

**ZONING, NATURAL RESOURCES, AND RECLAMATION:  
OPPORTUNITIES FOR ENVIRONMENTAL JUSTICE IN A  
FLOWERING INDUSTRY**

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## INTRODUCTION

The cultivation, production, and consumption of cannabis is at an all-time high.<sup>1</sup> Presently, 47 states, the District of Columbia, Guam, the Northern Mariana Islands, and Puerto Rico have all passed some form of measure regulating cannabis for adult-use, with more states and local governments facing legislative action every year.<sup>2</sup> Even when COVID-19 has much of the country operating from home or at a distance, cannabis operations were generally (although inconsistently) deemed “essential,” allowing them to remain open despite other business closures.<sup>3</sup> There are attractive economic incentives that likely motivate states to entertain cannabis legalization: consumer spending,<sup>4</sup> employment,<sup>5</sup> and community reinvestment.<sup>6</sup> Indeed, the prospect of capitalizing on a multibillion-dollar industry provides powerful motivation to at least investigate pathways for opening up to cannabis cultivation, production, and distribution opportunities. Inversely, an

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1. “Cannabis,” as it is used in this Article, generally refers to a grouping of three plants from which the psychoactive chemical delta-9-tetrahydrocannabinol may be derived, produced, and consumed: *Cannabis sativa*, *Cannabis indica*, and *Cannabis ruderalis*. Although it is commonly referred to as “marijuana” in the existing literature, at least one commentator has questioned the appropriateness of using the word. See Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 797 (2019) (“Even the name ‘marihuana’ or ‘marijuana’ reflects a subtly racist appeal: until the influx of Mexicans [during the Mexican Revolution], ‘cannabis’ was the usual term of art.”). Accordingly, the word will only be used in this article where it is quoted by another source.

2. See *Unlocked Potential? Small Businesses in the Cannabis Industry: Hearing before the H. Comm. on Small Bus.*, 116th Cong. 9 (June 19, 2019) (citing testimony by Dana Chavez) [hereinafter *Unlocked Potential*].

3. Natalie Fertig et al., *Cannabis Finds its Moment Amid Coronavirus Outbreak*, POLITICO (Mar. 27, 2020), <https://www.politico.com/news/2020/03/27/cannabis-coronavirus-151209>; see also Patricia Alfonso Tortolani, *Why the Pandemic Was a Breakout Moment for the Cannabis Industry*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/05/31/business/cannabis-marijuana-industry-pandemic-dispensaries.html> (explaining that cannabis sales increased while consumers coped with “pandemic-related stress and anxiety”).

4. Fertig et al., *supra* note 3; Tortolani *supra* note 3; see also Paulina Firozi, *This University Will be the Latest to Offer a Cannabis Major*, WASH. POST (Feb. 10, 2020), <https://www.washingtonpost.com/education/2020/02/10/colorado-cannabis-major/> (discussing economic influence of cannabis industry in Colorado); Andrew DePietro, *Here’s How Much Money States are Raking in From Legal Marijuana Sales*, FORBES (May 4, 2018), <https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/?sh=3b3df115f181> (listing estimated cannabis sales per state); Chris Roberts, *California Liberals Talked a Big Game About Weed Justice. Then Big Cannabis Took Over*, VICE (Nov. 20, 2019) (discussing the changing cannabis economic landscape in California); see also Jeffrey E. Anderson et al., *The Highs and Lows of Startups in the Cannabis Industry: A Pestle Analysis of the Current Issues*, 27 BUS. F. 26, 29 (2019) (stating profits from cannabis sales increased 35%).

5. Anderson et al., *supra* note 4, at 29; see also DRUG POL’Y ALL., FROM PROHIBITION TO PROGRESS: A STATUS REPORT ON MARIJUANA LEGALIZATION 24 (Jan. 22, 2018), [https://www.drugpolicy.org/sites/default/files/dpa\\_marijuana\\_legalization\\_report\\_feb14\\_2018\\_0.pdf](https://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf) (estimating 165,000 to 230,000 employees in cannabis industry).

6. DRUG POL’Y ALL., *supra* note 5, at 6.

established corporation with millions (or even billions) of dollars in capital may be capable of investigating, identifying, and lobbying communities to pursue industry-favorable cannabis regulations given their ability to recognize the value that corporate establishments may bring to an unestablished cannabis market.<sup>7</sup>

On a parallel track, the Environmental Justice Movement demands full recognition of the disparate impacts of policy on the environmental conditions of marginalized persons and a meaningful inclusion of those persons in environmentally affective decision making at all levels.<sup>8</sup> These two tracks intersect at the point where cannabis cultivation, production, and distribution meet prohibitory and regulatory schemas that explicitly prevent, or functionally exclude, meaningful involvement by minority, impoverished, and other marginalized communities. This junction presents lawyers, activists, legislators, and other regulatory bodies with unique opportunities to produce and enact environmentally just cannabis regulations that seek to remediate the systemic, exclusionary harms of cannabis prohibition.<sup>9</sup>

Part I of this Article will briefly explore the racialized history of cannabis prohibition and highlight aspects of state legalization efforts that warrant further exploration. Part II will examine the relationship between cannabis cultivation and the environment, with an emphasis on those problematic aspects of the relationship which demand recognition of possible environmental justice interests. In Part III, this Article will identify three specific areas of the cannabis industry ripe for environmental justice consideration: zoning, natural resources, and economic (re)development. This Article argues not only that existing cannabis regulations should be amended and to incorporate those environmental justice (EJ) interests, but also that all future cannabis regulation efforts must implement policy and regulations which enable disenfranchised communities to meaningfully engage in and reconstruct their relationship with cannabis. Following the primary argument, Part IV will speak to the difficult balance of interests, ask some tough questions, and look forward to the direction of the industry. Ultimately, this Article is targeted at anyone involved in, or interested in becoming involved in, cannabis regulation with the aim of offering some

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7. See, e.g., Janell Ross, *Legal Marijuana Made Big Promises on Racial Equity—And Fell Short*, NBC NEWS (Dec. 31, 2018), <https://www.nbcnews.com/news/nbcblk/legal-marijuana-made-big-promises-racial-equity-fell-short-n952376> (describing the expansion of the cannabis industry in recent years).

8. See, e.g., Letter from Southwest Organizing Project to the “Group of Ten”, SW. ORG. PROJECT (Mar. 16, 1990) (describing a call to action for the “Group of Ten” environmental organizations to include representatives from communities impacted by environmental contaminants).

9. See DRUG POL’Y ALL., *supra* note 5, at 36 (explaining that regulating the cannabis industry can improve accessibility and equity).

guidance on how legislation and regulation can be utilized to accomplish environmental justice goals.

## I. RACIALIZED CRIMINALIZATION AND ATTEMPTED RESTORATION

### A. Criminalization

The United States has undoubtedly enacted a racially emphasized effort to prohibit and criminalize cannabis. This history is well documented in the relevant literature by appropriate authorities on the subject.<sup>10</sup> To avoid simple restatements of analysis which has been thoroughly developed elsewhere, this Article will explore several impacts of disproportionate cannabis enforcement in communities of color. Specifically, to the extent that cannabis initiatives purport to be borne of such injustices,<sup>11</sup> it is essential to consider the effects of concentrated, racially biased policing tactics before assessing what sort of cannabis policies may be a best fit for impacted communities.

Beginning with the premise that cannabis policing efforts have been racially biased, one need look no further than California to find corroborating evidence.<sup>12</sup> Although the specific statistical likelihoods vary by group, area surveyed, time period, and other variables and externalities, one conclusion holds fast amongst the literature reviewing cannabis-oriented arrests: Black and Latinx persons are more likely to be arrested and punished for cannabis crimes than are Caucasians.<sup>13</sup> This may be unsurprising considering that cannabis' initial entry into, and prohibition from, United States markets was

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10. See, e.g., Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 797–805 (2019); Gene Taras, *High Time for Change: How Legalizing Marijuana Could Help Narrow the Racial Divide in the United States*, 24 CARDOZO J. INT'L & COMP. L. 565, 571–80 (2016); EZEKIEL EDWARDS, ET AL. AM. CIV. LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013); Thomas J. Moran, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How It Might Affect Racial and Ethnic Minorities*, 17 WASH. & LEE J.C.R. & SOC. JUST. 557, 561–70 (2011).

11. Alexis Holmes, *Zoning, Race, and Marijuana: the Unintended Consequences of Proposition 64*, 23 LEWIS & CLARK L. REV. 939, 941–42 (2019) (citing *About Prop-64 The Adult Use of Marijuana Act*, YES ON 64, <http://yeson64.org/about-prop-64>).

12. See Steven W. Bender, *The Colors of Cannabis: Reflections on the Racial Justice Implications of California's Proposition 64*, 50 U.C. DAVIS L. REV. ONLINE 11, 13–14 (2017) (highlighting numerous studies which reveal disproportionate arrest rates of African American and Latinx in California).

13. *Id.* at 14; see also DRUG POL'Y ALL., *supra* note 5, at 31 (stating that a “Black person in D.C. is 11 times more likely than a White person to be arrested for public consumption of marijuana”); Holmes, *supra* note 11, at 954–55 (discussing the history of cannabis criminalization before and after the war on drugs); EDWARDS ET AL., *supra* note 10, at 4, 21, 66 (generally outlining the history of racial discrimination against minority groups involving cannabis); see also Lynda Garcia, *The War on Marijuana Has a Latino Data Problem*, ACLU (June 14, 2013), <https://www.aclu.org/blog/smart-justice/sentencing-reform/war-marijuana-has-latino-data-problem> (noting that calculation of arrest disparities is complicated by the fact that “most Latino arrests were likely counted as ‘white’ arrests, meaning that the white arrest rate was artificially inflated . . . obscur[ing] the devastating impact that marijuana arrests can have on Latino communities.”).

motivated by the racist, xenophobic, and blatantly ignorant beliefs of politicians like Harry Anslinger.<sup>14</sup> The racially charged foundation for cannabis' prohibition paved the way for the hearts and minds of white Americans to develop an association between cannabis, violence, and crime—an association which affected perceptions of cannabis and its use for generations to come.<sup>15</sup> Although Americans were generally moving away from “overt appeals to race” by the 1960s, President Richard Nixon utilized more nuanced racial references to “chip away at the Democrats’ advantage among white working-class voters.”<sup>16</sup> This helped President Nixon garner support for his so-called War on Drugs—a devastating intra-national criminal enforcement effort furthered under the Reagan and Clinton administrations,<sup>17</sup> which continues to this day.<sup>18</sup>

The lasting (and ongoing) effects of the failed War on Drugs are too numerous to exhaust in this Article, but they include: disenfranchisement of minority voting rights,<sup>19</sup> mass incarceration,<sup>20</sup> and loss of employment, housing, and federal aid opportunities.<sup>21</sup> These first-order harms of the War on Drugs have historically given way to second-order, systemic harms such as familial breakdown.<sup>22</sup> In turn, they fuel “a debilitating cycle of failure and

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14. Amanda Chicago Lewis, *How Black People Are Being Shut Out of America's Weed Boom*, BUZZFEED NEWS (Mar. 16, 2016), <https://www.buzzfeednews.com/article/amandachicagolewis/americas-white-only-weed-boom>; Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 MONT. L. REV. 167, 168 (Feb. 7, 2014); Cydney Adams, *The Man Behind the Marijuana Ban for all the Wrong Reasons*, CBS NEWS (Nov. 17, 2016), <https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/>; see Vitiello, *supra* note 10, at 790, 797–98 (explaining how racism led to cannabis becoming “demon weed”); see also Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 UCD L. REV. 689, 690 (2016) (discussing the racist history of cannabis criminalization).

