

EMERGING ISSUES IN CANNABIS LAW: 2022 AND BEYOND

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ABSTRACT

The cannabis industry continues to evolve at a dizzying pace. Across the United States, states and cities shape and reshape their cannabis policies and regulations, cannabis businesses jockey for position and profit, and consumers sift through a marketplace brimming with cannabis products. It is difficult for many stakeholders to make sense of these rapid changes, and by the time they do, the landscape will likely shift again.

This introductory article of the Seton Hall Legislative Journal's symposium issue—"Conversations on Cannabis"—will set the stage for a probing look into the legal challenges facing the cannabis industry and its stakeholders. It begins with a breakdown of the state of legalization initiatives in the United States, as well as the less-than-ironclad nature of federal prohibition. Next, the Article explores the business of cannabis, considering both the size of the industry, the interplay between regulated and unregulated markets, and the regulatory challenges facing cannabis businesses today. Finally, the Article explores notions of justice and equity as they relate to the cannabis industry, and the role governments can play to right the wrongs of the war on drugs while spreading the benefits of legalization equitably.

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I. INTRODUCTION

Ten years have passed since Colorado and Washington became the first U.S. states to legalize the recreational use of cannabis.¹ Today, nineteen states allow recreational cannabis use.² In the twenty-six years since California became the first state to legalize the medicinal use of cannabis, thirty-eight states have followed suit.³ Twenty-seven states have decriminalized cannabis possession to some degree.⁴

Only three states—Idaho, Kansas, and Nebraska—still maintain a more or less traditional prohibition on cannabis.⁵ These states collectively account for only two percent of the United States' population.⁶ The legalization movement has evolved quickly and continues to gain steam.

And yet, the above figures do not paint a complete picture. First, the federal prohibition remains in force, meaning that psychoactive marijuana is a Schedule I drug per the Controlled Substances Act.⁷ That listing creates an assortment of restrictions and prohibitions, and this Article will explore some of the nuances

¹ Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATORS (May 31, 2022), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

² *Id.*

³ *Id.*; *Where Marijuana is Legal in the United States*, MARIJUANA BUS. DAILY, <https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/> (last visited Aug. 8, 2022) [hereinafter *Marijuana Legality*].

⁴ Hartman, *supra* note 1.

⁵ Hartman, *supra* note 1.

⁶ *Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020, to July 1, 2021*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?tid=PEPPER2021.NST_EST2021_POP&hidePreview=false (last visited May 25, 2022).

⁷ 21 U.S.C.S. § 812.

of federal prohibition as well. In short, while cannabis remains a prohibited substance under federal law, Congress and federal agencies have been loosening some restrictions.

Second, while legalization moves forward and the legal cannabis industry is minting new beneficiaries, the process has not been equitable, and the benefits have not been evenly distributed. Many people convicted with non-violent cannabis-related charges, which would not be illegal today due to legislative changes, remain incarcerated.⁸ Further, the legal industry's myriad regulatory requirements are becoming increasingly difficult for small businesses to navigate.

Nonetheless, the tide is turning toward legal cannabis markets, and with it, the need to scrutinize how states are legalizing and regulating their industries. As these new markets begin to take shape, it is important to understand the state of the industry. This special symposium issue—"Conversations on Cannabis"—represents a timely opportunity to evaluate the challenges that remain.

This special journal issue contains a collection of stimulating scholarly projects that provide a snapshot of the cannabis industry and its many legal challenges. In *Cannabis Conundrum*, Judge Mary Celeste and Francesca Jenkins explore the nexus between cannabis and the Fourth Amendment of the United States Constitution.⁹ After tracing the history of search and seizure laws as they relate to hemp and marijuana, their article investigates federal jurisprudence and current trends, noting the potential inconsistencies across jurisdictions as search and seizures relate to hemp and/or marijuana.¹⁰

⁸ An estimated 40,000 people remain incarcerated for cannabis-related offenses. See Joan Oleck, *Incarcerated for Marijuana Offenses, The Cannabis Industry Needs to Step Up, Activists Said This Week*, FORBES (Jun. 26, 2020), <https://www.forbes.com/sites/joanoleck/2020/06/26/with-40000-americans-incarcerated-for-marijuana-offenses-the-cannabis-industry-needs-to-step-up-activists-said-this-week/?sh=dfb4dbec16f3>.

⁹ Mary Celeste & Francesca Jenkins, *Cannabis Conundrum*, 46 SETON HALL LEGIS. J. (forthcoming 2022).

