *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), *abrogated by Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis. 2006); see also Rand, *supra* note 267, at 995–98.

271. See *Dairyland Greyhound Park*, 719 N.W.2d 408.

272. See *id.* at 438 n.61 ("We do not reach the 2003 gaming compacts."); Rand, *supra* note 267, at 999 ("[T]he *Dairyland* court claimed not to reach the 2003 amendments, seemingly construing them as separate compacts rather than amendments to the original compacts.")

273. See Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 208 (2010).

274. See *id.* at 207.

proper scope,²⁷⁵ they represent to some extent a substitution of California's policies for tribally determined ones.

Attitudes toward gaming vary, of course, and some courts have seen such state measures as reasonable attempts to control the off-reservation effects of gaming.²⁷⁶ Nonetheless, they also serve as checks on robust tribal sovereignty and self-determination. Although the effects of gaming “[c]learly . . . may go beyond the casino floor,”²⁷⁷ and it is reasonable for states to be cognizant of that fact, heavy state involvement that limits the independence of tribal decision-making also hinders tribes' ability to test regulatory schemes that differ from state law.

2. *Tribal Policies and Spillover Effects*

Of course, just as state policies can have unwanted effects on tribes or on surrounding states, tribal policies may themselves have spillovers in surrounding communities. Some of these effects are unavoidable and may be fairly easily resolved. If a tribal casino creates added traffic on a state road, the state and the tribe can agree in compact negotiations that the tribe will help fund the road's expansion.²⁷⁸ Such negotiations happen frequently outside the formal IGRA compact process as well, as when tribes enter into intergovernmental agreements with state and local governments on matters ranging from law enforcement to land use.²⁷⁹

Where meaningful differences exist in state and tribal policies, however, such agreement can be more difficult to achieve. For example, South Dakota officials expressed hostility to the Flandreau Sandee Sioux Tribe's marijuana resort plans based in part on fears that state residents would ingest marijuana on the reservation and then return to state territory, where marijuana was illegal.²⁸⁰ Likewise, the issue of payday lending, which this Article has already discussed as an example of a pernicious race to the bottom in the state context, has recently been a

275. *In re Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003).

276. *See id.* at 1114–15 (noting that compact providing for some revenue-sharing with state required that the money be spent on purposes “directly related to tribal gaming” and finding that this is “not . . . inimical to the purpose or design of IGRA”).

277. *See Gover & Gede, supra* note 273, at 208.

278. *See id.*

279. *See Singel, supra* note 24, at 842–43 (“Intergovernmental agreements between tribes and other tribal, local, state, and federal governments exist in nearly every area of governance, including environmental protection, natural resources management, law enforcement, criminal justice, child welfare, taxation, and land use planning.”).

280. *See Manning, supra* note 15.

source of friction between some states and tribes. Operating in an area where state laws range from “draconian . . . to permissive,” payday lenders have already successfully evaded state law by taking their operations online.²⁸¹ As some states have grown more aggressive about enforcing their laws, some payday lenders have also partnered with tribes to create so-called tribal lending entities (TLEs) that make nationwide online loans.²⁸² Because tribal business entities generally share in tribal sovereign immunity, such lenders may escape state-court suit and consequent discovery.²⁸³ Notably, the high-interest payday loan business is often of limited financial value to tribes, which sometimes receive as little as one percent of revenue.²⁸⁴

Tribes’ payday lending partnerships have been subject to criticism and calls for greater tribal or federal regulation.²⁸⁵ Meanwhile, some tribes have defended payday loans as the provision of a needed service to underbanked consumers²⁸⁶ and a reasonable expression of tribal sovereignty that is no different in kind from the “sort of economic engineering” engaged in states like Delaware and South Dakota, “which routinely export their corporate-favorable state laws” to consumers in more restrictive jurisdictions.²⁸⁷

In the midst of the controversy, some tribes have worked to improve internal regulation of their own lending practices and to defuse tensions with state and federal officials. In March 2016, the Tunica-Biloxi Tribe

281. See Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 764–65 (2012).

282. Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, ABA BUS. L. SECTION (Mar. 22, 2013), <http://apps.americanbar.org/buslaw/blt/content/2013/03/article-04-miller.shtml> [<https://perma.cc/RP35-CAXX>]; Ben Walsch, *Outlawed by the States, Payday Lenders Take Refuge on Reservations*, HUFFINGTON POST (June 29, 2015), http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations_n_7625006.html [<https://perma.cc/TJ4T-NTCF>].

283. See Miller, *supra* note 282.

284. See Martin & Schwartz, *supra* note 281, at 767 (noting that under some payday lending models, “tribes get the crumbs while the non-tribal outsiders use their tribal sovereignty to make huge profits”); Julia Harte and Joanna Zuckerman Bernstein, *Payday Nation: When Tribes Team Up With Payday Lenders, Who Profits?*, AL JAZEERA AM. (June 17, 2014), <http://projects.aljazeera.com/2014/payday-nation/> [<https://perma.cc/MQ3V-V6NS>].

285. See Martin & Schwartz, *supra* note 281; Rosen, *Pluralism*, *infra* note 306, at 786.

286. See Robert Rosette & Saba Bazzazieh, *Arizona’s Win-Win Short-Term Credit Solution: Assisting Arizona’s Unbanked and Underbanked While Supporting Tribal Self-Determination*, 45 ARIZ. ST. L.J. 781 (2013).

287. See Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, 61 FED. LAWYER 58, 62 (Apr. 2014), https://www.bestlawyers.com/Downloads/Articles/4218_1.pdf [<https://perma.cc/3KWM-254R>].

of Louisiana announced its plans to create a Tribal Regulatory Commission for Consumer Lending.²⁸⁸ The Commission, whose inaugural members include a former mayor of Phoenix, Arizona and a former head of the National Indian Gaming Commission,²⁸⁹ is intended to influence not only the Tunica-Biloxi Tribe but the tribal lending industry more generally, as part of what the tribal chairman called a way “to challenge ourselves to create a better lending product and change the tribal online lending industry in a meaningful way.”²⁹⁰ The Commission, which was initiated by the tribe but operates independently, is designed to facilitate better communication with federal regulators; it has received “largely positive feedback” from tribal leaders.²⁹¹

Short-term, high-interest loans are likely to remain a controversial lending product that may continue to cause friction between tribes that offer them and states with more restrictive regulations. At the same time, efforts at tribal self-regulation and to negotiate accommodations between states and tribes may help to ease tensions. As the issue of payday lending shows, spillovers between states and tribes are not necessarily of a different kind than those that occur between states, but mutual trust and cooperation may be more difficult to achieve than in the interstate context.

3. *The Legal Uncertainty Underlying State-Tribal Spillovers*

Further, although states create spillover effects for their neighbors that resemble in many respects the issues that exist in the state-tribal context, the state-tribal arena differs in one important respect from the interstate one: states have numerous constitutional restrictions and subconstitutional mechanisms to help them negotiate interstate conflict, while state-tribal relationships are, by contrast, fraught with legal uncertainty.

The interstate version of horizontal federalism relies on several constitutional provisions that, while incomplete and uncertain in many respects, nonetheless help to define states’ respective territorial spheres.

288. See *Tunica-Biloxi Tribe Establishes a New Commission to Regulate Tribal Lending*, RED LAKE NATION NEWS (Mar. 24, 2016), <http://www.redlakenationnews.com/story/2016/03/24/business/tunica-biloxi-tribe-establishes-a-new-commission-to-regulate-tribal-lending/45167.html> [<https://perma.cc/XDE7-USL9>].

289. *Id.*

290. *Id.*

291. Andrew Westney, *New Tribal Panel to Offer Input on CFPB Regulation*, LAW360 (Apr. 22, 2016), <http://www.law360.com/articles/787472/new-tribal-panel-to-offer-input-on-cfpb-regulation> [<https://perma.cc/D7Q5-GHDZ>].

Most relevant for comparison to the tribal context, states are subject to the Full Faith and Credit Clause²⁹² and statute,²⁹³ and their ability to pass regulations (and, in some cases, issue court opinions) with extraterritorial effects is limited by a number of constitutional doctrines, including dormant Commerce Clause limits on extraterritorial regulation,²⁹⁴ Due Process Clause limits on punitive damages for conduct in other states,²⁹⁵ and restrictions (under both the Due Process and Full Faith and Credit Clauses) on the degree to which states can apply forum law to out-of-state conduct.²⁹⁶ While the precise contours of these doctrines are notoriously unclear,²⁹⁷ it is fair to say that they impose both a number of specific prohibitions on states—for example, state courts may not impose punitive damages for out-of-state conduct lawful in the jurisdiction where it took place²⁹⁸—and, in the aggregate, help to foster a sense that territorial overreaching is undesirable.