15. Vitiello, *supra* note 10, at 799–800.

16. See Susan Stellan, *Is the 'War on Drugs' Over? Arrest Statistics Say No*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html> (explaining that drug-related arrests have “increased every year since 2015”).

17. Vitiello, *supra* note 10, at 802–04.

18. See Susan Stellan, *Is the 'War on Drugs' Over? Arrest Statistics Say No*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html> (explaining that drug-related arrests have “increased every year since 2015”).

19. Vitiello, *supra* note 10, at 806.

20. Chester Harper, *All Is for the Best in the Best of All Possible Worlds: The Unnecessary Environmental Costs of Federal Cannabis Prohibition*, 21 VT. J. ENV'T. L. 55, 88 (2019).

21. Vitiello, *supra* note 10, at 806–07.

22. Nekima Levy-Pounds, *Can These Bones Live?—A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 354–55 (2010) (“When poor African-American mothers and fathers are imprisoned, their children suffer a multitude of harms: They are more likely to become incarcerated themselves or become engaged in harmful activities such as gang involvement or substance abuse.”); see also Inge Fryklund, *Want to Solve Inequality and Child Poverty? End the War on Drugs*, HUFFPOST (May 31, 2015), <https://www.huffpost.com/entry/want-to-solve-inequality-and-child-poverty-end-the-war-on-drugsb6978462> (discussing the effect of ending the war on drugs on poor children).

marginalization that may be perpetuated from generation to generation.”<sup>23</sup> With limited ability to vote or find a job comes limited resources; with limited resources comes decreased opportunity for socioeconomic mobility; with limited socioeconomic mobility comes entrenchment in a system that successfully keeps communities of color locked in to cycles of government reliance, poverty, and violence.<sup>24</sup>

### B. Legalization

Following the long, bleak, “and ugly racist history” of cannabis prohibition in the United States, the stage was set for the nation’s first steps into the territory of legalization. In 1996, California was the first state to legalize cannabis for medical consumption. As of January 22, 2021, 18 states, two territories, and the District of Columbia have regulated non-medical cannabis use.<sup>25</sup> However, a slew of states are facing efforts to regulate adult-use cannabis in some form for the upcoming legislative cycle.<sup>26</sup> Despite that progress, questions remain as to how successful these efforts have been at addressing the underlying and systemically marginalizing effects of America’s racially biased War on Drugs.

#### 1. Canna-colonialism

Without question, the recreational and medicinal cannabis industry is a white, male dominated space.<sup>27</sup> For instance, several estimates of Black

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23. Levy-Pounds, *supra* note 22, at 355.

24. *See id.* at 364, 366–67, 371–777 (discussing the school to prison pipeline).

25. *See State Medical Cannabis Laws*, NAT’L CONF. STATE LEGIS. (Feb. 3, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

26. Those states are Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Washington, D.C., and Wyoming. *See* Kyle Jaeger, *These States Could Legalize Marijuana or Psychedelics in 2022*, MARIJUANA MOMENT (Jan. 13, 2022), <https://www.marijuanamoment.net/these-states-could-legalize-marijuana-or-psychedelics-in-2022/> (listing states which might reform their cannabis and psychedelics legislation by 2022).

27. Bender, *supra* note 12, at 21; *see also* Nick Charles, *Black Entrepreneurs Struggle to Join Legal Weed Industry*, NBC NEWS (Feb. 11, 2020), <https://www.nbcnews.com/news/nbcblk/black-entrepreneurs-struggle-join-legal-weed-industry-n1132351> (“Less than a fifth of the people involved at an ownership or stake-holder level were people of color . . . black people made up only 4.3 percent.”); *see also* Jeremy Berke & Yeji Lee, *Top Executives at the 14 Largest Cannabis Companies are Overwhelmingly White Men, an Insider Analysis Shows*, INSIDER (Jun. 30, 2021), <https://www.businessinsider.in/retail/news/top-executives-at-the-14-largest-cannabis-companies-are-overwhelmingly-white-men-an-insider-analysis-shows/articleshow/83989346.cms> (“White men comprise 70% of the C-suite at the 14 largest publicly traded cannabis companies by market value in the U.S.”).

dispensary ownership sit as low as 1–2%.<sup>28</sup> This unfortunate exclusionary trend adds insult to already particularized, systemic, racial marginalization suffered alongside the War on Drugs. In conjunction with the general, macro-level harms that accompany the disproportionately greater likelihood of being profiled and punished, current legalization efforts have fallen short of addressing the nearly impassable barriers-to-entry faced by would-be minority cannabis entrepreneurs. Some of the biggest barriers are lack of wealth, lack of access to capital, and the disproportionate likelihood of permit denial.<sup>29</sup> Moreover, fears of federal sanctions disincentivize financial institutions from working with the industry, compounding the existing wealth disparities currently afflicting communities of color.<sup>30</sup> Accordingly, with some estimates placing the costs of starting a legal cannabis operation at upwards of \$250,000,<sup>31</sup> it is no wonder that the barriers to entry into the cannabis market exclude communities who have been socioeconomically gutted by the social violence of the War on Drugs.<sup>32</sup> Indeed, Ham

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28. See, e.g., Kevin Sabet & Will Jones, *Marijuana Legalization in the United States: A Social Injustice*, 5 U. PENN. J. L. & PUB. AFFS. 15, 19 (2019) (estimating 2% black ownership); NPR, *As The Legal Pot Industry Booms, African-Americans Are Left Behind* (Interview with Amanda Chicago Lewis) (Mar. 18, 2016), <https://www.npr.org/2016/03/18/471008253/as-the-legal-pot-industry-booms-african-americans-are-left-behind> (estimating 1% black ownership); Vitiello, *supra* note 10, at 816 (noting predominance of white ownership of California’s medical cannabis dispensaries); Dana Gentry, *Weed Injustice Called out as a Civil Rights Issue*, NEV. CURRENT (Jan. 21, 2019), <https://www.nevadacurrent.com/2019/01/21/weed-injustice-called-out-as-a-civil-rights-issue/> (estimating only one minority woman with an ownership in Nevada’s cannabis industry). But other data suggests that minority ownership may be somewhere closer to 17-20%. See Liz Posner, *The Green Rush Is Too White*, PAC. STANDARD (Dec. 10, 2018), <https://psmag.com/economics/the-green-rush-is-too-white-hood-incubator-race-weed> (estimating approximately 80% of cannabis executives are white); Meera Jagannathan, *People of Color are Reclaiming Their Place in a Cannabis Industry ‘Built On The Backs Of People From Marginalized Communities’*, MARKETWATCH (Nov. 12, 2019), <https://www.marketwatch.com/story/people-of-color-are-claiming-their-place-in-a-cannabis-industry-built-on-the-backs-of-people-from-marginalized-communities-2019-08-05> (noting estimates of ownership as low as 1% and as high as 17%).

29. See Bryon Adinoff & Amanda Reiman, *Implementing Social Justice in the Transition from Illicit to Legal Cannabis*, 45 AM. J. DRUG & ALCOHOL ABUSE 673, 679 (2019) (exploring the effect of legalization on past injustices); see also Posner, *supra* note 28 (estimating approximately 80% of cannabis executives are white); Lewis, *supra* note 14 (discussing how a man was denied employment in the cannabis industry because of past drug possession felonies).

30. *Unlocked Potential*, *supra* note 2, at 9 (Statement of Dana Chaves); see also Ben Adlin, *New House Bills Would Make Cannabis Businesses Eligible for Federal Small-Business Aid*, MARIJUANA MOMENT (Apr. 20, 2021) (“Fear of sanctions has kept many banks and credit unions from working with the industry, forcing marijuana firms to operate on a cash basis that makes them targets of crime and creates complications for financial regulators.”).

31. Lewis, *supra* note 14; see also Adinoff & Reiman, *supra* note 29, at 680 (noting that Colorado licensing and regulatory fees can total several hundred thousand dollars).

32. Bender, *supra* note 12, at 696–97; see also BLUE RIBBON COMM’N ON MARIJUANA POL’Y, PATHWAYS REPORT: POLICY OPTIONS FOR REGULATING MARIJUANA IN CALIFORNIA 54, at 41 (2015), [https://www.aclunc.org/sites/default/files/20150721-brc\\_pathways\\_report.pdf](https://www.aclunc.org/sites/default/files/20150721-brc_pathways_report.pdf) (discussing approaches to overcome barriers of entry into legal cannabis market); Vitiello, *supra* note 10, at 820 (describing the “running start” given to wealthy investors who had already pumped billions of dollars into California

mersvik et al. aptly identified the Catch-22 of cannabis production and cultivation 10 years ago.<sup>33</sup> They recognized that to maintain a successful cannabis operation, one often needs the kind of capital inaccessible to marginalized and disenfranchised people, or the kinds of practical and logistical experience which have been denied to those people—to their current licensing disadvantage.<sup>34</sup>

Moreover, and in truly colonial fashion, non-white and non-affluent communities are uniquely susceptible to the overwhelmingly white, profit-driven and cash-infused businesses exploiting their communities for profit.<sup>35</sup> Taking advantage of favorable zoning, comparatively lower rents, and the incentive of profit divestment, commercial cannabis growers and dispensaries have a tendency to target and locate themselves in comparatively disadvantaged neighborhoods.<sup>36</sup> Not just a mere occupation of space, such tactics accelerate the gentrification of that space.<sup>37</sup>

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before smaller operations had the opportunity to compete in the same markets); Rose Hackman, *A Billion-Dollar Industry, a Racist Legacy: Being Black and Growing Pot in America*, GUARDIAN (June 15, 2017), <https://www.theguardian.com/us-news/2017/jun/15/legal-marijuana-industry-racism-portland-jesse-horton> (“There is an obvious chasm between the number of people of color who have been jailed for simple possession during the ‘war on drugs’ and the number of white men who are starting to make millions in profit from the industry.”); see also DRUG POL’Y ALL., *supra* note 5, at 27 (discussing the lasting impacts of cannabis prohibition).