¹⁰ *Id.*

Professor Stephanie Geiger-Oneto and Professor Robert Sprague propose a conceptual framework of “involuntary deviance” as a means of thinking through the dilemma many cannabis industry stakeholders face in light of the ongoing federal prohibition.¹¹ Even though many of these actors comply with state or local cannabis laws, the federal prohibition promotes conflict in a number of sectors, including banking, taxation, intellectual property, legal services, and agricultural inputs.¹²

Professor H. Justin Pace compares and contrasts the development of regulatory regimes for the alcohol and cannabis markets in *Convergence and Divergence of Alcohol and Marijuana Regulation in a Federalist System*.¹³ In addition, Pace compares regulatory markets for alcohol and marijuana in the United States and Canada.¹⁴ The article highlights the similarities and notable differences these products have faced on the road to legalization.¹⁵

Finally, Professor Gideon Mark investigates changes in securities litigation in the cannabis industry and financial markets.¹⁶ Mark’s article, *Cannabis Securities Litigation*, observes a rapid increase in the number of cannabis securities class actions in the past eight years, and breaks down the trends in securities litigation that have enabled these developments.¹⁷ As the cannabis industry evolves to include more sophisticated financial markets, the ways in which broader securities litigation trends interact with the industry will be an important indicator for the cannabis space moving forward.¹⁸

¹¹ Stephanie Geiger-Oneto & Robert Sprague, *Cultivating Deviance in the Marijuana Industry*, 46 SETON HALL LEGIS. J. (forthcoming 2022).

¹² *Id.*

¹³ H. Justin Pace, *Convergence and Divergence of Alcohol and Marijuana Regulation in a Federalist System*, 46 SETON HALL LEGIS. J. (forthcoming 2022).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Gideon Mark, *Cannabis Securities Litigation*, 46 SETON HALL LEGIS. J. (forthcoming 2022).

¹⁷ *Id.*

¹⁸ *Id.*

To set the stage for these thought-provoking articles, this Article will provide an overview of the United States cannabis industry as it exists today.¹⁹ This Article will give attention to challenges and cross-cutting themes that relate to many states and legal markets. Section II provides a big-picture analysis of the state of legalization in the United States. While the focus is on state-level legalization efforts, this section also considers the more subtle ways in which the federal government is easing restrictions. Section III addresses the business of cannabis, including early data on legal markets and estimates of the continued role of illicit or unregulated markets. Section IV delves into the challenges stakeholders continue to face with respect to equity and participation. While the legalization trend is exciting for many, the reality is that many others are excluded from the benefits of legal markets.

II. CANNABIS LEGALIZATION AND PROHIBITION

The twenty-first century has been marked by a wave of state-level legalization efforts across the United States. Legalization efforts have been remarkably successful, primarily taking place by voter or ballot initiatives, rather than by legislative, executive, or judicial initiatives.²⁰ As of August 2022, nineteen states allow recreational cannabis use,²¹ thirty-nine states allow medical cannabis use,²² and twenty-seven states have decriminalized cannabis possession to some degree.²³ The cannabis prohibition era has loosened rapidly and across jurisdictions.

¹⁹ A short note from the author on the subject of nomenclature: I have been researching, writing, and speaking about cannabis since 2015. In that short time, the language of cannabis has transformed and reimagined itself many times. The nomenclature used by cannabis industry stakeholders is not yet agreed upon or solidified. I have listened to advocates push for the industry to use “marijuana” instead of “cannabis,” and vice versa. To some, cannabis is more professional and less stigmatized, to others marijuana is more specific to psychoactive cannabis strains and also honors the Hispanic origins of the word. In this Article, I refer broadly to the cannabis industry as “cannabis,” understanding that it is often more precise to refer to psychoactive strains as marijuana and non-psychoactive strains as hemp.

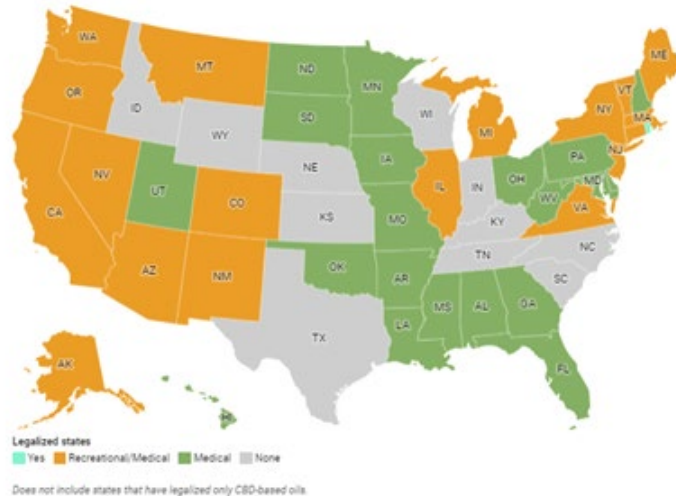
²⁰ *History of Marijuana on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/History_of_marijuana_on_the_ballot (last visited June 15, 2022).