By contrast, the Constitution has nothing to say about the territorial element of tribal power, and Supreme Court case law has left the area severely underexplored. A major issue—though by no means the sole one—is that, because of several relatively recent Supreme Court cases, tribes do not possess the automatic territorial jurisdiction that states do; they often lack the power to tax, regulate, or hale into court nonmembers present in their territory, and where they do have such power, it is difficult to establish *ex ante* because the underlying law is murky and fact-specific.²⁹⁹ Perhaps an even more severe problem is that the Supreme Court only sporadically conceives of tribes as territorial sovereigns in the first place; rather, it has tended to view tribal sovereignty, particularly when it comes to regulation, as either the power

292. See U.S. CONST. art. IV, § 1.

293. See 28 U.S.C. § 1738 (2012).

294. See *Healy v. Beer Inst.*, 491 U.S. 324, 335–37 (1989).

295. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

296. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

297. See Florey, *supra* note 109, at 1134 (noting that extraterritoriality limits are a “famously murky and unsettled area of law”).

298. See *BMW*, 517 U.S. at 572–73 (“[A s]tate may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”).

299. See Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CAL. L. REV. 1499, 1554–55 (2013) (discussing uncertain, fact-specific nature of the Court’s jurisprudence on tribal jurisdiction).

of a landowner over land³⁰⁰ or that of a voluntary organization over its members.³⁰¹

The degree to which state authority can encroach on tribal land is also a muddled question. The Indian Commerce Clause, plenary power doctrine, and federal trust relationship with tribes suggest that states are mostly excluded from the federal-tribal relationship except where Congress so authorizes,³⁰² and foundational cases such as *Worcester v. Georgia* stand for the proposition that state law has no place in Indian country.³⁰³ Nonetheless, the Supreme Court has recognized that states have power to extend their law onto reservations in various ways—from punishing crimes nonmembers commit against each other in Indian country³⁰⁴ to compelling tribes themselves to help enforce state taxes.³⁰⁵ Even as the Court has recognized these state powers, however, their contours are quite unclear. This muddled conception of tribal territoriality and state-tribal boundaries is a recipe for uncertainty and conflict when states and tribes follow divergent policies that have effects on each other's land.

A second extraterritoriality problem has to do with the Court's focus on tribal membership as a basis for tribal power. This membership-based analysis raises the question whether tribes have power over their members while they are off tribal territory and the related issue of the power that states possess to regulate their nonmember citizens when they are on it. In the interstate context, many questions exist about the degree to which states can (if at all) restrain their citizens from traveling to other states to engage in conduct that would be illegal in their home state.³⁰⁶ This question, a perennial topic of debate³⁰⁷ that remains

300. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (noting that “a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands”).

301. See, e.g., *Duro v. Reina*, 495 U.S. 676, 693 (1990) (characterizing tribal sovereignty as “but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members”).

302. See *Gover & Gede*, *supra* note 273, at 186–87 (describing primacy of federal-tribal relationship).

303. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832) (finding that “the laws of Georgia can have no force” in Cherokee territory).

304. See *United States v. McBratney*, 104 U.S. 621 (1881).

305. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980) (finding that “the State may impose at least ‘minimal’ burdens on the Indian retailer to aid in enforcing and collecting the [state cigarette] tax”).

306. For an overview of this longstanding debate, see Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002) (taking the view that citizens of one state may travel to another to engage in conduct that is legal there, but illegal in their home state); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to*

unresolved, is both more urgent and more complicated in the tribal arena. On the one hand, the contours of tribal and state jurisdiction in Indian country have, in contrast to the interstate context, always been based on citizenship rather than territory. From that perspective, it seems natural that states and tribes alike should be able to apply their law to, respectively, nonmembers and members, regardless of whether the conduct at issue took place in or out of Indian country. Further, some of the constitutional provisions that have been cited as potential restraints on states' ability to regulate their citizens' conduct, such as the Privileges and Immunities clauses from both Article IV and the Fourteenth Amendment,³⁰⁸ do not apply to tribes directly.³⁰⁹

In some ways, then, it seems more likely that extraterritorial regulation of citizens/members would be permissible across reservation borders. But there is also law to the contrary, and it should be noted that tribal regulation of nonmembers off-reservation and state regulation of citizens on-reservation are, despite some similarities, different issues in many respects. With respect to states, federal Indian law doctrine appears to assume that they will have some ability to regulate their members while in Indian country (at least as long as they remain within state borders). Even though state law generally does not apply on reservations (except to the extent the state may have opted into criminal jurisdiction under Public Law 280), states have had jurisdiction since the nineteenth century over crimes committed by nonmembers against nonmember victims in Indian country.³¹⁰ In the civil context, it is clear that states can often (although not invariably) tax transactions involving nonmembers in Indian country, even where those transactions are with the tribe or its members;³¹¹ further, states can compel tribes to bear some of the record-keeping burden of administering such taxes by, for

Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. REV. 451 (1992); Rosen, *supra* note 89, at 864–64 (taking the opposite view); Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713 (2007) [hereinafter *Pluralism*] (expanding upon the author’s prior views).

307. See *supra* note 306.

308. See Rosen, *Pluralism*, *supra* note 306, at 731–32.

309. While these provisions do not apply directly to tribes, they might come into play if, for example, the citizen of one state wanted to travel to a tribe located in a different state to engage in conduct illegal in her home state.

310. See *United States v. McBratney*, 104 U.S. 621 (1881). This jurisdiction may also extend to victimless nonmember crimes. See COHEN’S HANDBOOK, *supra* note 25, § 9.03[1], at 763–64.

311. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 141–42 (1980).

example, keeping a log of cigarette purchasers and turning it over to the state upon request.³¹² This jurisdictional landscape suggests a continued regulatory oversight by states over nonmember citizens when they are on a reservation.

This background does not, however, necessarily mean that state authority over nonmembers on reservations is unlimited. State law and taxes emphatically do not apply to a great deal of nonmembers' Indian country conduct or transactions.³¹³ Also left unanswered are the questions that arise when a citizen of one state travels to a reservation in a different state: is this simply an instance of the problem of extraterritorial regulation of citizens discussed above, or do distinct factors present in the tribal context counsel a different result?

The question whether tribes can regulate their members' conduct outside of Indian country raises different but similarly vexing questions. On the one hand, the Supreme Court has in recent years tended to conceive of tribal authority in quasi-contractual terms, suggesting that the act of becoming a tribe member represents agreement to accept tribal regulation.³¹⁴ This view would seem to permit tribes to include regulation of off-reservation conduct as part of the bargain of membership; the Supreme Court has lent support to this view by noting that tribes "possess[] attributes of sovereignty over *both* their members and their territory."³¹⁵ Tribal courts, for example, may have jurisdiction over matters involving domestic relations regardless of where members reside and may be able to determine ownership of property outside of Indian country.³¹⁶ On the other hand, although the Court has not fully delineated the extent of the power tribes possess over their members, it is likely not unlimited; the leading Indian law treatise suggests that tribes would have a strong case for extraterritorial regulation only with respect to such "core tribal interests" as domestic relations, probate, maintaining

312. *See id.* at 151.

313. *See, e.g.,* *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 761–62 (1985) (finding that state of Montana could not tax royalty interests in oil and gas produced pursuant to leases between tribe and nonmember lessees); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) (rejecting application of state hunting and fishing regulation to nonmembers on reservation); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (finding that Arizona could not exercise jurisdiction over a suit involving on-reservation transactions between members of the Navajo tribe and a non-Indian general store operator).

314. *See, e.g.,* *Duro v. Reina*, 495 U.S. 676, 693 (1990).

315. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added); *see also* COHEN'S HANDBOOK, *supra* note 25, § 4.01[2][d], at 220 (2012) (discussing significance of this language).

316. *See* *John v. Baker*, 982 P.2d 738 (Alaska 1999); COHEN'S HANDBOOK, *supra* note 25, § 7.02[1][c], at 603.

the peace, and hunting or fishing regulation.³¹⁷ It is far from clear whether tribes could regulate their members with respect to, say, the off-reservation use of marijuana.

Even if one accepts some ability by states and tribes to regulate the extraterritorial conduct of their citizens or members, the practical difficulties of implementation and enforcement attending such regulation are immense. Because of states' and tribes' respective jurisdictional gaps, in many cases the only means by which each sovereign could enforce its respective laws would be to work out a cross-jurisdictional enforcement agreement. Further, because applicability of each sovereign's law would depend on tribal membership status, enforcement would be complicated and in many cases impossible. On the one hand, a tribe selling marijuana to nonmembers could require them to present driver's licenses and sell only to those nonmembers residing in states in which such a sale would be legal. But if a tribe wanted to bar its members from off-reservation purchases of marijuana, the state would have no practical way of verifying that a potential purchaser was not a member of the tribe in question. Given such difficulties, cross-border enforcement might not be possible even if both tribe and state were willing parties.