33. Eirik Hammersvik et al., *Why Small-Scale Cannabis Growers Stay Small: Five Mechanisms that Prevent Small-Scale Growers from Going Large Scale*, 23 INT’L J. DRUG POL’Y 458, 462 (2012); cf. Sophie Quinton, *Black-Owned Pot Businesses Remain Rare Despite Diversity Efforts*, PEW CHARITABLE TRS. (Jan. 15, 2021) (“Laura Herrera, a cannabis consultant who advises social equity entrepreneurs in Oakland, said the application process in the city is akin to getting planning permission for a housing development. . . . ‘Nobody’s really prepared, except for big firms, for the bureaucracy and then the compliance requirements, and all the operation requirements,’ she said. ‘It’s a huge lift.’”).

34. Hammersvik et al., *supra* note 33, at 460.

35. See Vitiello, *supra* note 10, at 818 (“While minority communities may not experience the economic benefits of a successful marijuana industry, they will continue to suffer some of the costs of that industry.”); see also Todd Subritzky et al., *Issues in the Implementation and Evolution of the Commercial Recreational Cannabis Market in Colorado*, 27 INT’L J. DRUG POL’Y 1, 4 (2016) (“long-term advocates such as NORML have pointed out that cannabis legalization movements appear to be ‘losing their innocence’ as enterprises focus on profit maximization.”).

36. See Sabet & Jones, *supra* note 28, at 18 (citing Kevin Hamm, *Marijuana in Denver: Map of Pot-related Businesses by Neighborhood with Income Data, School Locations*, DENVER POST (Jan. 2, 2016), <https://www.denverpost.com/2016/01/02/marijuana-in-denver-map-of-pot-related-businesses-by-neighborhood-with-income-data-school-locations/>; OR-IDAHO HIGH INTENSITY DRUG TRAFFICKING AREA, AN INITIAL ASSESSMENT OF CANNABIS PRODUCTION, DISTRIBUTION, AND CONSUMPTION IN OREGON 2018—AN INSIGHT REPORT 13 (Aug. 16, 2018), <http://oridhidta.org/cannabis-production-distribution-consumption-assessment>; Eli McVey, *Chart: Recreational Marijuana Stores are Clustered in Low-income Areas of Denver, Seattle*, MARIJUANA BUS. DAILY (July 31, 2017), <https://mjbizdaily.com/chart-recreational-marijuana-stores-clustered-low-income-areas-denver-seattle/>; Phillip Smith, *Why Are Pot Shops Mainly in Poor Neighborhoods?*, DAILY CHRONIC (Aug. 9, 2017), <http://www.thedailychronic.net/2017/75557/pot-shops-mainly-poor-neighborhoods>).

37. The process of gentrification has had identified, “distinct stages” since as early as 1979. See Peter Moskowitz, *HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD* 14–15 (2018) (“First, a few ‘pioneering’ gentrifiers move in to the neighborhood, followed by a rush of more gentrifiers. Then corporations such as real estate companies and chain retail



By way of analogy, Samuel Walker and Chloe Fox Miller analyzed the possible contribution of craft breweries to gentrification in a way that closely mirrors the process of gentrification identified by Peter Moskowitz.<sup>38</sup> Craft brewery entrepreneurs, faced with high startup costs, specialized equipment, and particular zoning needs, are attracted to the economic opportunities, relatively cheaper rents, and increasing disposable income offered by gentrifying neighborhoods.<sup>39</sup> The changing image of those new communities fuels rent hikes, and subsequently displaces residents and business owners.<sup>40</sup>

The cannabis industry's explosive growth fits neatly within the model of gentrification, especially considering the marginalizing economic incentives present in the *status quo*.<sup>41</sup> Established cannabis dispensary chains find new opportunities for geographic expansion with every state and local regulation effort. These out-of-state, profit-driven entities will logically seek the most favorably zoned and priced areas for new investment opportunities. These investment opportunities are in predominantly non-white, industrial, and/or disadvantaged communities—populations who are unlikely to benefit from either the jobs or the profits that the hosted cannabis venture will bring with them. Without effective, localized incentives for minority and disadvantaged communities to be meaningfully involved in cannabis policy, the processes for minority or community involvement can be co-opted by the asymmetrical capital advantages that corporate cannabis holds over smaller, budding entrepreneurs.<sup>42</sup> In this way, rather than ameliorate the harms of cannabis

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stores, seeing an opportunity to profit from the arrival of the pioneers, become the main actors in a neighborhood. It's not that corporations are necessarily conspiring to overpower the pioneers, but because corporate buying power is so much greater than that of individuals, gentrification inevitably leads to corporate control of neighborhoods. Finally . . . the only entities powerful enough to change and hypergentrify an already gentrified landscape are corporations and their political allies.”); see also Samuel Walker & Chloe Fox Miller, *Have Craft Breweries Followed or Led Gentrification in Portland, Oregon? An Investigation of Retail and Neighborhood Change*, 101 GEOGRAFISKA ANNALER: SERIES B, HUMAN GEOGRAPHY 102, 103 (2018) (“The arrival of new commercial spaces helps gentrifiers stake claim to a changing neighborhood. For gentrifiers, new commercial establishments offer spaces of conviviality and community building. In the early stages of gentrification new merchants are likely to be residential gentrifiers themselves, who are looking to establish a ‘hangout’ for themselves and their friends.”); see also *id.* (“There is often a racial as well as socioeconomic element to the commercial gentrification process, with the arrival of white-owned businesses catering to white, middle-class gentrifiers contributing to exclusion of existing non-white residents.”).

38. See Walker & Miller, *supra* note 37, at 104 (analyzing how craft breweries contribute to gentrification).

39. *Id.*

40. *Id.*

41. See Ekaterina Yudina, *Greened Out: The Bittersweet Impacts of Marijuana Legalization in the United States*, BERKELEY ECON. REV. (Oct. 15, 2020), <https://econreview.berkeley.edu/greened-out-the-bittersweet-impacts-of-marijuana-legalization-in-the-united-states/> (discussing how cannabis legalization was “repackaged” to fit the upper middle-class white gentrification narrative).

42. For example, because “less sophisticated operators” are forced to compete with established business under Oakland, California’s equity application program, the “‘guarantee of execution’” that accompanies corporate investments rewards more wealthy applicants and aggregates industry profit away

criminalization, profit-driven cannabis initiatives have the very real ability to leave behind, and fundamentally alter, the communities that should, instead, reap the primary benefits of legalization. This exploitative use and denial of land is, therefore, an environmental injustice, to the extent that communities consequently lose stake in their land, property, energy, and natural resources.

But where does that leave us? At the end of the day, the onus is on all actors to promote, establish, and oversee regulatory schemes to usher in a more just era of cannabis cultivation, production, and distribution. This is why environmental justice efforts must be at the forefront of every effort to legalize, decriminalize, or otherwise regulate the cultivation, production, and distribution of cannabis in these United States. There is a particular burden on states, however, insofar as they are: (1) responsible for their own collective and proportioned roles in the War on Drugs; (2) responsible for enacting and delegating new cannabis regulations; and, (3) imperiling land and natural resources by doing so improperly. Environmentally just lawmaking must ultimately fall on state actors working with disproportionately affected communities to craft fitting provisions. If marginalized communities are denied a significant role in shaping cannabis policy, harmful regulations will continue to be implemented at their peril. And, without an understanding of how we got *here*, it will be nearly impossible to proceed with assessing the options.

## II. RELATIONSHIP BETWEEN THE ENVIRONMENT AND CANNABIS CULTIVATION/PRODUCTION

While not ignored by the cannabis industry or its legislative and regulatory proponents,<sup>43</sup> the intense energy demands of cannabis cultivation require greater consideration if the cultivation, production, and distribution of cannabis are to be environmentally just.<sup>44</sup>

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from the communities hosting the business opportunities. See Alex Halperin, *Cannabis Capitalism: Who is Making Money in the Marijuana Industry?*, GUARDIAN (Oct. 3, 2018), <https://www.theguardian.com/society/2018/oct/03/cannabis-industry-legalization-who-is-making-money> (because “less sophisticated operators” are forced to compete with established business under Oakland, California’s equity application program, the “guarantee of execution” that accompanies corporate investments rewards more wealthy applicants and aggregates industry profit away from the communities hosting the business opportunities).

43. See, e.g., Nate Seldenrich, *Most States Legalizing Marijuana Have Yet To Grapple With Energy Demand*, ENERGY NEWS NETWORK (June 27, 2019), <https://energynews.us/2019/06/27/west/most-states-legalizing-marijuana-have-yet-to-grapple-with-energy-demand/> (“Among the 11 states to permit recreational use of cannabis, only Massachusetts and . . . Illinois . . . have included energy-efficiency standards for indoor cultivation, a practice that requires nearly nonstop use of lights and various heating, ventilation and air conditioning systems.”).