²¹ Hartman, *supra* note 1.

²² *Marijuana Legality*, *supra* note 3

²³ Hartman, *supra* note 1.

Where marijuana is legal in the United States



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Legalization efforts first gained traction in the American West, where recreational use of cannabis is legal in most states.²⁵ These recreation-legal states include California, Oregon, Washington, Nevada, Arizona, New Mexico, Montana, Alaska, and Colorado.²⁶ California first legalized medicinal cannabis use in 1996, while Colorado and Washington legalized recreational use in 2012.²⁷ It is unclear why the American West legalized cannabis so quickly relative to the rest of the United States. Explanations informally proposed to the author of this Article include the west's historic role in cannabis cultivation, California's place as the country's hotbed of counterculture and drug positivism, and other western states' libertarian ethos.

In recent years, major cities and states in the northeast began to follow the west's lead. Notably, legislatures in the northeast have been more proactive in legalizing cannabis use than their counterparts in the rest of the country. Vermont became the first state to legalize recreational cannabis use by legislative enactment

²⁴ *Marijuana Legality*, *supra* note 3.

²⁵ Hartman, *supra* note 1.

²⁶ Hartman, *supra* note 1.

²⁷ Hartman, *supra* note 1.

in 2018.²⁸ The New York legislature passed recreational use measures in 2021, creating a legal cannabis market in the country's second most populous state.²⁹

The Midwest and the South lag behind. Other than Virginia, no southern state has legalized recreational cannabis use.³⁰ Oklahoma, however, has embraced cannabis cultivation for medical purposes, perhaps capitalizing on the regulatory burdens being felt by cannabis businesses elsewhere in the country to attract cannabis industry businesses to the state.³¹ In the Midwest, recreational use is legal only in Illinois and Michigan.³² Perhaps the slower pace of legalization in the Midwest and South can be attributed to those regions' traditional embrace of social conservatism despite cannabis legalization enjoying bipartisan support in many states and on the federal level.

Part of the bipartisan support for cannabis legalization is likely due to the fact that legalization has never been more popular with voters.³³ Each election year, legalization initiatives receive more votes than many politicians. Indeed, it appears that cannabis legalization enjoys broad support from Americans. A 2021 Gallup poll found that sixty-eight percent of Americans support cannabis legalization, the highest level of support since the group's polling began in 1969.³⁴ The 2021 poll shows slight majorities of Republicans and religious service attendees support legalization as well.³⁵ According to a 2021 Pew Research Center poll, sixty percent of Americans support cannabis legalization for recreational use, while another thirty-one percent support medical

²⁸ Hartman, *supra* note 1.

²⁹ Hartman, *supra* note 1.

³⁰ *Marijuana Legality*, *supra* note 3.

³¹ See, e.g., Paul Demko, *Inside the Rise—and Surprising Crackdown—of the Country's Hottest Weed Market*, POLITICO (Nov. 12, 2021, 4:30 AM EST), <https://www.politico.com/news/magazine/2021/11/12/oklahoma-marijuana-laws-520311>; Simon Romero, *How Oklahoma Became a Marijuana Boom State*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/29/us/oklahoma-marijuana-boom.html>.

³² *Marijuana Legality*, *supra* note 3.

³³ *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx>.

³⁴ *Id.*

³⁵ *Id.*

use legalization.³⁶ Only eight percent of Americans prefer to maintain cannabis prohibition as traditionally conceived.³⁷

Although the big-picture is encouraging for legalization advocates, progress has been uneven. While the decision to legalize cannabis use for adults is a relatively straightforward one for voters, the mechanics of doing so, including the regulatory infrastructure that must be devised and developed, is much more confounding. Since the federal government has not participated in the development of cannabis industry regulations, states have been forced to create—for the first time in modern administrative agency history—regulatory frameworks for the billion-dollar (and growing) cannabis industry. This has been a challenge for many.

The next section describes the challenges faced by stakeholders across the board, including overburdened regulators ill-equipped to regulate a brand new and rapidly changing industry, and cannabis businesses collapsing under the weight of an opaque maze of regulatory requirements. What is important to recognize is that after legalization is championed and applauded across the country, the messier work of creating rules and regulations still awaits. This is the state of development states now find themselves in—for many states, these regulatory frameworks are not working and are instead fostering a thriving unregulated market.

Of course, an understanding of cannabis legality in the United States requires a look at the state of prohibition at the federal level. It is well understood that marijuana is a Schedule I drug under the Controlled Substances Act (“CSA”), meaning that, according to the CSA, it has a high potential for abuse and no “currently accepted medical use.”³⁸ This listing requires that the federal government strictly regulate cannabis and the cannabis industry.³⁹

³⁶ Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/>.