As a result of these issues, the question of jurisdictional and territorial boundaries when state and tribes have different policies is fraught with uncertainty that is not present in the interstate context. Moreover, many of the doctrines that mediate potential interstate tensions simply do not exist where tribal-state relationships are concerned. The final section of this Article considers how existing law might be changed to facilitate positive interaction between tribes and states—respect for each other's distinctive policy choices, and borrowing of successful innovations—and to minimize friction.

IV. MAXIMIZING THE PROMISE OF TRIBAL INNOVATION

Tribes offer great promise as regulatory pioneers, but the extent to which they can fulfill that promise depends on background policies. This section suggests two changes to current law that could enhance tribes' ability to engage in experimentation: policies favoring more robust tribal autonomy, and development in the tribal-state context of doctrines similar to those promoting comity and positive interaction that exist in the sister-state realm. More tentatively, it considers the advantages and

317. See COHEN'S HANDBOOK, *supra* note 25, § 4.01[2][d].

disadvantages of a federal framework to promote what Alex Wellchief Skibine has called “cooperative tri-federalism”³¹⁸ in which states, tribes, and the federal government all participate.

A. *Strengthening Tribal Powers*

A recognition of the role that tribes play in developing innovative policies should counsel in favor of granting tribes powers that are both stronger and more clearly delineated. Currently, tribal powers over nonmembers—even those who deliberately and voluntarily associate themselves with a tribe or a reservation—are severely limited. This situation is largely the product of *Montana v. United States*,³¹⁹ a 1981 case invalidating a Crow Tribe ordinance barring nonmembers from hunting or fishing within the reservation.³²⁰ In reaching *Montana*’s result, the Court found that tribes lacked the ability to regulate nonmember conduct within reservations on land not owned by the tribe unless one of two exceptions were met: the conduct is rooted in a “consensual relationship[] with the tribe or its members[] through commercial dealing, contracts, leases, or other arrangements”³²¹ or it “threatens or has some direct effect” upon the tribe’s “political integrity . . . economic security, or . . . health or welfare.”³²² Three years prior to *Montana*, the Court had already found that tribes lacked criminal jurisdiction over non-Indians.³²³

Montana and later cases that build on it have been sharply criticized by scholars on many grounds—among others, for narrowing tribal sovereignty,³²⁴ for ignoring the troublesome nonmember conduct that led to the Crow Tribe’s action,³²⁵ and for inserting judicially crafted law into

318. See Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 259 (2010).

319. 450 U.S. 544 (1981).

320. *Id.* at 547.

321. *Id.* at 565.

322. *Id.* at 566.

323. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In general, it remains the case that tribes lack such jurisdiction, although under the 2013 reauthorization of the Violence Against Women Act, tribes that conform to certain requirements have a limited ability to prosecute non-Indians for certain types of intimate partner violence. See 25 U.S.C. § 1304 (2012).

324. See Frickey, *supra* note 14, at 80–81 (criticizing judicial trend embodied in *Montana*, among other cases, toward limiting tribal sovereignty).

325. See John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in INDIAN LAW STORIES 539–41 (2011) (discussing evidence that Crow Tribe had passed its regulation in response to problem of nonmember tourists traveling to reservation to hunt and fish).

an area that had been traditionally the province of Congress.³²⁶ But in addition to these important criticisms, another line of objection to *Montana* is that it is simply shortsighted, ignoring the benefits to other tribes and to states that could accrue through facilitating robust tribal self-governance.

As the law stands, *Montana* poses several distinct problems for the model of tribes as laboratories. First and most basically, it shrinks tribes' sovereign powers and sharply limits their ability to exercise a basic level of control over their territory. Indeed, much nonmember conduct in Indian country falls into a legal gray area, not clearly subject to regulation either by the tribe or the state, with the result that Matthew L.M. Fletcher has described nonmember activity on reservations as "some of the least governed activity in the United States."³²⁷

Second, *Montana* creates uncertainty that is in direct tension with a stable regulatory climate. Because the scope of *Montana*'s exceptions is unclear, it is almost impossible for a tribe to know in advance whether it is within its power to apply a given regulation to nonmembers or not. In the case of gun regulation, for example, tribes may be able to regulate nonmembers pursuant to *Montana*'s "health and welfare" exception.³²⁸ Yet two scholars who have addressed the issue at length have taken starkly different positions on whether a court is likely to find that these regulations fit within the exception,³²⁹ and no court appears to have yet considered the matter. Further, where courts *have* pronounced on the validity of particular tribal regulations under *Montana*,³³⁰ the *Montana*

326. See, e.g., Frickey, *supra* note 14, at 48–49 (arguing that, with *Oliphant* and *Montana*, the Court abandoned its traditional approach of deferring to Congress and began crafting common law to protect perceived nonmember interests).

327. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002 (2010).

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

329. See Riley, *supra* note 28, at 1739 (suggesting that tribal gun regulation is likely to fall within *Montana*'s health and welfare exception); Tweedy, *supra* note 171, at 897–98 (opining that "it is impossible to predict" whether a given tribal gun regulation would survive a *Montana* challenge and suggesting that some such regulations might not, given the "unduly parsimonious way" in which the Court has interpreted the *Montana* exceptions).

330. See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (finding that *Montana* barred tribal imposition of hotel tax on nonmember hotel on private land); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 440–45 (1989) (upholding some tribal zoning regulations under *Montana* exceptions while invalidating others); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1307 (9th Cir. 2013) (holding that, under *Montana*, tribe could not prohibit nonmember from constructing single-family house on fee simple land within reservation borders); *State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108, 1114 (9th Cir. 1999) (finding that tribe lacked regulatory authority under *Montana* to enforce Tribal Employment Rights Ordinance against state engaged in maintenance work on state highway).

inquiry's fact-specific nature makes it difficult for other tribes to generalize from those decisions. Even when tribes take the cautious course of passing regulations applicable only to members, enforcement may be fraught with doubt because it may not be obvious at a glance whether someone (who may be of tribal ancestry and/or a lifelong resident on the reservation) is a member of the tribe or not.

The need to make such determinations, and to engage in the sort of litigation that may well attend the tribe's efforts to assert its sovereignty, makes regulation far costlier and more difficult for tribes than for states.³³¹ These problems may be particularly acute in the case of new or bold regulations that may represent more of a departure from existing expectations and thus are more likely to encounter resistance. Thus, tribes' inability to regulate universally may make them reluctant to regulate at all, for fear of either having the regulations invalidated or of simply imposing extra burdens (or, as with the case of guns, even dangers) on their members that nonmembers who live in or pass through tribal territory do not face.

A less obvious problem that *Montana* poses for tribal innovation is that it deprives tribes of relatively pristine "laboratories" in which to conduct their regulatory experiments. If a tribe cannot enforce its regulations fairly uniformly throughout a particular community—and even worse, if some members of that community are subject to different or even conflicting legal standards, as nonmembers may be—it is much more difficult to test the regulations' effectiveness. Where regulation fails to achieve its intended result, it will be difficult to sort out whether the failure is due to inherent flaws in the idea or the absence of uniform applicability or enforcement.

The Court's *Montana* jurisprudence, and its application of the *Montana* exceptions, has sometimes appeared to resemble a multifactor balancing test, in which the Court weighs fairness to nonmembers, tribal needs, whether states or tribes have historically exercised jurisdiction in a certain area, and so forth. A modest way in which the Court's position might be moved forward is to take into account in *Montana* analysis the potential benefits of regulatory experimentation, not only for the tribe in question but for other tribes and states.

331. The phenomenon that legal uncertainty is a hindrance to effective governance and economic development in Indian country has been widely noted. *See, e.g.*, Valentina Dimitrova-Grajzl, Peter Grajzl & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 L. & SOC'Y REV. 127, 127 (2014) (finding Public Law 280, based on empirical research, to be an example of the way in which "perplexing laws and unpredictable law enforcement hinder progress" in Indian country).