44. See generally Evan Mills, *The Carbon Footprint of Indoor Cannabis Production*, 46 ENERGY POL’Y 58 (2012). For example, at that time, Mills determined that cannabis’ energy demands contributed

In 2012, Evan Mills concluded that cannabis was among the least energy-efficient industries when measured by the amount of energy required to create economic value.<sup>45</sup> In a 2021 update, he points out the reason why indoor cannabis production is so problematic in this regard: light requirements necessary to “simulate and maintain artificially cloudless tropical environments while suppressing disease-causing humidity year-round” are coupled with the injection of “[i]ndustrially manufactured carbon dioxide . . . to artificially boost plant growth.”<sup>46</sup> Maintaining this level of energy output “can require as much energy as a similarly sized data center.”<sup>47</sup> And while the relatively recent and increasing use of large-scale greenhouses resulted in somewhat increased energy efficiency, the fact remains that they require “prodigious amounts of lighting, cooling, heating, and dehumidification in most climates.”<sup>48</sup> Even when these operations utilize “hydro power,” they have been connected to “reduced salmon populations, and starvation issues facing salmon-eating killer whales (*orcas*) in the Pacific Northwest.”<sup>49</sup>

With the exorbitant energy demands of larger-scale cannabis operations comes externalities which are disproportionately impactful on impoverished communities and communities of color: “moisture damage to buildings, nighttime light pollution, power plant emissions and other environmental impacts, power theft, and outages and other constraints on the broader grid caused by unchecked electrical load growth.”<sup>50</sup> This structural erosion of the surrounding communities is not experienced by the cultivator in the same way that it is experienced by the residents of those communities, and it will remain these communities’ problem long after the cultivator has relocated their operation. There are additional concerns regarding the emission of pollutant-catalyzing volatile organic compounds (VOCs), with at least one study suggesting that “600 cultivation facilities within the city of Denver[,] Colorado could double the prevailing level of VOCs, while air pollution in

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a significant amount of carbon dioxide (CO<sub>2</sub>) emissions to our atmosphere: in 2012, indoor cannabis cultivation carried with it approximately 15 million metric tons of CO<sub>2</sub> emissions, “equivalent to that of 3 million average American cars.” *Id.* at 59. This means that indoor cultivation of one cannabis cigarette’s worth of product creates about three pounds of CO<sub>2</sub>, comparable to driving 22 miles in a 44-mpg vehicle or leaving a 100-watt lightbulb on for 25 hours. *Id.* at 60.

45. *Id.* at 62.

46. See Evan Mills & Scott Zeramby, *Energy Use by the Indoor Cannabis Industry: Inconvenient Truths for Producers, Consumers, and Policymakers*, in Dominic Corva & Joshua Meisel, *THE ROUTLEDGE HANDBOOK OF POST-PROHIBITION CANNABIS RESEARCH* (eds. 2021), at 5, available at [https://www.researchgate.net/publication/342364745\\_Energy\\_Use\\_by\\_the\\_Indoor\\_Cannabis\\_Industry\\_Inconvenient\\_Truths\\_for\\_Producers\\_Consumers\\_and\\_Policymakers](https://www.researchgate.net/publication/342364745_Energy_Use_by_the_Indoor_Cannabis_Industry_Inconvenient_Truths_for_Producers_Consumers_and_Policymakers).

47. *Id.*

48. *Id.*

49. *Id.* at 10.

50. *Id.*

that city already periodically violates federal limits.”<sup>51</sup> Further considering these operations are associated with greenhouse gas emissions, mercury release, and wastewater discharges,<sup>52</sup> communities abutting large-scale cannabis cultivation operations almost certainly experience disproportionate and significant health impacts as a result of the industry’s preference for those spaces.<sup>53</sup> If the general projection holds true that energy demands of cannabis cultivation outpace improvements to energy efficiency,<sup>54</sup> large-scale indoor facilities will indefinitely continue to wreak havoc on surrounding communities.

Although outdoor cannabis cultivation has the relative advantage of nearly eliminating energy costs, energy consumption is only part of the picture.<sup>55</sup> In many ways, the War on Drugs distorted our ability to meaningfully consider the environmental harms of outdoor (and indoor) cannabis cultivation. Indeed, a line can be traced from federal cannabis prohibition to the devastating impacts of illegal cannabis operations.<sup>56</sup> The black market for cannabis, borne of its criminalization, has been documented as pushing illegal growers into U.S. National Forests and other public lands.<sup>57</sup> This leaves “severe and lingering ecological damage in [their] wake.”<sup>58</sup> To use land, illegal growers often utilized *clear-cutting* to ensure suitability for cultivation—a method which causes erosion and watershed alteration.<sup>59</sup> In the West and Southwest regions of the United States, illegal grow operations can also exacerbate drought and yield reductions of surface water levels,

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51. *Id.* at 11.

52. *Id.*

53. See Desert Research Institute, *Emissions from Cannabis Growing Facilities May Impact Indoor and Regional Air Quality*, SCI. DAILY (Sep. 18, 2019), <https://www.sciencedaily.com/releases/2019/09/190918100230.htm> (“‘The concentrations of BVOCs and butane that we measured inside of these facilities were high enough to be concerning,’ explained lead author Vera Samburova. . . . ‘In addition to being potential[ly] hazardous to the workers inside the cannabis growing and processing facilities, these chemicals can contribute to the formation of ground-level ozone if they are released into the outside air.’”).

54. See Mills & Zeramby, *supra* note 46, at 12 (“The energy forecasting authority in the Pacific Northwest projects an 82% increase in energy demand despite improving energy efficiency.”).

55. *Id.* at 63.

56. Harper, *supra* note 20, at 59 (citing Warren Eth, *Up in Smoke: Wholesale Marijuana Cultivation Within the National Parks and Forests, and the Accompanying Extensive Environmental Damage*, 16 PENN ST. ENV. L. REV. 451, 471–72 (2008)) (“By prohibiting legal, regulated cannabis production, the federal government has created a thriving black market marked by indifference to the externalities of grow operations.”); see also Mills & Zeramby, *supra* note 46, at 2 (“Decades spent in the shadows of the black market precluded opportunities to understand the energy use of indoor cannabis cultivation and compel the industry to keep its environmental consequences in check.”).

57. Harper, *supra* note 20, at 59; see also Michael Polson, *Making Marijuana an Environmental Issue: Prohibition, Pollution, and Policy*, 2 ENV. & PLANNING E: NATURE & SPACE 229, 232 (2019) (noting that the environmental harms of cannabis cultivation “cannot be disentangled from prohibitionist policies, which incentivize production in remote, hard-to-detect, ecologically sensitive locations and energy-intensive indoor locations.”).

58. Harper, *supra* note 20, at 59.

59. *Id.* at 60.

which increases the risk of wildfires and requires expensive restoration projects.<sup>60</sup> Because illegal growers were (and are) not particularly concerned with governmental regulations, they generally engaged in unregulated pesticide use, contaminating soil and water, and secondarily exposing wildlife in the process.<sup>61</sup> Compounding these particular, prohibition-consequent harms is the subsequently impaired collection, reporting, and dissemination of data.<sup>62</sup> This data would reveal the extensive environmental harms propagated by cannabis criminalization and otherwise inadequate or unregulated cultivation practices.<sup>63</sup>

But even legal cannabis cultivators and regulators must still reckon with the fact that cannabis itself is a water-intensive crop.<sup>64</sup> As one commentator explained: whereas grapes use 271 million liters of water per cultivated square kilometer per growing season, cannabis consumes over 430 million liters in the same time frame.<sup>65</sup> To be fair, common crops such as corn, potatoes, tree fruits, and alfalfa all require considerably more water than does cannabis.<sup>66</sup> But inconsistently illegal and un(der)-regulated water use still contributes to ecosystem destruction by inadequately preventing *clear-cutting*, the diversion of water from streams and wetlands, and exposures from unregulated pesticides and rodenticides.<sup>67</sup>

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60. *Id.* at 60, 64.

61. Harper, *supra* note 20, at 60; *see also* Craig M. Thompson et al., *Impacts of Rodenticide and Insecticide Toxicants From Marijuana Cultivation Sites on Fisher Survival Rates in the Sierra National Forest, California*, 7 CONSERVATION LETTERS 91, 97 (2013) (estimating that pesticide contamination at illegal cannabis sites is “more akin to leaking chemical weapons stockpiles than typical use or misuse of agricultural products.”); Madison Park, *Use of Federal Lands for Illegal Pot a Growing Concern, California Officials Say*, CNN (May 30, 2018), <https://www.cnn.com/2018/05/30/us/california-illegal-marijuana-federal-lands/index.html> (stating that illegal growers grow cannabis on federal land and use banned pesticides); Mills, *supra* note 44, at 63 (additionally noting that illegal cannabis cultivators can compromise “fisheries, and other ecosystem services.”); *see also* Anderson et al., *supra* note 4, at 31 (citing Ian J. Wang et al., *Cannabis, an Emerging Agricultural Crop, Leads to Deforestation and Fragmentation*, 15 FRONTIERS ECOLOGY & ENV'T 495 (2017)) (“cannabis agriculture has been found to be detrimental to the livelihood of diverse ecosystems surrounding,” by causing “forest fragmentation, stream modification, soil erosion, and landslides.”).

62. *See* Polson, *supra* note 57, at 232 (noting that the environmental harms of cannabis cultivation).

63. *Id.*

64. Scott Baur et al., *Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds*, 10 PLOS ONE 1, 2–3 (2015); *see* Harper, *supra* note 20, at 61 (“cannabis production requires large amounts of water, which has exacerbated droughts in states already experiencing water shortages.”); *see also* Jennifer K. Cara et al., *High Time for Conservation: Adding the Environment to the Debate on Marijuana Legalization*, 65 BIOSCIENCE 822, 823 (2015).

65. Harper, *supra* note 20, at 63.

66. *See* Christopher Ingraham, *Forget Almonds: Look at how much water California's Pot Growers Use*, WASH. POST (June 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/26/forget-almonds-look-at-how-much-water-californias-pot-growers-use/> (stating California uses approximately 430 million liters of water per square kilometer to grow cannabis).

67. *Id.*

By encouraging commercial cannabis cultivation without regard for cannabis' natural resource costs, state legislators and regulators turn a blind eye to the multiplied and magnified environmental effects on marginalized communities. Specifically, disadvantaged rural and minority farming communities bear the disproportionate brunt of these harms because they (1) are less likely to survive the invasion of corporate, commercial cannabis operations,<sup>68</sup> and (2) are more likely to be directly and adversely affected by environmental degradation.<sup>69</sup>

To the first point, well-documented and years-long patterns of USDA loan discrimination drastically reduced the number of non-white and non-male farmers.<sup>70</sup> With reduced numbers and the inhibited ability to amass community or generational capital,<sup>71</sup> marginalized farmers are unlikely to

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68. See Hekia Bodwitch et al., *Growers Say Cannabis Legalization Excludes Small Growers, Supports Illicit Markets, Undermines Local Economies*, 73 CAL. AGRIC. 177, 179, 181–82 (2019) (discussing the impact of large-scale growers on minority farmers in the cannabis market following legalization).