³⁷ *Id.*

³⁸ 21 U.S.C. § 812(b)(1).

³⁹ LISA N. SACCO, CONG. RSCH. SERV., IN11204, THE SCHEDULE I STATUS OF MARIJUANA (2022), <https://crsreports.congress.gov/product/pdf/IN/IN11204>.

Nonetheless, the federal prohibition is not as ironclad as it may seem. Congress lifted most restrictions on hemp (non-psychoactive products derived from cannabis plants) and its production in the 2018 Farm Bill.⁴⁰ Every year since 2014, Congress has restricted the Department of Justice from spending federal funds on cannabis-related prosecutions that would comply with state law.⁴¹ Attorneys General of the United States Department of Justice have broad discretion to direct enforcement priorities away from state-legal cannabis markets, as the Cole Memorandum explained in 2013.⁴²

The federal administrative state does not speak with a united voice on cannabis, as many agencies attempt to navigate the murky waters of state and federal cannabis policy. The United States Patent and Trade Office (“USPTO”) has signaled an openness to issuing cannabis-related patents and trademarks,⁴³ and the possibility of owning intellectual property in the cannabis industry is attractive to many investors.⁴⁴ And, naturally, the Internal Revenue Service is happy to provide guidance to cannabis businesses seeking to report cannabis income (and therefore, tax obligations).⁴⁵ As the cannabis industry touches so many sectors and communities, it requires administrative agencies to reckon with its growth and development, the CSA’s prohibition notwithstanding.

⁴⁰ Agricultural Improvement Act of 2018, H.R. 2, 115th Cong. (2018).

⁴¹ See, *E.g.*, Consolidated Appropriations Act of 2021, H.R. 133, 116th Cong. (2021), <https://www.congress.gov/bill/116th-congress/house-bill/133/text> (restricting the Department of Justice from spending federal funds on cannabis prosecutions that do not run afoul of state laws); see generally JOANNA R. LAMPE, CONG. RESEARCH SERV., LSB10655, DOES THE PRESIDENT HAVE THE POWER TO LEGALIZE MARIJUANA? (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10655>.

⁴² Memorandum from Deputy AG James M. Cole to All United States Att’ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (providing guidance on marijuana enforcement).

⁴³ See *Patents and Cannabis*, NORRIS McLAUGHLIN, <https://norrismclaughlin.com/blogs/mtym/category/patents-and-cannabis> (last visited June 15, 2022).

⁴⁴ John Rebchook, *Intellectual Property Takes On Growing Role in Cannabis Industry Deals*, MARIJUANA BUS. DAILY (Apr. 5, 2021), <https://mjbizdaily.com/intellectual-property-takes-on-growing-role-in-cannabis-industry-deals/>.

⁴⁵ De Lon Harris, *Providing Resources to Help Cannabis Business Owners Successfully Navigate Unique Tax Responsibilities*, IRS (Sept. 27, 2021), <https://www.irs.gov/about-irs/providing-resources-to-help-cannabis-business-owners-successfully-navigate-unique-tax-responsibilities>.

III. THE BUSINESS OF CANNABIS—LEGAL AND OTHERWISE

Having explored the state of cannabis legality in the United States, this Article now explores: (1) what legalization means for the growth and development of both regulated (legal) and unregulated (illegal) markets; and (2) what challenges remain to move the industry from the latter to the former?

It is clear that the cannabis industry, as a whole, is thriving. Both the regulated and unregulated markets are large and growing larger. With respect to the global legal cannabis industry, consumer spending grew forty-six percent in 2019 to a record high of \$14.8 billion, with \$12.4 billion coming from United States legalized sales alone.⁴⁶ One cannabis industry market research firm believes United States sales will reach \$33.9 billion by 2025.⁴⁷

Nonetheless, the landscape of legal cannabis business is volatile. In 2019, publicly traded cannabis businesses in the United States crashed by over eighty percent, one of the largest sector crashes in modern history.⁴⁸ One of the central challenges for cannabis businesses seeking to scale up is to maintain the quality of production while keeping prices competitive.⁴⁹ So far, most big firms have struggled to do so.⁵⁰ Many of these publicly traded companies jostle to become the next “Starbucks of Weed,” but the resilience of small businesses and craft operators may prove enduring, not to mention a compelling alternative for consumers.⁵¹ A central question facing the cannabis industry is whether it will be dominated by a few large companies, or whether it will continue to be served by tens of thousands of small businesses.⁵²

⁴⁶ ARCVIEW MKT. RES. & BDSA, THE STATE OF LEGAL CANNABIS MARKETS 11, 62 (Tom Adams ed., 8th ed. 2020) [hereinafter ARCVIEW].