Because tribal advocates and scholars have been criticizing *Montana* for decades to little avail, there is ample reason for skepticism that the Supreme Court will take up this suggestion. Nevertheless, while the Court has for many years shown little inclination to revisit *Montana* or expand its exceptions, recent events suggest the possibility of some positive movement. Increasingly, lower courts have been interpreting the *Montana* standard in a way more generous to tribes. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*,³³² the Ninth Circuit held that *Montana* applied only on land privately owned by nonmembers and did not limit tribal power on tribal land; while this position is well supported by the language the Court originally used in *Montana*, it had been eroded by subsequent Supreme Court pronouncements.³³³ *Water Wheel's* result is important not merely because it restores power to tribes but because it provides a relatively clear, territorially delineated rule that is relatively easy to apply in most cases. Likewise, in *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians*,³³⁴ the Fifth Circuit, while failing to go as far as the Ninth, nonetheless held that a tribe could retain jurisdiction over a case involving the tribal court's jurisdiction over a lawsuit by the family of a thirteen-year-old tribe member against Dollar General, based on allegations that the boy had been molested while working at the store. (The authority of tribal courts to hear claims against nonmembers is, like direct tribal regulation of nonmembers, governed by the *Montana* standard.)³³⁵ In contrast to the Ninth Circuit, the court applied *Montana* notwithstanding the location of the alleged conduct on tribal land.³³⁶ But the court also took a reasonably expansive view of *Montana's* "consent" exception, holding that Dollar General's relatively informal agreement to cooperate with the tribe on an internship program was sufficient to subject it to tribal jurisdiction.³³⁷

332. 642 F.3d 802 (9th Cir. 2011).

333. See *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (indicating that the status of land as tribal or nontribal was an important but not necessarily determinative factor in determining whether a tribe had jurisdiction over a lawsuit against a non-Indian state officer). But see Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 95 (2003) (suggesting that *Hicks* can be read narrowly to apply only when defendants are state officials).

334. 746 F.3d 167 (5th Cir. 2014).

335. See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (stating that "[a]s to nonmembers, . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" and explaining that the *Montana* framework applies to both).

336. *Dolgenercorp*, 746 F.3d at 173 (noting that the alleged conduct occurred at a "Dollar General store located on tribal lands").

337. See *id.* (finding that tribe and Dollar General had a commercial relationship sufficient to trigger first *Montana* exception).

The Supreme Court granted certiorari and heard oral argument in *Dollar General* while Justice Scalia was still on the Court, but in the wake of Scalia's death it granted a four-four per curiam affirmance of the Fifth Circuit, leaving its decision intact.³³⁸ This affirmance, coupled with the justices' remarks at oral argument,³³⁹ suggests that the Court is split both evenly and strongly on its general approach to tribal jurisdiction. As a result, it will be some time before the new balance of the Court on tribal jurisdiction issues becomes clear.³⁴⁰ Nonetheless, there is some reason to hope that the Court might be willing to cast a friendlier eye on tribal regulation in the future.

One reason for optimism is that *Dollar General* was a case involving tribal court jurisdiction, not tribal regulation. Further, it involved a high-stakes tort suit against a corporation in which the plaintiff sought punitive damages. A reasonable speculation is that the extreme hostility some of the four right-leaning justices showed at oral argument to the tribe's position³⁴¹ did not arise entirely from suspicion of tribal self-governance per se but was derived in part from the impulse the Court has shown in many recent decisions to protect corporate defendants from what the Court views as unreasonable damages or excessive exposure to

338. See *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, __ U.S. __, 136 S. Ct. 2159 (2016). Shortly after the Court's decision, Indian law scholar Matthew L.M. Fletcher opined that the case would continue to be useful for those invoking tribal jurisdiction. See Matthew L.M. Fletcher, *Impact of Dollar General Affirmance*, TURTLE TALK (June 23, 2016), <https://turtletalk.wordpress.com/2016/06/23/impact-of-dollar-general-affirmance/#comments> [<https://perma.cc/Q3H6-RYR8>].

339. See Transcript of Oral Argument, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, __ U.S. __, 136 S. Ct. 2159 (2016) (No. 13-1496); Ed Gehres, *Argument Analysis: Is Tribal Court Civil Jurisdiction over Non-Indians Truly a Constitutional Issue, or One of Settled Precedent?*, SCOTUSBLOG (Dec. 18, 2015), <http://www.scotusblog.com/2015/12/argument-analysis-is-tribal-court-civil-jurisdiction-over-non-indians-truly-a-constitutional-issue-or-one-of-settled-precedent/> [<https://perma.cc/5X7V-QTZH>] (noting division on Court between judges "skeptical of . . . the abilities of tribal courts" and those with more "confidence" in such abilities and suggesting, based on oral argument, that this "looks to be a case that may be decided on a tight vote").

340. Justice Neil Gorsuch, before being appointed to the Supreme Court, participated in dozens of cases in which tribal issues were at stake and frequently (although not invariably) sided with tribal interests. See Matthew L.M. Fletcher, *Neil Gorsuch Indian Law Record as Tenth Circuit Judge*, TURTLE TALK (Feb. 1, 2017), <https://turtletalk.wordpress.com/2017/02/01/neil-gorsuch-indian-law-record-as-tenth-circuit-judge/> [<https://perma.cc/Y9ND-P9TW>]. None of these cases, however, directly confronts the question of tribal regulatory authority. See *id.*

341. See Gehres, *supra* note 339 (noting that, at oral argument, Justice Kennedy "startled many observers by openly urging [Dollar General's counsel] toward its broader constitutional arguments" against tribal jurisdiction).

litigation.³⁴² Notably, at oral argument in the *Dollar General* case, Dollar General’s counsel took the position that a tribe would have broader authority to bring an action on its own behalf enforcing a tax or licensing requirement than to invest its courts with jurisdiction to hear a private suit.³⁴³

Indeed, most of the Court’s recent opinions scaling back tribal sovereignty have focused on tribal courts rather than tribal regulation. The Court, while cautioning that “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction,”³⁴⁴ has specifically left open the question whether tribal legislative jurisdiction might be the broader power.³⁴⁵ In practice, in assessing the validity of tribal regulation, the Court has sounded a more mixed note than it has in the judicial realm, where it has tended to rule against tribal interests more consistently. On the one hand, the Court found that a tribe lacked the authority to tax nonmember hotel guests staying on private land within a reservation,³⁴⁶ and in doing so, emphatically restated and even expanded the general *Montana* formulation.³⁴⁷ At the same time, the Court has also held, marking the only instance in which the Court has explicitly found a *Montana* exception to apply,³⁴⁸ that the *Montana* “health and welfare” exception permitted a tribe to block nonmember development on private land in a pristine area of the reservation,³⁴⁹ and it has shielded tribes

342. See Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?_r=0 [https://perma.cc/AC45-9MQG] (describing Court as “far friendlier to business than . . . any court since at least World War II”).

343. See Transcript of Oral Argument, *Dollar General*, 136 S. Ct. 2159 (No. 13-1496).

344. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

345. See *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (describing the issue as an “open question” and declining to resolve it).

346. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). This case is in some tension with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 130 (1982), which held that the tribal power to tax derived from a tribe’s “general authority, as sovereign, to control economic activity within its jurisdiction.”

347. See *Atkinson*, 532 U.S. at 647 (beginning opinion with discussion of *Montana* framework). The Court had not previously applied *Montana* to tribal taxes. See *Merrion*, 455 U.S. at 171–72.

348. An evenly divided Court affirmed the Fifth Circuit’s decision, which relied on the consensual relationships exception, but its one-sentence opinion failed to reveal the justices’ reasoning. See *Dollar General*, 136 S. Ct. at 2160.

349. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). In a fractured opinion, the Court decided (with different majorities on each issue) that the tribe could not apply its zoning regulations to private nonmember land in a more trafficked area of the reservation, *id.* at 445 (opinion of Stevens, J., announcing the judgment of the Court in part and concurring in part), but could do so in a closed portion of the reservation that was retained a “pristine” wilderness character. *Id.* at 440–41.

from the application of state law that might disrupt a uniform system of tribal game management and hunting regulation.³⁵⁰ In the latter case, *New Mexico v. Mescalero Apache Tribe*,³⁵¹ it is particularly notable that the Court recognized the danger of allowing inconsistent schemes of regulation to coexist within a single geographic area: the Court noted that “concurrent [state and tribal] jurisdiction would effectively nullify the Tribe’s authority to control hunting and fishing on the reservation” and would disrupt the fish and game management scheme that had been jointly developed by tribal and federal authorities.³⁵² Even where ruling against tribal interests, the Court has at times displayed some concern for the territorial integrity of tribal lands.³⁵³

All this suggests that—particularly if newly confirmed Justice Gorsuch proves favorable to tribal interests—this may be an opportune moment for tribes to assert a robust view of their regulatory power under *Montana*. In making this argument, tribes will be able to point to the diversity and novelty of their regulatory efforts and their benefits both to other tribes and to the nation as a whole. One of the factors thought to have driven the *Montana* decision is the Court’s (mostly unfounded) belief that the Crow Tribe’s regulation constituted an attempt to advantage its members to the detriment of nonmembers living and owning property on the reservation.³⁵⁴ By contrast, successful tribal innovation provides a chance to highlight the positive aspects of tribal autonomy in ways that might resonate with the Supreme Court—especially, perhaps, with a differently constituted one.