69. See, e.g., Gwen M. Pfeifer, *Pesticides, Migrant Farm Workers, and Corporate Agriculture: How Social Work Can Promote Environmental Justice*, 27 J. PROGRESSIVE HUM. SERVS. 175, 178–79 (2016) (“Pesticide drifts have been found to be a major form of pesticide exposure for farm workers and others near fields in which pesticides are used. . . . Drifts affect not only farm workers and their families but also other community members living, attending school, or working in affected areas.”); see also Michael Gochfeld & Joanna Burger, *Disproportionate Exposure in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH 53, 57 (“Rural areas may be close to agriculture (farms, feedlots, swine facilities), where pesticide and animal waste exposures occur. . . . Home-grown livestock and produce are a vector for pesticides, water pollutants, and soil contamination. . . . Neighbors [of farms] may also experience exposure to pesticides from wind drift or runoff.”).

70. Jessica Robinson, *Women, Hispanic Farmers Say Discrimination Continues In Settlement*, NPR (Nov. 9, 2012), <https://www.npr.org/templates/story/story.php?storyId=164833428>; Emily Moon, *African-American Farmers Make up Less than 2 Percent of all U.S. Farmers*, PAC. STANDARD (Apr. 5, 2019), <https://psmag.com/news/african-american-farmers-make-up-less-than-2-percent-of-all-us-farmers> (“The effects of [USDA] discrimination are startlingly apparent over the last century: African-American farmers made up around 14 percent of U.S. farmers in 1910, but just 1.6 percent in 2012.”); ABRIL CASTRO & ZOE WILLINGHAM, CENTER FOR AMERICAN PROGRESS, PROGRESSIVE GOVERNANCE CAN TURN THE TIDE FOR BLACK FARMERS 2 (CTR. AM. PROGRESS 2019) (citing Pamela Browning et al., *The Decline of Black Farming in America*, WASH. COMM’N CIV. RTS. (1982)) (“As the number of black farmers shrunk, so did the size of their farms. . . . [B]lack farmers lost 80 percent of their land from 1910 to 2007. As the U.S. Commission on Civil Rights concluded in a 1982 report, this pattern of discrimination virtually eliminated black farms, dealing a serious blow to rural black communities.”).

71. Mario Parker, *More Black U.S. Farmers, But Fewer Own Land or Earn Top Income*, BLOOMBERG (Apr. 11, 2019), <https://www.bloomberg.com/news/articles/2019-04-11/more-black-u-s-farmers-but-fewer-own-land-or-make-big-bucks> (“There’s also an income gap, with 2/349 black farmers running operations that made \$50,000 a year or more in 2017, compared with 492,000 for white farmers.”); see also CASTRO & WILLINGHAM, *supra* note 67, at 2 (“In 2017, the average full-time white farmer brought in \$17,190 in farm income, while the average full-time black farmer made just \$2,408. . . . [T]oday [black farmers] suffer from severe economic challenges, among them a poverty rate twice that of rural whites.”); Skyler Swisher, *‘We Don’t Have the Generational Wealth.’ Black Farmers Left Behind in Florida’s Medical Marijuana Boom*, ORLANDO SENTINEL (Nov. 5, 2021), <https://www.orlandosentinel.com/news/florida-marijuana/os-ne-black-marijuana-farmers-20211105-lcjqibepab5dzfb7flo6hy5e7um-story.html> (talking to a local Floridian about the difficulties of obtaining cannabis growing permits without generational wealth).

enter, succeed in, or benefit from the cannabis industry because the land and capital requirements for profitable ventures are beyond their reach. Systemic inequality, combined with the grossly asymmetrical wealth of commercial cannabis operations, has reconstructed the barriers to entry around minority farms and doomed them to dismal odds of success.<sup>72</sup>

As for the second matter, the racially participatory exclusion ensured by industry dominance means that already drastically reduced minority farming populations will be disproportionately impacted by negatively affected watersheds.<sup>73</sup> Not only will the amount of available water decrease, but the condition of the remaining soil and surface waters renders farming in the shadows of corporate cannabis farms a hazard to human health and the environment.<sup>74</sup> Minority-owned cannabis cultivation operations will, in turn, be forced to compete against much larger and less environmentally conscious operations, with the disadvantage of having a smaller share of viable and healthy land, water, and capital. Even non-cannabis farmers in those circumstances will be forced to make do with a lessened and poisoned share of surface water from the watershed, thereby suffering the continuing effects of environmental practices and policy that have historically worked against them.<sup>75</sup>

The lack of adequate state or federal regulations specific to pesticide use<sup>76</sup> or water ownership<sup>77</sup> for cannabis cultivation perpetuates cultivation schemes which are not strictly “legal,” and unquestionably hamstrings the

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72. See, e.g., Andy Campbell, *Marijuana Company Buys Entire California Town*, HUFFPOST (Aug. 10, 2017), [https://www.huffpost.com/entry/marijuana-company-buys-nipton-california\\_n\\_5985e9bce4b041356ec00bbd](https://www.huffpost.com/entry/marijuana-company-buys-nipton-california_n_5985e9bce4b041356ec00bbd).

73. See generally Baur et al., *supra* note 64.

74. See, e.g., Gochfield & Burger, *supra* note 69, at 58 (“Proximity to farms may result in exposures and adverse outcomes. The amount of cropland within 750 meters of a house predicted the amount of herbicide residue on carpets. In California, pregnant mothers who lived within 500 meters of fields on which agriculture pesticides were applied . . . had a 6.1 odds ratio for having a child with autism-spectrum disorder. . . . Poor minority schools in North Carolina were closer to swine confinement factories and were more likely to experience animal waste odors than were White high schools.”).

75. See Baur et al., *supra* note 64, at 17 (estimating the negative effects of water-intensive cannabis on watersheds).

76. Subritzky et al., *supra* note 35, at 93; see also Leah N. Sandler et al., *Cannabis as Conundrum*, 117 PERSP. CROP PROT. 37, 39, 41, 43 (2018) (discussing how “Current [federal and state level] regulations are not long-term solutions and cannot replace an overarching pesticide labeling system for *Cannabis*”).

77. Only Oregon and California have taken steps to require permits and/or proof of a water right for usage of water on cannabis cultivation. See Theresa Davis, *State’s Water Takes A Hit From Cannabis Farms*, ALBUQUERQUE J. (Jan. 5, 2020), <https://www.abqjournal.com/1406718/states-water-takes-a-hit-from-cannabis-farms.html>. California does have a system for water rights permits generally, but only for facilities that use more than 5,000 gallons of surface or groundwater per day. See STATE WASH. DEP’T ECOLOGY, MARIJUANA LICENSING AND THE ENVIRONMENT (last visited Apr. 9, 2020), <https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Guidance-for-marijuana-businesses> (stating that California does have a system for water rights permits generally, but only for facilities that use more than 5,000 gallons of surface or groundwater per day) [hereinafter MARIJUANA LICENSING].

efficacy of state-level efforts to address these systemic disadvantages. A patchwork of state laws either leaves cultivators in a legal gray-zone or incentivizes them to break federal and state laws in ways that are not covered by protections currently built into legalization legislation. While some states have taken steps to incorporate environmental concerns into permitting and licensing processes, the lack of federal guidance means that each state's regulatory efforts must fully acknowledge the environmental impacts of cannabis cultivation.<sup>78</sup> Otherwise, the disproportionately impactful environmental harm will further marginalize already devastated populations.

### III. EJ AND CANNABIS: CONSIDERATIONS AND OPPORTUNITIES

At this juncture, the framework of Environmental Justice must be applied to the injustices facing marginalized populations seeking involvement in the cannabis industry. The framework proposed by this Article is that of Robert Kuehn, who articulated “a four-part categorization of environmental justice issues: (1) distributive justice; (2) procedural justice; (3) corrective justice; and (4) social justice . . . [which] offers a method of collapsing the seemingly broad scope of environmental justice and identifying common causes of and solutions to environmental injustice.”<sup>79</sup>

Within this framework, distributive justice refers to the equal treatment of persons, in terms of how goods and opportunities are distributed amongst them.<sup>80</sup> Procedural justice refers to meaningful involvement by way of concern and respect for the distribution of these goods and opportunities.<sup>81</sup> Corrective justice refers to the punitive response to damages inflicted upon marginalized communities, as well as the repairs to those damages.<sup>82</sup> Social

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78. See e.g., DRUG POL'Y ALL., *supra* note 5, at 29 (California requires that “marijuana industry licensees . . . comply with environmental regulations or risk losing their license and facing civil fines or criminal prosecution.”); MARIJUANA LICENSING, *supra* note 77 (noting Washington state environmental laws “may potentially apply” to cannabis facilities, based on both the size and location of those operations); MASS. CANNABIS CONTROL COMM'N, ENERGY AND ENVIRONMENT COMPILED GUIDANCE 8 (2020) (Massachusetts licensees “are . . . required to meet all applicable environmental laws, regulations, permits, and other applicable approvals, including those related to water quality and solid and hazardous waste management, prior to obtaining a final license.”); see also Amy Antonioli & David M. Loring, *Tips for Satisfying the Illinois Cannabis License Application Environmental Plan*, NAT'L L. REV. (Dec. 16, 2019), <https://www.natlawreview.com/article/tips-satisfying-illinois-cannabis-license-application-environmental-plan> (Illinois “[a]pplicants seeking to best position themselves for [a] dispensing license are advised to provide an environmental plan of action . . . that demonstrates how the applicant will minimize the carbon footprint, environmental impact, and resources needs for the dispensary.”).

79. See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10703 (2000) (“This taxonomy offers the opportunity for greater awareness of what justice means to impacted people of color and lower income communities and improved environmental conditions that are the shared goals of all Americans.”).

80. *Id.* at 10683.

81. *Id.* at 10688.

82. *Id.* at 10693.



justice refers to the accountability of privileged classes to those with marginalized resources and opportunity.<sup>83</sup>

Therefore, to the extent that the historically established, systemic harms of criminalized and colonized cannabis present issues that square neatly with each of these four pillars. The framework provides a unique opportunity to meaningfully involve marginalized communities in cannabis-oriented policy making. This Article explores two dimensions of the cannabis industry which are ripe for such an analysis: zoning and licensing practices, and the protection of natural resources. The problems with both, as well as potential regulatory and legislative solutions, are explored below.

### *A. Zoning, Licensing, and Community Rebuilding*

Zoning authority is a powerful tool that gives local governments the opportunity to dictate what space businesses can occupy within their jurisdiction. Unfortunately, with an historically criminalized industry, the broad discretion of zoning authorities to relegate unsavory and “nuisance” operations<sup>84</sup> towards industrial sectors—or otherwise away from affluence—tends to push dispensaries and cultivation operations to low-income, minority, or otherwise marginalized communities. Zoning regulations in California, for example, have contributed to the disproportionate presence of cannabis dispensaries in California’s Hispanic-populated neighborhoods, near points of highway accessibility, and areas of concentrated alcohol outlets.<sup>85</sup> The results are similar in Colorado,<sup>86</sup> offering further evidence that a kind of “sacrifice zone”<sup>87</sup> is created by discretionary, procedurally unjust cannabis policy; as marginalized communities are forced to bear the burden of becoming the undesirable centers of nuisance industry,<sup>88</sup> rich, white business owners extract profits from that community. Unfortunately, decades

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83. *Id.* at 10698.