⁴⁷ *Id.* at 35.

⁴⁸ *Id.* at 14.

⁴⁹ *Id.* at 14–15.

⁵⁰ *Id.* at 15 (“Few cannabis companies have ever turned a profit.”).

⁵¹ *See generally* RYAN STOA, CRAFT WEED: FAMILY FARMING AND THE FUTURE OF THE MARIJUANA INDUSTRY (2018).

⁵² *Id.*

While legal markets appear to be taking off, the “legacy” or “unregulated” market remains as resilient and robust as ever. In states where cannabis remains prohibited for most consumers, the unregulated market provides the product. But even in states where legal markets have emerged, they struggle to compete with legacy networks.⁵³ In California—the state considered by most to be the largest player in the cannabis industry—eighty-to-ninety percent of the cannabis industry is not part of the new, legal market.⁵⁴ Perhaps as little as seven percent of global cannabis consumer spending is done through legal channels.⁵⁵

One wonders why legal markets are making such little headway into total market share. Possible explanations include excessive taxes, confusing regulatory requirements for consumers, and a lack of trust in, or familiarity with, new cannabis companies. Even so, many cannabis businesses attempting to gain a foothold in legal markets complain of the increasingly byzantine nature of state regulatory frameworks.⁵⁶

The nascent state of the cannabis industry presents an opportunity for stakeholders to create a regulatory framework that promotes their values. Every state is experimenting with new regulations, and in many cases, regulators do not have experience in regulating cannabis. From the perspective of many cultivators, for example, states are introducing far too much complexity into the regulatory process.⁵⁷

There is strong evidence that California, for example, has created a regulatory system so opaque and unpredictable that businesses who initially expressed enthusiasm for legalization and applied for licenses have since given up.⁵⁸ It is becoming clear that

⁵³ Amanda Chicago Lewis, *California Legalized Weed Five Years Ago. Why is the Illicit Market Still Thriving?*, THE GUARDIAN (Nov. 2, 2021, 6:00 EDT), <https://www.theguardian.com/us-news/2021/nov/02/california-legal-weed-cannabis-industry-economy>.

⁵⁴ *Id.*

⁵⁵ ARCVIEW, *supra* note 46, at 12.

⁵⁶ As reported to the author in original research in California and Oregon, 2020–2022.

⁵⁷ See generally Symposium, *Equity in Cannabis Agriculture*, 101 B.U. L. REV. 1135 (2021) (This section adapts and builds upon material published in this Symposium). One of the themes of the symposium was the challenges faced by cannabis businesses trying to navigate the path to licensure.

⁵⁸ See Natalie Fertig, *How Legal Weed Is Killing America's Most Famous*

if states create unrealistic regulatory burdens for small businesses that cannot afford teams of lawyers and consultants, those businesses will not be capable of operating in the legal market. In order to incentivize participation in the cannabis industry; therefore, regulators must create regulatory frameworks that small businesses can navigate.

In 2018, the *San Francisco Chronicle* characterized the first year of California's legal cannabis market—and the impact of its convoluted regulatory landscape—as a “death by a thousand cuts.”⁵⁹ Small businesses are being pushed out of the industry (or back onto the illicit market) due to the unrealistic regulatory hoops they are required to jump through.⁶⁰ By 2020, the state's Cannabis Advisory Committee (“Committee”) recognized that regulatory complexity was hampering the legal market and recommended that regulators loosen regulations and lower taxes.⁶¹ The Committee's report provided detailed suggestions for cutting back on regulatory requirements, though it remains to be seen whether or not the state's regulators will implement any changes.⁶²

The complexity of regulation in the cannabis industry has entered the national consciousness as well. The 2020 California Cannabis Advisory Commission Annual Report revealed a startling pattern of corruption cases being brought against local officials overseeing cannabis legalization and licensing.⁶³ It notes that because so many states put regulatory authority over cannabis in the hands of local officials, the fate of a billion-dollar industry—including its winners and losers—is being decided by relatively

Marijuana Farmers, POLITICO MAG. (June 4, 2019), <https://www.politico.com/magazine/story/2019/06/04/humboldt-county-marijuana-farmers-regulations-227041/>.

⁵⁹ Peter Fimrite, ‘Death By a Thousand Cuts:’ California's First Year of Legalized Pot is No Smooth Trip, S.F. CHRONICLE (Dec. 28, 2018, 10:14 AM), <https://www.sfchronicle.com/news/article/Death-by-a-thousand-cuts-California-s-13494193.php>.