B. Tribal-State Engagement and Comity

The relationship between states and tribes is, along almost any dimension, more complex than the relationships between individual states. States clearly occupy a position of parity with each other within the constitutional structure. By contrast, the relationship of states and tribes is both murky and fraught. On the one hand, by virtue of both history and current doctrine, tribes are autonomous sovereigns that negotiate with the United States on a government-to-government basis

350. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

351. *Id.*

352. See *id.* at 338.

353. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (“[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe.” (quoting *Nevada v. Hicks*, 533 U.S. 353, 3592 (2001) (O’Connor, J., concurring in part and concurring in judgment))).

354. See LaVelle, *supra* note 325 and accompanying text.

and are not automatically subject to all federal law,³⁵⁵ unlike states, which are bound by the Supremacy Clause to a position subordinate to the federal government. At the same time, states enjoy more day-to-day sovereign authority in many important respects; they possess police powers giving them typical sovereign authority to regulate people and conduct within their territory, whereas the ability of tribes to govern the conduct of nonmembers on their reservations is notoriously both limited and unclear.³⁵⁶

Moreover, tribes and states have a history of mutual suspicion in which states have often been the—figurative or literal—aggressors against tribes. Tribes’ primary relationship has been to the federal government, not to states, and tribal sovereignty has often been defined in opposition to state sovereignty; one of the very few ringing affirmations of tribal autonomy to be found in U.S. case law is Justice Marshall’s characterization of the Cherokee Nation in *Worcester v. Georgia* as a “distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force.”³⁵⁷ More recently, the adoption by many states of Public Law 280, which initially permitted states to make the unilateral decision to apply their criminal laws in tribal territory, further strained tribal-state relations and cast states as a threat to tribal self-rule.³⁵⁸

Today, even in situations where states and tribes enjoy relatively friendly relations, states and tribes simply do not have in place the same sorts of doctrines and procedures that facilitate comity in the sister-state context. Most notably, states vary in the extent to which they enforce tribal judgments. While many states, particularly those with several tribes within their borders, grant some degree of comity to tribal

355. The Constitution tacitly recognizes tribal sovereignty through the Indian Commerce Clause, but does not protect it, nor does it articulate a clear role for tribes in the constitutional design. See Singel, *supra* note 24, at 785–89 (summarizing historical and textual evidence about the Constitution’s treatment of tribes). Over the years, the Court has found that Congress possesses plenary power over tribes, and more recently it has suggested that this power is rooted in the Indian Commerce Clause. See Gover & Gede, *supra* note 273, at 186–87. But other federal Indian law doctrines, including the so-called canons of interpretation applicable to tribes, provide at least presumptive limits on the degree to which Congress can encroach on tribal sovereignty. See Frickey, *supra* note 14, at 8–9 (describing canons).

356. See Florey, *supra* note 299, at 1544 (noting that “the Court’s approach creates substantial uncertainty because—even as it displays a sweeping hostility to tribal sovereignty in general—it mandates an examination that is stubbornly unpredictable”).

357. 31 U.S. (6 Pet.) 515, 520 (1832).

358. See Dimitrova-Grajzl et al., *supra* note 331, at 136 (noting that many tribe members perceived P.L. 280 as a threat to tribal sovereignty that “corroded the trust between tribal citizens and law enforcement officials and state courts”).

judgments,³⁵⁹ only three currently give tribal judgments full faith and credit.³⁶⁰ This is a notable contrast to the interstate context, where states are both constitutionally³⁶¹ and statutorily³⁶² obliged to extend full faith and credit to sister-state judgments—even if the court of the rendering state misinterpreted the law of the enforcing state,³⁶³ adopted a position strongly against the public policy of the enforcing state,³⁶⁴ or even lacked clear subject-matter jurisdiction.³⁶⁵ While of course difficult to measure directly, it would be surprising if the unquestioning deference state courts are required to give to each other's decisions did not play some role in increasing both knowledge of and respect for sister-state law and processes.³⁶⁶ From that perspective, the apparent trend in recent years toward greater state enforcement of tribal judgments is promising.

Another way in which state-tribal relations differ from sister-state ones is the degree to which the operation of choice-of-law principles puts the courts of one state into contact with the law of other jurisdictions. State courts constantly hear cases involving multijurisdictional contacts in which they conclude that the law of a different state rather than forum law should apply.³⁶⁷ Application of sister-state law often involves careful study of that state's statutes and judicial opinions. This frequent contact can familiarize states with each

359. See Brief for the Puyallup Tribe of Indians et al. as Amici Curiae in Support of Respondents at 26–29, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, __ U.S. __, 136 S. Ct. 2159 (2016) (No. 13-1496).

360. *Id.* at 29.

361. U.S. CONST. art. IV, § 1.

362. 28 U.S.C. § 1738 (2012).

363. See *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908) (holding that Mississippi must enforce a Missouri judgment despite the fact that the rendering court incorrectly “supposed that the award [of money in question] was binding by the law of Mississippi”).

364. See *id.* at 239 (White, J., dissenting) (objecting that Court was requiring enforcement by Mississippi of a judgment “in violation of laws embodying the public policy of that state”).

365. See *Des Moines Navigation & R. v. Iowa Homestead Co.*, 123 U.S. 552, 558 (1887) (full faith and credit to judgment was required even where the “record show[ed] there could be no jurisdiction”).

366. Supporting this view, there is evidence that states' common law is more influenced by the law of neighboring states (which judges likely have more experience applying) than by the law of distant states. See, e.g., Gregory A. Caldera, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 190 (1985) (noting that “the more substantial the cultural penetration of one state by another, the more likely the recipient state court is to cite the precedents of the original name state's court”).

367. See Florey, *supra* note 92, at 1133 (observing that multijurisdictional transactions that generate litigation are now routine).

other's laws and promote borrowing of ideas and doctrines from the courts of one state to another.³⁶⁸

By contrast, even where the ordinary operation of state choice-of-law principles would seem to dictate the application of tribal law, state-court decisions applying tribal law are as rare as those applying sister-state law are routine. State courts may simply fail to recognize the application of tribal law as an option, or conclude that tribal law is too difficult to ascertain or apply.³⁶⁹ Ironically, the reverse is not necessarily true—many tribal courts apply doctrines modeled on state common-law principles, or even outright adopt state law to fill in gaps in tribal codes.³⁷⁰

Finally, the differences between tribes' and states' respective positions in the constitutional structure make direct borrowing more difficult in some cases. Tribes, for example, may enjoy more room to experiment than states in environmental law areas where some federal regulation also exists;³⁷¹ at the same time, states' unquestioned territorial authority makes it possible for them to address problems such as drug use or negligent driving within their borders in ways that would be impossible for tribes that lack full powers to regulate nonmember conduct.

For all these reasons and more, it is harder to theorize about the ways in which tribes and states should interact in the regulatory arena than it is in the purely interstate context. For example, Gerken and Holzblatt's view of spillovers sees permeability of state borders as a positive good—something that promotes robust debate and forces both politicians and citizens to engage unfamiliar ideas.³⁷² But they acknowledge that this view is somewhat in tension with the idea that the citizens of a given state should have autonomy to “regulate themselves as they see fit.”³⁷³ The authors describe the autonomy-based view as “principled” and

368. See Caldiera, *supra* note 366, at 190 (suggesting that this sort of borrowing occurs).

369. See Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1651 (2006) (noting that some state courts have “worried that the process of establishing the content of tribal law on a given subject is simply too difficult” or simply failed to recognize the possibility that tribal law may apply).

370. See *id.* at 1632 (noting that many tribes “rely to some degree on principles of Anglo-American jurisprudence familiar to state courts”).

371. See, e.g., Warner, *supra* note 17, at 807–09 (noting that some environmental statutes delegate federal authority to tribes and thus permit tribal regulations promulgated under the statute preempt conflicting state law).

372. See Gerken & Holzblatt, *supra* note 95, at 89–90.

373. *Id.* at 103.