84. Holmes, *supra* note 11, at 940 (citing *Urgent Care Med. Servs. v. City of Pasadena*, 230 Cal. Rptr. 3d 892, 894 (Cal. 2018)) (“Under Proposition 64, local governments now regulate marijuana by exercising land use controls which governments commonly use to cordon off anything associated with disorder.”).

85. Crystal Thomas & Bridget Freisthler, *Examining the Locations of Medical Marijuana Dispensaries in Los Angeles*, 35 DRUG & ALCOHOL REV. 334, 334 (2016); Crystal Thomas & Bridget Freisthler, *Evaluating the Change in Medical Marijuana Dispensary Locations in Los Angeles Following the Passage of Local Legislation*, 38 J. PRIMARY PREVENTION 265, 275 (2017) (explaining that Proposition D’s zoning restrictions and caps caused “some dispensaries . . . [to] re-locate . . . to areas with less commercial zoning and higher proportions of Black residents.”).

86. Holmes, *supra* note 11, at 950–51.

87. Here, “sacrifice zone” is used to refer to the process “in which people and their existing or desired land use practices are sacrificed in the name of . . . growth and development aspirations.” See Lindsay Shade, *Sustainable Development or Sacrifice Zone? Politics Below The Surface in Post-Neoliberal Ecuador*, 2 EXTRACTIVE INDUS. & SOC. 775, 776 (2015) (explaining how subsurface land grabs slowly lead to sacrifice zones in Ecuador).

88. Holmes, *supra* note 11, at 949–50.

of devastating drug policy and inconsiderate legalization efforts have left communities wishing to resist canna-colonialism—lacking the resources and agency to fight back.<sup>89</sup>

Nor are affected communities meaningfully or adequately represented in the cannabis industry because of the currently prohibitive and exclusionary licensure schemes which bar their participation based on criminal status and/or stigma.<sup>90</sup> Recalling the systemically oppressive and racially disproportionate enforcement of cannabis prohibition, minority communities impacted by the War on Drugs are “significantly more likely to be affected by these statutory restrictions . . . [and] are effectively blocked from entering this new market.”<sup>91</sup> But even when individuals are not outright barred from applying for a license, state licensing schemes which favor large, commercial cannabis operations maintain the industry’s whiteness<sup>92</sup> at the same time that they inflate licensing and startup costs.<sup>93</sup> This further suppresses the representation of marginalized voices from participating in industry-related decision-making.<sup>94</sup> Together with the outsized likelihood of being legally or practically disenfranchised of voting rights, marginalized communities are

89. See Chris Morrison et al., *The Economic Geography of Medical Marijuana Dispensaries in California*, 25 INT’L J. DRUG POL’Y 508, 513 (2014) (“The development of new dispensaries will be greater in low-income areas and in communities that lack the social and economic resources to resist their establishment.”).

90. In Washington, the statutory point system has “the same practical effect as those states with a blanket ban for those with felony convictions.” See Maya Rahwanji, *Hashing out Inequality in the Legal Recreational Cannabis Industry*, 39 NW. J. INT’L L. & BUS. 333, 352 (2019) (discussing the discriminatory treatment within regulation of legal recreational cannabis); see also Bender, *supra* note 12, at 21 (referring to discriminatory access and outcomes as a result of California’s Proposition 64 licensing and capital requirements); see e.g. ALASKA STAT. § 17.38.200(i) (2018) (owner, officer, or agent may not register if they have been convicted of a felony within five years of attempted registration, or if they are currently on probation or parole); COLO. REV. STAT. § 12-43.4-306(g)(I)–(II) (2016) (no licensure for applicants with a felony in the last five years, except for felonies related to possession or use of cannabis); see also WASH. ADMIN. CODE § 314-55-040(1)–(3) (2021) (describing a “point system” which considers an applicant’s criminal history in determining the applicant’s qualification for licensure).

91. Rahwanji, *supra* note 90, at 336.

92. Vitiello, *supra* note 10, at 816 (explaining how one factor in the lack of racial diversity of ownership among cannabis operations “is the Bureau of Cannabis Control’s decision to allow entity to own more than one license. Such a decision invites larger, better capitalized entities to dominate the legal industry.”).

93. See Hackman, *supra* note 32 (“In Pennsylvania, . . . [w]annabe growers were required to pay a \$10,000 non-refundable application fee, together with a \$200,000 deposit. They also had to provide \$2 [million] in funding, with at least \$500,000 in the bank.”); see also Nick Kovacevich, *The Hidden Costs of The Cannabis Business*, FORBES (Feb. 1, 2019), <https://www.forbes.com/sites/nickkovacevich/2019/02/01/the-hidden-costs-of-the-cannabis-business/#f2fc02f7da3d> (discussing expenses for cannabis grower startups); Lewis, *supra* note 14 (discussing barriers to entry into legal cannabis industry); see also Adinoff & Reiman, *supra* note 29, at 679 (discussing how cannabis statutes fail to address cannabis use outside of the statute, which falls under prior criminal statutes).

94. See, e.g., Sarah Milov, *Marijuana Reform Should Focus on Inequality*, ATLANTIC (Oct. 5, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/marijuana-reform-should-focus-inequality/599383/> (“licensure system for marijuana cultivation is poised to replicate some of the oligopolistic features of the tobacco program, while thwarting its genuinely redistributive ones.”).

systemically deprived of opportunities for meaningful involvement.<sup>95</sup> Therefore, unmitigated canna-colonialism has created, and will maintain, a parasitic, unjust, exploitative relationship between the cannabis industry, the environment, and the marginalized people who bear the disproportionate burden of the economic and environmental harms.

In pursuit of restorative and procedural justice, some states have taken steps to address these disqualifiers. California, for example, has taken the step of barring only license applications for drug felonies relating to the trafficking of controlled substances such as heroin, cocaine, meth, amphetamines, and PCP,<sup>96</sup> a measure specifically calculated to address disparities resulting from the War on Drugs.<sup>97</sup> Local governments have buttressed that effort by establishing a “social equity program” to provide those in low-income areas, Drug War-impacted area, and “Disproportionately Impacted Areas” with target support in the way of priority application consideration, licensing navigation, and networking support.<sup>98</sup> Additionally, local governments have implemented workforce development and job placement programs.<sup>99</sup> To help fill in remaining gaps, community and private sector efforts such as the “Hood Incubator” program similarly provides Black and Hispanic populations with essential business assistance and networking opportunities.<sup>100</sup> Maine similarly prohibits “disqualifying drug offense[s]” within 10 years of the application but has a discretionary exception for conduct which would now be legal under Maine state law.<sup>101</sup> Perhaps more importantly, Maine applicants are afforded the opportunity to explain their criminal history and show that they have been rehabilitated by submitting character references, as well as educational and

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95. See NATIONAL CONFERENCE OF STATE LEGISLATURES, FELON VOTING RIGHTS (2019) (commenting on laws relating to the restoration of voting rights of felons in 21 states where rights are restored upon release, 16 states where rights are restored on completion of parole and/or probation, and 11 states where restoration requires additional action beyond completion of parole and/or probation – such as a governor’s pardon, an application process, or some additional waiting period); see also Michael Wines, *Protection of Voting Rights for Minorities Has Fallen Sharply, a New Report Finds*, N.Y. TIMES (Sep. 12, 2018), <https://www.nytimes.com/2018/09/12/us/voting-rights-minorities.html> (showing a sharp decline in federal actions to protect voting rights for minorities).

96. S.B. 94, 2017–2018 Reg. Sess. (Cal. 2017) (barring licenses for violations of CAL. HEALTH & SAFETY CODE §§ 11370.4, 11379.8 (2017)).

97. Rahwanji, *supra* note 90, at 355.

98. CITY L.A. DEP’T CANNABIS REG., SOCIAL EQUITY PROG. OVERVIEW (last visited Apr. 12, 2022), available at <https://cannabis.lacity.org/licensing/social-equity-program>; see also Rahwanji, *supra* note 90, at 355 (“Oakland, California created a cannabis dispensary equity program whose goal was to ‘address past disparities in the cannabis industry by prioritizing victims of the war on drugs and minimizing barriers of entry into the industry.’”); see also Vitiello, *supra* note 10, at 819 (“San Francisco, Los Angeles and Sacramento have sought to address equity issues with reforms similar to Oakland’s equity program.”).

99. CITY L.A. DEP’T CANNABIS REG., *supra* note 98; see also Rahwanji, *supra* note 90, at 355; see also Vitiello, *supra* note 10, at 819.

100. Posner, *supra* note 28.

101. ME REV STAT. ANN. 28-B §202(4) (2017); 18-691 C.M.R. Ch. 1 §2.3.1(E)(2)(a–b) (2019).

professional achievements.<sup>102</sup> Massachusetts, with its equity-oriented Cannabis Control Commission,<sup>103</sup> has also pushed for cannabis-conviction licensing priority,<sup>104</sup> social equity programs,<sup>105</sup> and other community outreach measures for neighborhoods hosting cannabis operations.<sup>106</sup>

These states should be recognized for intentionally (or unintentionally) incorporating some aspects of the environmental justice framework into their regulation of cannabis licensure. That being said, policy efforts in this sector of the industry must push for improved distributive, procedural, and social justice outcomes through broad and meaningful community involvement. Because cannabis prohibition disproportionately and racially criminalized our communities, affirmative steps must be taken to recognize and dismantle the systemic disadvantages which resulted therefrom. Maintaining licensing or regulatory schemes biased against individuals with controlled-substance offenses simply fails to protect against industrial canna-colonizing, because criminalized communities cannot compete with corporations in matters of licensure, land acquisition, or funding. Without a sort of legislative and regulatory humanization of these marginalized groups, it is doubtful that the industry will overcome the exclusionary, racially profiteering nature of commercial cannabis.<sup>107</sup>

The programmatic outcomes in California can also offer a sobering reminder that even the more-progressive efforts still require widespread, structural, and systemic support to succeed. California's ahead-of-schedule enablement of commercial cannabis not only betrayed Governor Newsom's

102. ME. REV. STAT. ANN. 28, § 203(1) (2018).

103. MASS. CANNABIS CONTROL COMM'N, *Municipal Equity* (2018).

104. Alexander Lekhtman, *Massachusetts Advances Its Unique Cannabis Social Equity Program*, FILTER (July 26, 2019), <https://filtermag.org/massachusetts-cannabis-equity/> (“to be eligible for the program, someone must either have a past drug conviction or be the spouse or child of a person with a drug conviction, who has lived in Massachusetts for the last 12 months. Alternatively, the person could have lived in a community classified as an area of disproportionate impact for at least five years and have income below 400 percent of the federal poverty level.”); see also M.G.L.A. 94G § 5(b)(4) (Mass. Dec. 2016) (persons convicted of felonies will not be licensed to run a cannabis establishment in Massachusetts).