⁶⁰ *Id.*

⁶¹ See CAL. CANNABIS ADVISORY COMM., 2020 ANNUAL REPORT 5–22 (2020), https://bcc.ca.gov/about_us/documents/cac_annual_report_2020.pdf; see also Patrick McGreevy, *Panel Wants Looser Rules on Selling Pot As Industry Lags*, L.A. TIMES, Dec. 11, 2020, at B1.

⁶² CAL. CANNABIS ADVISORY COMM., *supra* note 61, at 5–22.

⁶³ Mona Zhang, *How State Marijuana Legalization Became a Boon for Corruption*, POLITICO (Dec. 27, 2020, 6:50 AM), <https://www.politico.com/news/2020/12/27/marijuana-legalization-corruption-450529>.

low-level officials.⁶⁴ So far, there appear to be many instances in which licenses are being awarded or regulations are being ignored due to favoritism or corruption.⁶⁵

Yet, in 2022 some things are clear. Demand for cannabis products is high and consumer spending is likely to continue; for that reason, the cannabis industry will continue to thrive. What is not clear is what types of businesses will meet those demands—regulated or unregulated, big or small. For the time being, demand is being met from both legal and illegal markets and from both large publicly traded companies and small businesses. What is not clear, however, is which of those forces will prevail.

IV. EQUITY AND PARTICIPATION IN THE LEGAL CANNABIS INDUSTRY

In the years since the initial wave of successful recreational legalization initiatives, it has become increasingly apparent that the benefits of legalization are not being shared equitably. In general, the first wave of legal cannabis businesses does not represent the demographics of communities hit the hardest by prohibitionist policies.

There are many equity challenges facing the cannabis industry in 2022. This Article will address some of those challenges while acknowledging that neither the author nor the industry has settled on a definitive conception of what “equity” would mean. Nor does the author purport to write with authority or experience on this question. To some, equity means righting the wrongs of the past; for cannabis, this means correcting the harms inflicted by the war on drugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits. A broad understanding of equity surely incorporates both, and a holistic approach to equity in cannabis will require a multidimensional and evolving understanding of what equity means and, perhaps more importantly, what equity requires.

⁶⁴ *Id.*

⁶⁵ *Id.*

A strong theme in the push for equity in the cannabis industry is the desire to use the catalytic potential of legalization to right the wrongs of the war on drugs. This conception of equity points out that because low-income and minority communities were hit the hardest—and disproportionately—by prohibition, legalization efforts should first attempt to rehabilitate or acknowledge these communities by ensuring that they enjoy some of the benefits of legalization. This vision of cannabis equity would harness the power of legalization to promote rehabilitation and growth in vulnerable communities.

The war on drugs has negatively and disproportionately impacted communities of color.⁶⁶ Cannabis prohibition has had this effect as well.⁶⁷ While White communities report similar or increased rates of cannabis use, Black or Brown communities experience much higher rates of arrest for cannabis possession.⁶⁸ For example, in Buffalo, New York, total arrest rates for cannabis possession were cut in half from 2017 to 2018, while arrest rates for people of color during the same period increased.⁶⁹

The full extent of the impact of cannabis prohibition on communities of color is outside the scope of this introductory piece. Still, if the cannabis industry is going to enjoy an equitable future, it must reckon with its inequitable past. Efforts toward this goal tend to fall into two camps: (1) those focused on restorative justice and revitalizing communities hit hardest by prohibitionist policies, and (2) those focused on inclusion and minority participation in a more general sense.⁷⁰

⁶⁶ *Race and the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/race-and-drug-war> (last visited May 25, 2022).

⁶⁷ See generally Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 689–90 (2016).

⁶⁸ Crystal Peoples-Stokes, *People of Color Were Targeted by the War on Drugs. They Must Benefit from Marijuana Legalization*, NEWSWEEK (Apr. 8, 2019, 6:00 AM), <https://www.newsweek.com/people-color-marijuana-legalization-opinion-1381990>.

⁶⁹ *Id.*

⁷⁰ These camps do not necessarily work at cross purposes, but rather focus on different social justice goals. The Last Prisoner Project, for example, works to liberate those incarcerated by prohibition era cannabis prosecutions. See LAST PRISONER PROJECT, <https://www.lastprisonerproject.org/> (last visited June 15, 2022). The licensing programs described in this Article, meanwhile, aim to increase minority participation in the cannabis industry of tomorrow. *Id.*

Many advocates recognize the hypocrisy of operating a legal cannabis market while inmates languish in state prisons for acts that no longer violate the law.⁷¹ Therefore, an equitable cannabis industry would need a holistic expungement mechanism to address the disproportionately low-income and minority populations incarcerated for cannabis-related offenses.⁷² In addition, while it is important to prioritize the participation of businesses of color in the newly legal cannabis industry, as discussed later in this Article, it may be necessary to target specific communities that continue to suffer from prohibitionist policies.⁷³

One think tank has proposed channeling state or federal funding for community development, such as that which might be generated by cannabis tax revenue, to communities based on the severity of disproportionate incarceration.⁷⁴ Illinois, for example, has identified “Disproportionately Impacted Areas” based on factors such as rates of arrest and incarceration for cannabis-related offenses, unemployment, and poverty.⁷⁵ Whatever factors are appropriate in a given context to determine the disproportionate impact of prohibitionist policies, it may be necessary for cannabis legalization laws to target those communities hit the hardest by such policies.