“appealing,” while rejecting it in part on the grounds that it does not fit descriptive reality: spillovers inevitably occur, populous states tend to have more influence over national standards than small ones, and so forth.³⁷⁴ Given these real-world factors, the authors advocate that we balance our appreciation for the virtues of self-rule with recognition that other, competing values more compatible with spillovers—such as “interaction, accommodation, and compromise”—are also important.³⁷⁵

Gerken and Holzblatt have presented a robust defense of spillovers in interstate interactions. Yet, even if one accepts their argument in the interstate context, there are a number of reasons why we should be more concerned with spillovers from states to Indian country. Where tribes are concerned, the notion of self-rule is both more fundamental and more fragile than it is in the state context. Indeed, the threat state encroachment may pose to tribal governance is the central concern of the foundational tribal sovereignty case *Williams v. Lee*,³⁷⁶ under which certain state actions are evaluated under a test asking whether they interfere with “the right of reservation Indians to make their own laws and be ruled by them.”³⁷⁷ Where we may find value in a compromise between two neighboring states with strong competing views on the same issue, we fear state coercion in an equivalent encounter between a tribe and a state.³⁷⁸ Further, to the extent the Gerken/Holzblatt defense of spillovers centers on empirical realities, such arguments may be less compelling in the tribal context, where reservations may be physically remote and tribe members may have little contact with non-Indians off the reservation, rendering frictions between competing legal regimes far from inevitable. Of course, it is important to note that not all tribes are so situated and that many may be important parts of an integrated regional economy that creates many circumstances in which tribe members and nonmembers interact both in and outside of Indian country.

In addition, a strong tradition of intertribal regulatory interaction does not exist in the same way that the interstate one does. While tribes can and do influence each other where regulatory policy is concerned,³⁷⁹

374. *Id.* at 103–04.

375. *Id.* at 104.

376. 358 U.S. 217 (1959).

377. *Id.* at 220.

378. For example, many commentators have demonstrated how tribal concerns have often lost out to state ones in the compact negotiating process. See Gover & Gede, *supra* note 273, at 207–08; Rand, *supra* note 267, at 100.

379. Many tribes, for example, have adopted peacemaking processes following the Navajo Nation’s example. See Wolf, *supra* note 200.

tribes border each other only rarely,³⁸⁰ and most tribes thus have relatively limited experience with the sort of day-to-day negotiation of frictions that states have with their neighbors. Further, while state borders and identity may be growing less significant as citizens participate in national markets and pass freely from state to state,³⁸¹ the same is not necessarily true in the tribal context, where membership in a particular tribe is important not merely as a matter of personal identification but as a factor of significance in legal doctrine.³⁸² Thus, while in theory it would be helpful to have a model of intertribal interaction to draw from in thinking about tribal-state relations, a wealth of comparable examples simply does not exist.

All this suggests that a more robust notion of tribal-state comity would be helpful in familiarizing states with tribal law and smoothing relations in instances where divergent tribal-state policies cause spillovers and conflict. Obviously, it is easy to make an anodyne plea for an improvement in tribal-state relationships but much harder to actually bring it about. Nonetheless, it is important to look at the formal and informal mechanisms that buttress interstate cooperation, experimentation, and borrowing in order to consider which might be adaptable to the state-tribal context. As previously suggested, greater willingness of states to grant full faith and credit to tribal decisions and to apply tribal law when appropriate under state choice-of-law rules would be productive steps in this direction. More basically, it may help simply to make states (and, in some cases local governments) more aware of the potential of tribal models—by, for example, incorporating discussions of relevant tribal innovations into workshops for state and local officials, or by raising media awareness of tribal regulation. Articles discussing Philadelphia’s recent adoption of a soda tax, for example, drew comparisons with Berkeley’s efforts but failed to mention the precedent also provided by the Navajo Nation.³⁸³

Complicating this project, of course, is the fact that, even with the various existing doctrines and practices that promote interstate comity, conflicts continue to exist even in the state context. Despite any

380. See *Indian Reservations in the Continental United States*, NAT’L NAGPRA, <https://www.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM> [<https://perma.cc/8PAN-YLT7>] (map).

381. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1110 (2014) (“American heterogeneity does not closely track state borders. Today, individuals from Montana to Mississippi to Maine can eat at the same restaurant chains, shop at the same stores, read the same publications, and listen to the same music.”).

382. See Florey, *supra* note 299, at 1555 (discussing “the importance the Court has placed on . . . formal membership status” in delineating the contours of tribal jurisdiction).

383. See *supra* note 127.

deficiencies, however, states do by and large tend to get by—as Gerken and Holzblatt have observed³⁸⁴—without constant friction with their neighbors, and also seem to borrow successful experiments reasonably often from sister states. By contrast, states vary considerably in the degree to which they have accepted the reality of tribal sovereignty and are willing to accommodate themselves to tribal policies that diverge from state ones.

Marijuana legalization illustrates some of the difficulties that states and tribes can have in negotiating contentious issues with a broad potential for spillover effects. Notably, tribes have run into problems when they have sought to implement policies that differ from those of the surrounding states in both directions—both more liberal policies and more restrictive ones. Despite what initially appeared to be the tacit approval of the federal government, the Flandreau Santee Sioux Tribe was forced to abandon its plans for a marijuana resort amid hostility from South Dakota.³⁸⁵ Meanwhile, the Yakama Nation has run into state opposition in its efforts to prevent the sale of marijuana in ten Washington counties—encompassing more than ten million acres of land and a quarter of state territory—where its members enjoy treaty-protected hunting and fishing rights.³⁸⁶ Working through such problems will require constant communication between tribal and state officials, along with the states’ respect for tribes’ autonomous policy choices—factors that have not always been present when state and tribal policies diverge. It will also require a clearer delineation of the rights and obligations of states and tribes, a process in which—as the next section discusses—the federal government can perhaps play a role.

C. The Federal Government, the Trust Relationship, and “Cooperative Tri-Federalism”

As the preceding sections have argued, the potential for state-tribal friction in areas of regulatory conflict is high and the process of working out cross-border enforcement issues may be difficult for states and tribes to manage on their own. This situation raises the question whether federal involvement might be desirable. Federal involvement could of course take many forms, but in general Congress has the power both to strengthen tribal governments by restoring inherent tribal powers over

384. See Gerken & Holtzblatt, *supra* note 95, at 79.

385. See Manning, *supra* note 15.

386. See Kaminsky, *supra* note 155.

nonmembers³⁸⁷ and (controversially) to extend state powers in Indian country.³⁸⁸ In contemplating whether federal involvement is wise and, if so, what form it might take, the Indian Gaming Regulatory Act (IGRA), which establishes a framework for state-tribal negotiations over tribal gaming, presents an obvious model. The following section briefly surveys the impact that IGRA has had on tribal-state relations in the gaming arena. It goes on to discuss how the experience of IGRA might inform a future model of (to use Skibine's term) "cooperative tri-federalism."

1. *The Indian Gaming Regulatory Act: History and Effects*

IGRA was passed in the wake of the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*,³⁸⁹ in which the Court found that the State of California had no power to restrict tribal bingo under either its inherent authority or under Public Law 280 (P.L. 280).³⁹⁰ P.L. 280, passed in 1953 when assimilationist sentiment was strong, enabled states to opt into a regime granting them criminal (but not civil) enforcement powers in Indian country. Notably, the Court's P.L. 280 holding rested explicitly on the content of state law; the Court reasoned that because California permitted some types of gambling, it had not taken a strong public policy stance against it, and thus its laws regulating bingo were not genuinely "prohibitory" enough to render them enforceable against tribes under P.L. 280.³⁹¹

Following the Court's decision in *Cabazon Band*, many states "lobbied furiously for passage of congressional legislation on Indian gaming,"³⁹² fearing both negative spillover effects (such as the involvement of organized crime) and increased tribal competition for state businesses.³⁹³ In response to those concerns, Congress enacted IGRA in 1988. IGRA separated tribal gaming into three classes, out of

387. See *United States v. Lara*, 541 U.S. 193 (2004) (discussing Congress's "Duro fix" restoring tribal jurisdiction over nonmember Indians).

388. Through P.L. 280, Congress bestowed criminal jurisdiction over Indian country upon states that opted in. P.L. 280 was passed in the assimilationist Termination Era, has been strongly opposed by tribes from the beginning, and is generally regarded as an abject failure from both the state and tribal perspective. See Dimitrova-Grajzl, *supra* note 331.

389. 480 U.S. 202 (1987).

390. *Id.* at 219–20.