105. See Shira Schoenberg, *Massachusetts Crafts ‘Social Equity’ Program to Help Minorities and Drug Offenders Enter Marijuana Industry*, MASSLIVE (June 26, 2018), [https://www.masslive.com/politics/2018/06/massachusetts\\_crafts\\_social\\_eq.html](https://www.masslive.com/politics/2018/06/massachusetts_crafts_social_eq.html) (highlighting Massachusetts's plan to create a statewide social equity program); see also Crystal Hanes, *Marijuana Equity Programs In Mass. Helping Bridge Social, Economic Gaps Within Cannabis Industry*, BOS. 25 NEWS (Mar. 10, 2020), <https://www.boston25news.com/news/marijuana-equity-programs-mass-helping-bridge-social-economic-gaps-within-cannabis-industry/KARAI3W3RRH5FG4O4GGBLZON4Q/> (highlighting two equity provisions: a social equity program and economic empowerment program).

106. See MASS. CANNABIS CONTROL COMM'N, *supra* note 103 (recommending municipalities initiate negotiations between host communities and cannabis establishments).

107. See, e.g., Milov, *supra* note 94 (“Much as small-scale tobacco farms anchored entire communities across the Southeast, cannabis cultivation on a human scale, rather than a corporate one, can build wealth within communities of color where opportunities to amass property have been denied—frequently at the hands of the government.”).

promises to give small operations a head-start, but it also hindered minority access to the industry.<sup>108</sup> Additionally, it created concentrated, environmental safety hazards where those operations established themselves.<sup>109</sup> Proposition 64 presents one example of how the failure to rein in industry domination begets shortcomings of restorative, distributive, and procedural justice because it frustrated meaningful efforts elsewhere to impactfully involve Drug War communities in the industry.<sup>110</sup>

It is nonetheless essential to recognize that, as the proverbial gatekeeper to the cannabis industry, licensing bodies hold the key for the marginalized communities devastated by cannabis prohibition to entirely flip and reconstruct the stigmatic narrative they endure. If licensing schemes truly prioritized and guaranteed licensure applicants from affected marginalized communities, the subsequent shift towards smaller and more inclusive operations would provide the industry with previously criminalized knowledge, ethics, and growing practices.<sup>111</sup> This would upend the exploitative nature of zoning and profiteering while mitigating the environmental impacts of cultivation, production, and distribution. Moreover, inverting the industry's racial makeup would enable Drug War-affected communities to make substantial progress in rebuilding from the environmental injustices of cannabis prohibition.<sup>112</sup> Reconstruction, a

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108. See Sam Levin, *'This was supposed to be reparations': Why is LA's Cannabis Industry Devastating Black Entrepreneurs?*, GUARDIAN (Feb. 3, 2020), <https://www.theguardian.com/us-news/2020/feb/03/this-was-supposed-to-be-reparations-why-is-las-cannabis-industry-devastating-black-entrepreneurs> (discussing the negative effect of cannabis legalization, which was intended to be reparations); see also Vitiello, *supra* note 10, at 816 (noting that California's equity programs "work against minority access" as a result of "built in preference for those already in business . . . [which is] likely [to] skew the racial composition of license holders."); see also Roberts, *supra* note 4 (discussing the impact of corporatized "Big Weed").

109. Subritzky et al., *supra* note 35, at 7.

110. Both Maryland and Massachusetts have seen disproportionate licensing outcomes, despite efforts to seek equitable licensure. See Ross, *supra* note 7 (despite calling on regulators to actively seek "racial, ethnic, and geographic diversity" in their licensing efforts, "after [Maryland] set up the process to vie for its first 15 grower licenses, none went to a black applicant."); see also Roberts, *supra* note 4 ("In Massachusetts, only two of 184 statewide weed licenses are held by equity program applicants.").

111. Polson, *supra* note 57, at 238–39.

112. U.S. CENSUS BUREAU, QUICKFACTS, LOS ANGELES COUNTY, CALIFORNIA; CALIFORNIA (2019), available at <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia,CA/PST045219#PST045219>; see also Bender, *supra* note 12, at 21 ("With a majority-minority population comprised of 49 percent Latinos and 10 percent African Americans, Los Angeles alone can help rewrite the recent experience of white entrepreneurs presiding over an industry that imprisoned so many dealers of color."); Chelsea L. Shover & Keith Humphreys, *Six Policy Lessons Relevant to Cannabis Legalization*, 45 AM. J. DRUG & ALCOHOL ABUSE 698, 702 (2019) ("[L]egalization is an excellent opportunity to reduce the damage of prior criminal penalties by expunging the records of individuals arrested for possession as well as low-level dealing. This group is disproportionately poor and minority, and their arrest record limits their ability to obtain housing, work, and education. It also keeps people with expertise out of the emerging and overwhelmingly white-dominated, cannabis industry."); see also Gentry, *supra* note 28 ("Zechariah Lord is . . . an African-American dispensary owner, Lord says he's tired of turning away otherwise

dominance narrative, would, in this case, be accompanied by the net benefit of an increased share of a multibillion-dollar industry. Accordingly, it is imperative that states with cannabis regulations (and those seeking to enact them in the future) greatly expand efforts to examine the prohibitive nature of licensing schemes.<sup>113</sup> They must also tailor them to address the harms affecting uniquely impacted populations and include host community input on licensure and zoning decisions.<sup>114</sup>

### B. Natural Resource Justice and Reclamation

Separate from any concerns of licensing and zoning, two New Mexico communities offer a clear example of the justice-imperatives for adequately addressing the environmental concerns of corporate cannabis. Sile and Peña Blanca, New Mexico, are two primarily Hispanic, rural, “census designated places” in the state responsible for overseeing their own *mutual domestic* water and sanitation systems. New Mexico’s Department of Health (Department) promulgates rules for and oversees the state’s cannabis regulation regime and does so without requiring that growers (of medical cannabis) provide the Department with the source of the water used for cannabis cultivation.<sup>115</sup> *Mutual domestic* water systems are considered subdivisions of the state under New Mexico law.<sup>116</sup> They are vested with the powers to operate the water systems, shut off “unauthorized . . . [or] illegal connections,” enforce rules for connection or disconnection, and recover costs associated with disconnecting water.<sup>117</sup>

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promising job applicants because they have a record of disqualifying marijuana offenses. . . . ‘That’s why it’s so important to get these records expunged[,]’ he says. ‘I think it deters a lot of people from even applying.’”)

113. The Massachusetts equity guidance recommends that community outreach be used in conjunction with “zon[ing] cannabis businesses based on the nature of their primary business operations,” suggesting that “[i]t may be most appropriate . . . for cultivators, microbusinesses, and cooperatives to be zone, respectively, as agricultural, industrial, and manufacturing businesses, while cannabis retailers would be zoned in the same manner as any other retailer.” MASS. CANNABIS CONTROL COMM’N, *supra* note 103. Specialized zoning such as this, coupled with meaningful community input, acts as both a check on the targeting of disadvantaged communities, and as a legally codified, municipal protection of marginalized community interests. Alternatively, and additionally, one unique approach to “[s]ocial equity” licensing is being put forward in Washington. Nick Thomas, *Washington State to Allow Social Equity Applicants Exclusive Access to Revoked Cannabis Licenses*, MARIJUANA BUS. DAILY (Mar. 11, 2020), <https://mjbizdaily.com/washington-state-to-allow-social-equity-applicants-exclusive-access-to-revoked-cannabis-licenses/>.

114. See Author’s analysis, *supra* note 113.

115. Davis, *supra* note 77; see also Theresa Davis, *Marijuana Farms May Be Straining New Mexico Water*, ASSOC. PRESS (Jan. 6, 2020), <https://apnews.com/2f9ac3e10107d81c8fd4178430997ba7> (highlighting that “medical marijuana regulations have not kept up with the increased strain on rural water supplies.”) [hereinafter *Marijuana Farms*].

116. N.M. STAT. ANN. §§ 3-29-3, 3-29-15 (2017).

117. N.M. STAT. ANN. § 3-29-6(D) (2017).

Nevertheless, the communities feel powerless to combat the excessive, commercial usage of domestic water by exploitative, out-of-state cannabis growers.<sup>118</sup> Without regard for the domestic-use requirements of the Sile and Peña Blanca water systems, the growers purchased property and proceeded to illegally pump large quantities of water for commercial cannabis cultivation, putting added strain on a water system already lacking the resources for necessary repairs.<sup>119</sup> In response, the Sile Mutual Domestic Water Association sent a *cease and desist* letter to one cultivator but found themselves unable to disconnect the cultivator without compliance of the county sheriff—who himself refused to comply without a court order.<sup>120</sup> Without the resources to pursue a civil claim in New Mexico state court, Sile and Peña Blanca were forced to send a letter to state agencies representatives articulating their concerns, demanding that their voice be heard, and asking the State to require proof of a “valid water right” before issuance of a cannabis license.<sup>121</sup>

Even still, Sile and Peña Blanca do not have unlimited time to wait for a court order, administrative rulemaking, or legislative solution—they require intervention on behalf of the natural resources that they depend on for survival. They also require codified, infrastructural, and governmental assistance that is targeted to remediate the harms to their communities.

To address the second of these necessities across the State, the Southwest, and the remaining cannabis frontier, the first steps in future regulatory efforts should look towards Oregon as a model for codifying meaningful natural resource protections. “With a few exceptions, . . . irrigators, businesses, and other water users must obtain a water right from the [Oregon] Water Resources Department to use water from a well, spring, stream or other source.”<sup>122</sup> Further, “[v]iolations of Oregon Water laws can result in civil penalties or prosecution for a class B misdemeanor.”<sup>123</sup> But such an approach must be supported by meaningful inclusion of marginalized communities, or corporate industries will be able to take advantage of the decreased barrier to acquisition. Just as well, structures that do not prioritize the inclusion of marginalized voices will magnify current distributive injustices related to water access and force disadvantaged communities to

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118. Davis, *supra* note 77.