A second strong theme in the cannabis equity discourse focuses on what the cannabis industry of the future will look like and how to distribute its benefits. This notion stems from a recognition that the winners of early legalization efforts tend to be well-capitalized, White, and/or male. An equitable cannabis industry surely requires broad participation and representation across demographic spectrums.

⁷¹ See, e.g., Eileen Rivers, *Nation's Failed Weed War Turned Many into Prisoners and Others into Moguls*, USA TODAY (last updated Apr. 23, 2020, 8:40 AM), <https://www.usatoday.com/in-depth/opinion/lifers/2019/09/04/pot-weed-war-marijuana-prison-life-sentence-lifers/2057276001/>.

⁷² Makada Henry-Nickie & John Hudak, *It Is Time for a Cannabis Opportunity Agenda*, BROOKINGS INST. 1, 2 (Mar. 2020), <https://www.brookings.edu/policy2020/bigideas/it-is-time-for-a-cannabis-opportunity-agenda/#:~:text=We%20argue%20that%202020%20is,equity%2C%20opportunity%2C%20and%20inclusion.>

⁷³ See *infra* Section IV.C.

⁷⁴ Henry-Nickie & Hudak, *supra* note 72, at 3.

⁷⁵ Henry-Nickie & Hudak, *supra* note 72, at 3.

Early trends of representation show that White men predominantly own legal cannabis businesses.⁷⁶ A 2019 report on women and minorities in the cannabis industry revealed a startling lack of diversity in legal markets.⁷⁷ In Massachusetts, for example, only 1.2 percent of permitted cannabis businesses are owned by racial and ethnic minorities, compared to 11.5 percent of businesses in other industries.⁷⁸ Moreover, only 4.7 percent of cannabis businesses are owned by women in the state, compared to 19.3 percent of businesses in other industries.⁷⁹ In Maryland, minority-owned businesses did not receive any of the state's fifteen initial cultivation licenses.⁸⁰ As of 2019, 15.3 percent of cultivation licenses are held by racial and ethnic minority owners, while 23.1 percent of cultivation license holders are women.⁸¹

Among others, two of the most significant reasons for these disparities are historic incarceration rates and a lack of access to capital. First, many minority communities may not be participating in the legal cannabis industry because cannabis business owners of those communities have historically been incarcerated at disproportionate rates.⁸² Many states that have legalized cannabis refuse to issue permits to individuals with past drug convictions, which tends to limit the ability of low-income communities to participate.⁸³ Second, the federal prohibition on cannabis dramatically limits access to traditional capital-raising measures.⁸⁴ Accordingly, cannabis businesses will, in most cases,

⁷⁶ Eli McVey, *WOMEN & MINORITIES IN THE CANNABIS INDUSTRY, MARIJUANA BUS. DAILY*, 10–12 (2d ed. 2019), https://mjbizdaily.com/wp-content/uploads/2019/07/women-and-minorities_FINAL.pdf.

⁷⁷ *See generally id.* at 3.

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 7.

⁸¹ *Id.*

⁸² *See* Ja'Nel Johnson, *How Marijuana Prohibition Blocks People of Color from Getting into the Legal Cannabis Industry*, ABC10 (Dec. 13, 2019, 2:25 PM), <https://www.abc10.com/article/money/business/how-marijuana-prohibition-blocks-people-of-color-from-getting-into-the-legal-cannabis-industry/103-580cbee7-63d0-4981-b516-ab9ab2d23c0a>.

⁸³ *Id.*

⁸⁴ *See* Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We're Going*, 43 SEATTLE U. L. REV. 883, 889 (2020) (“[W]hen marijuana businesses are unable to gain banking services, they must pay things like payroll, taxes, and licensing fees in cash. . . .”).

need to be funded by an individual's own wealth or that of their personal network. This too disadvantages historically low-income communities.⁸⁵

The frustrating permitting processes described above may ultimately exclude or frustrate all but the largest, wealthiest cannabis businesses. However, regulators can also harness the process to address and reverse inequities in the industry. Already some states are experimenting with licensing programs that prioritize underrepresented groups such as low-income and minority communities. In these jurisdictions, priority in licensing is given to communities hit hardest by prohibitionist policies. These permitting programs can serve as a model for other states to enact similar policies that ensure that the cannabis industry is represented by a diversity of voices and communities.