391. See *id.* at 211.

392. See Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 48–49 (1997).

393. See *id.* at 49.

which only the first—“social” or traditional games played for minimal value—remained fully under tribal control.³⁹⁴ As to both remaining categories, IGRA gave some role to states in determining the extent to which tribal gaming would be permissible. Class II gaming, which includes bingo and similar games,³⁹⁵ was made subject to explicit federal oversight through the National Indian Gaming Commission, but it was permissible in the first place only if “located within a State that permits such gaming for any purpose.”³⁹⁶ Class III encompassed all other forms of gaming, which Congress made subject to state input in two ways. First, it permitted tribes to offer such games only pursuant to compacts negotiated with states.³⁹⁷ However, states were required to negotiate only with respect to gaming permitted in the surrounding state.³⁹⁸

In enacting IGRA, Congress provided a remedial scheme for the statute’s violation that required abrogating state and tribal sovereign immunity, a move thought at the time to be constitutionally permissible as to both states and tribes.³⁹⁹ In *Seminole Tribe of Florida v. Florida*,⁴⁰⁰ however, a narrow majority of the Supreme Court held that the Eleventh Amendment barred Congress from abrogating sovereign immunity in legislation enacted pursuant to the Indian Commerce Clause.⁴⁰¹ This decision was a serious blow to tribes’ equal footing under the statute. It also created problems for the administration of IGRA, causing tribes—now barred from suing states under IGRA—to turn to IGRA-subverting measures, such as engaging in gaming outside the compact process, the

394. 25 U.S.C. § 2703(6) (2012); see also Tsosie, *supra* note 392, at 50 (“After the enactment of the IGRA, the only category of Indian gaming that remains exclusively within tribal jurisdiction is Class I gaming.”).

395. 25 U.S.C. § 2703(7)(A).

396. *Id.* § 2710(b)(1)(A).

397. *Id.* § 2710(d)(3)(A).

398. *Id.* § 2710(d)(1)(B). A circuit split exists on how this measure should be interpreted. The Second Circuit has applied the same framework that is used with respect to Class II games and found that if a state permits any Class III games (such as blackjack), it must negotiate with respect not only to that game but to other Class III games (such as, for example, slot machines). The Eighth and Ninth Circuits, however, have taken the position that states must negotiate only with respect to the particular games they allow—so a state allowing some forms of blackjack but banning slot machines in all circumstances would only have to put the former on the table. See *supra* note 262.

399. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (finding that Congress may abrogate state sovereign immunity pursuant to the Commerce Clause); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (finding that Congress may abrogate tribal sovereign immunity if it expresses its intent to do so clearly).

400. 517 U.S. 44 (1996).

401. See *id.* at 72–73.

course ultimately pursued by the Seminole Tribe itself.⁴⁰² Because IGRA abrogates tribal immunity only for suits related to the IGRA process, tribes remain immune for non-IGRA activities.

Reviews of IGRA today are mixed. Initially, “an overwhelming majority of tribal leaders” were opposed to IGRA⁴⁰³ because it curtailed tribal sovereignty both through the federal oversight over Class II games and the requirement of state compacts for Class III games. More recently, IGRA has also attracted criticism for inviting near-constant litigation between tribe and states⁴⁰⁴ rather than, as Congress initially hoped, facilitating smooth tribal-state relations.⁴⁰⁵ The Court’s decision in *Seminole Tribe* has exacerbated both of these problems, spawning litigation and giving state courts and state law disproportionate weight in resolving legal disputes arising under IGRA.⁴⁰⁶ With few checks on their role in the compact-negotiating process, states have at times exacted concessions from tribes that go well beyond what Congress envisioned as the proper scope of what should be subject to negotiation under IGRA.⁴⁰⁷

Nonetheless, some commentators have reacted more positively to IGRA, recognizing that, for all its flaws, it has played a vital role in revitalizing the finances of many tribes.⁴⁰⁸ In addition, IGRA has also in

402. The Eleventh Circuit found that, because the tribe retained its sovereign immunity for gaming outside the IGRA process, Florida was not permitted to sue the tribe for an injunction to prevent such gaming. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1239 (11th Cir. 1999) (noting that the case “demonstrates the continuing vitality of the venerable maxim that turnabout is fair play”).

403. *See Skibine, supra* note 318, at 254–55.

404. *See Gover & Gede, supra* note 273, at 194 (calling IGRA “an experiment in permanent and unremitting litigation”); Tsosie, *supra* note 392, at 52 (“Ironically, the compact procedure, which was originally intended to avert contentious and expensive litigation, has resulted in more litigation than any other provision of the IGRA.”).

405. *See* W. Ron Allen, *IGRA Intended Better State/Tribal Relations*, 17 INDIAN GAMING 14 (July 2007), http://www.indiangaming.com/istore/Jul07_SpeakOut1.pdf [<https://perma.cc/5KPU-XCC2>].

406. Kathryn R. L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 MARQ. L. REV. 971, 1006 (2007) (noting that, as a result of the Seminole Tribe decision, disputes relating to IGRA are generally litigated in state court, where “tribal authority and tribal interests . . . are literally absent”).

407. *See Gover & Gede, supra* note 273, at 207–08 (noting that, despite congressional intent, some states see the compact process as a “convenient vehicle to . . . stretch ever further from the regulation of gaming activities” to include matters such as revenue sharing and collective bargaining).

408. *See Skibine, supra* note 318, at 255 (recognizing that IGRA has flaws, but offering the statute praise for the degree to which it has “inject[ed] badly needed revenues into reservation economies”). Tribal gaming has grown from a \$200 million annual industry in 1988, *see id.*, to one that produced \$29.9 billion in revenue for tribes in fiscal year 2015, *see* NAT’L INDIAN GAMING

practice helped to bring about positive examples of tribal-state collaboration; states and tribes, for example, have productively cooperated on measures to reduce smoking and provide resources for problem gamblers.⁴⁰⁹ As one tribal chairman has noted, “The tribes were never happy about how IGRA eroded our sovereignty . . . but we have made it work.”⁴¹⁰

2. *IGRA, the Tribe-State Relationship, and Potential Reforms*

For better or worse, a notable feature of IGRA is that it puts tribal-state relations at the forefront. IGRA is unusual among federal Indian law legislation in mandating that tribes’ central relationship in the gaming arena be not with the U.S. government—which has for almost two centuries⁴¹¹ maintained a special trust relationship with tribes upon which much federal Indian law doctrine is predicated—but with states,⁴¹² which have sometimes been hostile to tribal sovereignty. Many commentators have argued that IGRA’s failure to re-envision more comprehensively tribes’ role in the constitutional scheme and to define the relations between the states, tribes, and the federal government is at best a missed opportunity, and at worst a fatal flaw.⁴¹³ At least as to Class III games, IGRA largely removes the federal government from the process and attempts to redraw jurisdictional lines between tribes and states—a move arguably at odds with Congress’s trust responsibility to

COMM’N, GROSS GAMING REVENUE TRENDING (2015), https://www.nigc.gov/images/uploads/reports/2015_Gross_Gaming_Revenue_Trending.pdf [<https://perma.cc/7M4T-R3ML>]. Tribes have used gaming revenue to further revitalize their economies, funneling the money into public services, infrastructure, social programs, housing construction, and many other endeavors. See Steven Andrew Light & Kathryn R.L. Rand, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 *DRAKE L. REV.* 413, 425–27 (2009).

409. See Allen, *supra* note 405. Notwithstanding some successes, however, the question of whether smoking should be tolerated in tribal casinos has at times been a point of friction between states with smoking bans and tribes that have sometimes chafed at what they see as interference with sovereign prerogatives. See, e.g., Kim Alford, *Smoke-Free Policies: Protecting Tribal Sovereignty and Community Health*, NAT’L NATIVE NETWORK (Jan. 2012), http://www.nihb.org/docs/02092012/tribal_sovereignty_smoke-free_policy_brief_final.pdf [<https://perma.cc/U8NX-D5J7>]; John H. Douglas, *Smoking Bans In Tribal Casinos: Health Issue or Labor’s Latest Smokescreen Assault on Tribal Sovereignty?*, *INDIAN GAMING* (May 1, 2008), <http://www.indiangaming.com/regulatory/view/?id=72> [<https://perma.cc/EMZ8-YT9X>].

410. See Allen, *supra* note 405.

411. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (first characterizing the tribal-federal relationship in these terms).

412. See Skibine, *supra* note 318, at 256 (“IGRA is unique among all federal Indian legislation in that it is the only national Indian legislation which included the states in the federal tribal relationship and, in the process, attempted to balance the tribal and state interests.”).