In Massachusetts, for example, regulators have given priority of review to license applicants who qualify as "Economic Empowerment Applicants."⁸⁶ Applicants must meet certain criteria, such as majority ownership by an individual living in a community disproportionately impacted by the prohibition era.⁸⁷

In addition, Massachusetts has developed a social equity program for cannabis business owners.⁸⁸ The program provides training and technical assistance to would-be licensees to understand the regulatory process and move through it effectively.⁸⁹ The program recognizes that navigating the regulatory landscape is challenging to begin with and that many applicants might require assistance in order to demonstrate that their business meets regulatory requirements.⁹⁰

⁸⁵ See Johnson, *supra* note 82.

⁸⁶ Press Release, Commonwealth of Mass. Cannabis Control Comm'n, Cannabis Control Comm'n Approves 204 Potential Licensing Applicants to Receive Priority Review (May 22, 2018), <https://masscannabiscontrol.com/2018/05/5619-2/>.

⁸⁷ *Id.*

⁸⁸ *Equity Programs*, COMMONWEALTH OF MASS. CANNABIS CONTROL COMM'N, <https://mass-cannabis-control.com/equityprograms/> (last visited May 25, 2022).

⁸⁹ *Id.*

⁹⁰ *Id.*

California and its local jurisdictions have taken admirable steps in this regard as well. In 2020, the state set aside \$23 million to be disbursed directly to low-income and minority licensees in the form of low-interest or no-interest loans and grants.⁹¹ Loan or grant programs such as these may be necessary in order to address the lack of start-up capital available in the cannabis industry, particularly for low-income or minority-owned start-up businesses.

The city of Oakland has committed to issuing half of all cannabis business licenses to “Equity Applicants.”⁹² These are applicants who were convicted of a cannabis crime or reside in the hardest hit areas of the city during the prohibition era and whose income is below eighty percent of the city’s median income.⁹³ The program represents one of the strongest commitments to allocating the benefits of legalization to those hit hardest by the prohibition era.

These early attempts to use state or local government licensing authority to address inequities in emerging legal cannabis markets should be applauded. It is possible that, in the future, evidence or rumors of foul play will emerge as future applicants try to abuse the system. And, of course, more is needed to address these inequities.⁹⁴ But these programs—by providing regulatory assistance, start-up capital, or simply priority in licensing—offer a promising toolkit for regulatory authorities across the country.

⁹¹ CAL. CANNABIS ADVISORY COMM., *supra* note 61, at 6.

⁹² *Become an Equity Applicant or Incubator*, CITY OF OAKLAND, <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incubator> (last visited May 25, 2022).

⁹³ *Id.*

⁹⁴ See, e.g., Melissa Hanson, ‘We’re Talking About Restorative Justice,’ *Marijuana Business Applicants, Advocates Call Out for More Equity in the Massachusetts Cannabis Industry*, MASS LIVE (July 16, 2020, 2:01 PM), <https://www.masslive.com/marijuana/2020/07/were-talking-about-restorative-justice-marijuana-business-applicants-advocates-call-out-for-more-equity-in-massachusetts-cannabis-industry.html>.

V. CONCLUSION

The cannabis industry is a truly inter-disciplinary subject of inquiry. Among other matters, cannabis implicates agriculture and the environment, law enforcement, incarceration and restorative justice, regulation and taxation, intellectual property, labor, transportation, manufacturing, marketing, consumption, and public health. Stakeholders must overcome many obstacles on the road to a prosperous and equitable legal cannabis marketplace.

This Article provided a big-picture snapshot of the cannabis industry in 2022, as well as a selection of the existential challenges the industry must address. First and foremost, it is important to recognize the steady but uneven march toward legalization while keeping an eye on the federal prohibition and the disruptive force federal legalization would represent. Thirty-nine states have legalized medicinal cannabis use, while nineteen have legalized recreational use.⁹⁵ The era of prohibition is coming to a close, but that does not mean that the new era of legal markets will be an easy one for stakeholders.

Equity and participation in legal markets are at the forefront of these challenges. As states create new regulatory frameworks, many small businesses struggle to keep up with or navigate new requirements. And while the war on drugs hit low-income and minority communities the hardest, those communities are not proportionately represented in the legal cannabis business community.

2022 will be an exciting year for the cannabis industry as it heads for another round of voter initiatives on the ballot in November, and with them, the potential for new entrants in the legal cannabis landscape. But, as industry stakeholders know all too well, legalization is only the beginning of the story. The rest of the story is sure to present many obstacles to overcome.

⁹⁵ *Marijuana Legality*, *supra* note 3.