413. See *id.* at 258–59.

tribes.⁴¹⁴ As a result of these criticisms, many proposals for reforming IGRA suggest reimagining and clarifying the ways in which the three sovereigns should interact—and preferably, in the process, restoring tribes to their previous position of relative strength in the negotiating process.⁴¹⁵ Alex Tallchief Skibine has called for revisions of IGRA that would incorporate principles of “cooperative tri-federalism: a version of federalism involving the tribes, the federal government, and the states.”⁴¹⁶ For example, Skibine suggests, IGRA might be redrafted to create a scheme under which the federal government would promulgate generalized requirements for tribal gaming and then negotiate individualized compacts with tribes pursuant to those guidelines.⁴¹⁷ States would be represented in the initial compact negotiations and would also have the chance to comment on the proposed compacts prior to final approval.⁴¹⁸

Notably, workarounds also exist for the new problem that has arisen with IGRA in the wake of the *Seminole Tribe*⁴¹⁹ decision—Congress’s inability to abrogate state sovereign immunity pursuant to the Indian Commerce Clause and the consequent (if unintended) imbalance in state and tribal powers under IGRA in its current form. Although recognizing problems with this approach, Skibine suggests, for example, that the statute might be rewritten to compel the U.S. Attorney General to sue states that failed to negotiate with tribes in good faith.⁴²⁰ Further, due to an odd twist of reasoning in *Seminole Tribe*, tribes would likely be able to sue states for at least prospective injunctive relief under IGRA as long as no alternative remedial scheme was clearly available or if Congress

414. See Gover & Gede, *supra* note 273, at 188 (criticizing Congress for “not hesitat[ing] to insert state authority into tribal affairs” in IGRA and elsewhere, “notwithstanding the notion that its trust responsibility to tribes has been articulated as one to protect tribes from the states”); *id.* at 189–90 (noting that IGRA purports to “adjust” state-tribal jurisdictional relationships).

415. For example, Gover and Gede acknowledge that states have legitimate concerns about tribal gaming: “[i]ncreased vehicle traffic to and from the casino, overused and inadequate highways and infrastructure, potential criminal activity in the area, increased demand on water, sewage, fire protection, energy, and related needs.” Gover & Gede, *supra* note 273, at 208. At the same time, they argue, the aggressive ways in which states have sought to address these concerns have raised “red flags for advocates of tribal sovereignty.” *Id.*

416. See Skibine, *supra* note 318, at 282.

417. See *id.* at 288.

418. See *id.*

419. 517 U.S. 44 (1996).

420. See Skibine, *supra* note 318, at 292–93. Among the problems with this approach is that “good faith” would require clearer statutory definition. See *id.*

made plain its desire for *Ex Parte Young*⁴²¹ (a limited exception to state sovereign immunity) to apply.⁴²²

Kevin Gover and Tom Gede have made additional suggestions for improving IGRA.⁴²³ These ideas include allowing tribes to regulate independently (i.e., outside the compact process) any gaming activity in which tribal law maps state law,⁴²⁴ and providing for an “opt in” compact process for all other forms of gaming.⁴²⁵ An even more far-reaching reform would be to eliminate the compact requirement entirely if the state allows any form of gaming at all.⁴²⁶

3. *Lessons from IGRA*

Just as federal law and the Constitution mediate the relationships between states, in certain instances a federally created scheme could help bring structure to the unsettled doctrine of tribal-state interaction. Overall, tribes’ experience with IGRA suggests that there is room, in some areas, for the federal government to establish and assist in a negotiation-based model of state-tribal cooperation, provided it is done in a way that is respectful to tribes and cognizant of IGRA’s mistakes as well as its successes. Indeed, IGRA’s deficiencies could be useful in helping to shape future legislation by illustrating the types of federal supervision of the state-tribal relationship that are unneeded or unhelpful.

Not all areas of tribal regulatory innovation, of course, clearly call for such a model. In many areas, tribes can safely go their own way with no particular effects on states or threats of state encroachment. For example, because most people both inside and outside of Indian country shop for groceries close to home, measures such as the Healthy Diné Nation Act are unlikely to spark worries about spillovers or other extraterritorial effects. At the same time, other areas of active tribal regulation, such as marijuana legalization or environmental law, are already enmeshed with

421. 209 U.S. 123 (1908).

422. Normally, the principle established in *Ex Parte Young*, 209 U.S. 123 (1908), permits suits for prospective injunctive relief against state officials who violate federal law. While ordinarily *Young* would have permitted the tribe’s suit, in *Seminole Tribe*, the Court found that, because Congress had created an alternative “detailed regulatory scheme,” 517 U.S. at 74, albeit one that was in the Court’s view barred by the Eleventh Amendment, such relief was unavailable. See Skibine, *supra* note 318, at 297–300 (discussing implications of Court’s reasoning).

423. See Gover & Gede, *supra* note 273, at 215–16.

424. See *id.* at 215.

425. See *id.* at 216.

426. See *id.* at 215–16.

federal policies that may also have effects for states. Other areas, such as gun regulation, are not as closely entwined with federal law but are nonetheless rife with the possibility of tribal-state spillovers.

In these areas, tribal-state negotiation and agreement is clearly desirable and necessary, and a case can be made for a limited federal role in facilitating dialogue between states, tribes, and the federal government. Further, regardless of the inherent desirability of federal legislation or other involvement, it seems possible in some particularly contentious areas, such as marijuana, that states or tribes will turn to the federal government for help in resolving conflicts.

Should the United States take on such a role, it should attempt to learn from states' and tribes' experiences with IGRA. It is important, for example, that Congress start from a baseline of protecting the regulatory powers tribes currently possess—in contrast to IGRA, which limited tribes' previously established right to engage in gaming where state law did not express a clear public policy to prohibit it. Beyond this basic starting point, proposed legislation or executive action should focus on providing clear guidance to tribes, respecting tribal autonomy, and facilitating state-tribal cooperation.⁴²⁷

Some of the ideas commentators have proposed for reforming IGRA have additional value as a potential framework for new regulation. While Alex Tallchief Skibine, for example, acknowledges that it “may be too late in the day to reinvent IGRA” itself,⁴²⁸ some of his ideas—such as his proposal of a predominantly federal-tribal compacting process guided by federal regulations and assisted by state input⁴²⁹—might be adapted as workable models in areas such as marijuana or gun regulation. It is worth noting as well that, in the environmental arena, the federal government has, with great success, facilitated local, autonomous regulation by tribes.⁴³⁰

Finally, any federal proposal should give careful thought to potential effects, intended or unintended, on the ability of tribal and state regulation to function autonomously. IGRA links the question of the scope of tribal gaming to the content of surrounding state law. In some

427. It is worth noting that the mixed signals sent by the federal government on marijuana illustrate a policy that violates all three of these principles: after giving its tacit blessing to tribal marijuana cultivation and legalization, the Department of Justice abruptly reversed course, and—among other actions that sent tribes a confused message—cooperated with South Dakota officials in a threatened raid on tribal crops that strained state-tribal relations. *See supra* note 139 and accompanying text.

428. *See* Skibine, *supra* note 318, at 288.

429. *See id.*

430. *See* Warner, *supra* note 17, at 798 (discussing federal policy of promoting tribal autonomy).

instances, as Kevin Washburn notes, this has had little effect on tribal autonomy—some states have been happy to allow reservations to serve as havens offering forms of gaming unavailable elsewhere in the states.⁴³¹ But in other cases, as has happened to some degree in Wisconsin, tribal power may be circumscribed by changes in underlying state law.⁴³²

By contrast, federal involvement in any other area of state-tribal friction should start with the premise that tribes should enjoy at least as much regulatory autonomy as they do now, and that tribes should be permitted to depart from the law of the surrounding state if they so choose. Inevitably, market forces may lead to state-tribal law convergence—as has been the case with marijuana legalization in Washington—but there is no reason for federal law to contribute to this process. Rather than trying to enforce a uniform, state-driven policy upon tribes, any federal framework should instead provide assistance to tribes and states in negotiating conflicts and spillovers—on both the state and tribal sides—that result from regulations that diverge.

CONCLUSION

In areas from environmental regulation to food policy, tribes are often innovators that exemplify the Brandeisian laboratory ideal. In other areas, such as marijuana and guns, tribes have attempted to develop unique regulatory approaches but have run into problems because of gaps in their sovereignty. In any case, tribal experimentation is likely to continue in the future, creating the possibility for productive emulation of successful tribal policies by states but also increasing the potential for friction and negative spillover effects.

For tribal experimentation to be most successful, tribes need to be able to regulate autonomously, without undue pressures by states, and with powers that are clearly delineated and adequate to the task. With an equally divided Supreme Court, the potential for reimagining the *Montana* test is higher than it has been in decades; any such re-envisioning should take into account the potential that tribal regulation offers. Meanwhile, states, tribes, and perhaps the federal government should work to develop for the state-tribal context equivalents of the comity-promoting doctrines and practices that play a significant role in smoothing interstate relations. While states have sometimes seen tribal independence in regulation as a site of conflict, it can instead be a source of models and ideas from which other jurisdictions can benefit.

431. See Washburn, *supra* note 264, at 294.

432. See *supra* notes 266–72 and accompanying text.