119. *Marijuana Farms*, *supra* note 115.

120. *Id.*

121. *Id.*

122. OR. WATER RES. DEP’T, OPTIONS FOR OBTAINING WATER LEGALLY: AN OVERVIEW FOR HEMP, MEDICAL MARIJUANA AND RECREATIONAL MARIJUANA 1 (last updated Apr. 10, 2019), [https://www.oregon.gov/owrd/Documents/Water\\_Use\\_and\\_Marijuana\\_Handout\\_FINAL.pdf](https://www.oregon.gov/owrd/Documents/Water_Use_and_Marijuana_Handout_FINAL.pdf); *see also* OR. ADMIN. R. 845-025-1030 (4)(f)(B)(i)–(iii) (2020) (stating requirements to show proof of legal water source).

123. *Id.*

disproportionately suffer the effects of environmental harm and degradation.<sup>124</sup>

In this way, Sile and Peña Blanca capture the ways in which environmental justice must encompass an environmentalism as well as a humanism. A human-centric approach can still produce disproportionate outcomes relative to each individual's relationship with, and access to, the environment. That environment must also be shielded by legal protections to protect it from degradation resulting from the disproportionality of subsequent, individualized harms. One resource-oriented proposal to address the harms of cannabis cultivation is structuring legislation to "establish a maximum number of cultivated acres that may be permitted for cannabis cultivation within their state."<sup>125</sup> This proposal is based on a calculation of the "current gross and net amount of water available within the state" such that the permitted acreage "may be no higher than the burden on the water supply may bear."<sup>126</sup> This type of regulatory measure would, in theory, address some short-term water shortages by putting a state and industry-wide cap on the amount of water that could be used for cannabis cultivation—effectively buying the state some time to separately protect and preserve its water supply.<sup>127</sup> Like the *catch limits* established for federal fisheries under the Magnuson-Stevens Fishery Conservation and Management Act, licensed cannabis growers could be limited to growing only a number of plants that (1) are in proportion to a sustainable portion of a state's available water; (2) will not burden the state, municipal, or local water supply; and, (3) which correspond to a provable water right.<sup>128</sup>

Within these parameters—and accompanied by environmentally just licensing and zoning practices—communities can be brought into the cannabis industry. Subsequently, they can be given control over the environment and the natural resources that they will invariably need to occupy some share of the available land and water. In Sile and Peña Blanca, this would allow residents to share the promises that industry brings while ensuring that their statutorily guaranteed authority to oversee the allocation of water will best benefit their communities.<sup>129</sup> In turn, the money sustainably

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124. See Wikstrom et al., *Environmental Inequities and Water Policy During a Drought: Burdened Communities, Minority Residents, and Cutback Assignments*, 36 REV. POL'Y RES. 4, 21 (2018) ("environmentally unjust outcomes may result from ingrained institutional factors rather than explicit acts of discrimination. Copious work . . . indicates that institutional design matters, particularly in the distribution and use of water . . . [W]e expect that minority burdens are so institutionalized that even well-meaning organizations operating in haste may lead to minority communities repenting at leisure.").

125. Harper, *supra* note 10, at 83.

126. *Id.*

127. *Id.*

128. *Id.* at 84.

129. See Davis, *supra* note 77 (explaining communities' opportunity to participate within the industry and assurance of water allocation is statutorily protected).



reaped from the industry could be used to provide infrastructural support for Sile and Peña Blanca, or could alternatively be used to return their communities to state-level water-use compliance. We can only hope some solution reaches them before the water dries up.

To address the prodigious energy needs of indoor and outdoor communication, a *cap-and-trade* type licensing scheme has also been proposed. The licensing scheme would “limit the proportion of cannabis produced indoors by capping indoor permits at a percentage of [allowable] outdoor permits.”<sup>130</sup> Without creating an actual limit on indoor cannabis production, the proportional relationship would greatly reduce the energy burdens and carbon footprint that massive and uninhibited proliferation indoor operations would invariably create.<sup>131</sup>

In tandem with favorable zoning and licensing schemes, environmentally just water and energy policy can therefore allow marginalized communities to reclaim the industry-colonized cannabis landscape by:

- (1) equitably distributing the opportunities and harms associated with cultivation and dispensary operations;
- (2) creating community opportunities for procedural involvement in defining and protecting the community’s relationship with the cannabis industry;
- (3) ensuring greater representation of criminalized, marginalized communities in the industry, and;
- (4) empowering communities to reverse and reconstruct the harmful narratives and cycles that cannabis prohibition brought upon them.

The need for such a transformative approach to cannabis policy is especially prescient when one recalls the connection between such policy and the tragically “odd” results of cannabis criminalization:

rather than locating the causes of environmental degradation and regulatory hindrances in an increasingly discredited prohibitionism, which over eight decades incentivized ecological destruction by preventing regulation, inflating prices, and instilling fear of governmental engagement, blame is instead placed on prohibition’s criminalized targets. This placement of blame ineluctably blends with social logics of degeneracy and danger, expanding into entire racialized groups as it has through prohibition’s history, whether they be spectral Mexican (or other ‘foreign’) cartels or deficient,

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130. Harper, *supra* note 20, at 82.

131. *Id.* at 63, 82; *see also* Mills, *supra* note 44, at 59 (comparing cannabis industry energy usage to that of hospitals).

polluting groups of white people described as outsiders or lower class, like ‘diesel dopers’ (mostly white, young men so named for their noise-making, polluting diesel generators). Criminalized groups, as criminal, cannot present in the public debate; they can only be spoken of by others.<sup>132</sup>

Returning to the four-part environmental justice framework, it is clear that the cannabis industry has unique opportunities to align environmental law with the racially and economically disproportionate impacts of the War on Drugs. Meaningful steps towards environmental justice can be achieved with appropriately tailored policy. But, if cannabis policy is not pursued with an eye towards enviro-humanism—with the proper acknowledgment of remediation mechanisms for the systemic, marginalizing impacts of the War on Drugs—it will struggle to accomplish any of these essential transformations.

### C. Financial Incentives and Economic Divestment

As a final point for consideration, the financial dimension of the cannabis industry stands as perhaps the most oppressive threshold to success for aspiring entrepreneurs. At every level, non-white persons face comparative financial disadvantage when measured against white persons. On top of a well-documented, racially divided wealth gap<sup>133</sup> is data suggesting that minorities separately face a significant number of structural barriers to building wealth and closing that gap.<sup>134</sup>

Perhaps the most notorious contribution to these barriers was the Home Owners’ Loan Corporation’s (HOLC) historical practice of *redlining*

132. Polson, *supra* note 57, at 245–46.

133. See Lynise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS. L. J. 419, 442 (2018) (noting that the historic wealth gap now impacts entrepreneurs of color); see also Stephen Wilks, *Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks*, 123 DICK. L. REV. 307, 358–59 (2019) (discussing the growing racial wealth gap between middle class households). See generally Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387 (2017).

134. Ruth Umoh, *How Closing The Racial Wealth Gap Helps The Economy*, FORBES (Aug. 15, 2019), <https://www.forbes.com/sites/ruthumoh/2019/08/15/how-closing-the-racial-wealth-gap-helps-the-economy/#303fc4944794>; see, e.g., Vann R. Newkirk II, *The Racial Wealth Gap Could Become a 2020 Litmus Test*, ATLANTIC (Jan. 20, 2020), <https://www.theatlantic.com/politics/archive/2019/01/new-litmus-test-2020-racial-wealth-gap/579823/> (“The racial wealth gap is a straightforward issue that almost nobody can agree on how to fix. White people have way more money than everyone else, and it’s not just income: Although there are persistent differences in wage, salary, and benefits between races, much of the wealth gap is attributable to real estate and other individual assets, as well as disparities in familial assets and income.”); see also DANYELLE SOLOMON & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, WHEN A JOB IS NOT ENOUGH (Dec. 5, 2018), <https://www.americanprogress.org/issues/race/reports/2018/12/05/461823/job-not-enough/> (“Latinx people face systematic obstacles to building wealth, such as discrimination and student debt.”).

neighborhoods as “hazardous . . . credit risks” in the 1930s.<sup>135</sup> By taking steps that would ensure the diversion of homeowner funds away from certain neighborhoods—nearly two-thirds of which are now predominantly Black and Latinx populated—the now-defunct HOLC laid the foundations for communities to build the wealth gap into the fabric of urban and suburban America.<sup>136</sup> Black women experienced (and continue to experience) unique generational harms of *redlining*,<sup>137</sup> and non-white women more broadly are limited by much of the same systems that prevent non-white, non-male persons from closing the wealth gaps.<sup>138</sup> Upward economic mobility in the United States has also been declining over the last 80 years.<sup>139</sup> Low-income communities are also economically immobile because of structural inhibitors to economic mobility for the impoverished.<sup>140</sup> Incarceration further impacts

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135. Tracy Jan, *Redlining was Banned 50 years ago. It's Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> (quotation marks omitted); *see also* Stephen M. Dane et al., *Discriminatory Maintenance of REO Properties As a Violation of the Federal Fair Housing Act*, 17 CUNY L. REV. 383, 388 (2014) (“HOLC’s redlined maps profoundly influenced mortgage lending throughout the country as both private banks and the Federal Housing Administration (responsible for federal home loan guarantees) adopted HOLC’s criteria, including the focus on neighborhood racial composition.”); Julie Gilgoff, *Local Responses to Today’s Housing Crisis: Permanently Affordable Housing Models*, CUNY L. REV. 587, 594–95 (2017) (“Redlined communities were also targeted decades later by policies such as ‘reverse redlining,’ whereby minority groups were singled out for predatory loans that offered onerous mortgage terms that set them up to default. . . .”); *see also* Aaron Glantz & Emmanuel Martinez, *Modern-Day Redlining: How Banks Block People of Color From Homeownership*, CHI. TRIBUNE (Feb. 17, 2018), <https://www.chicagotribune.com/business/ct-biz-modern-day-redlining-20180215-story.html> (discussing racial discrimination in home lender financing).

136. *See* Jan, *supra* note 135 (explaining the primarily Black and Latinx neighborhoods “have a significantly greater economic inequality”).

137. *See* Mark Michaud, *Legacy of Racism in Housing Policies Continues to Impact Maternal Health*, UNIV. ROCHESTER MED. CTR. (Oct. 4, 2021), <https://www.urmc.rochester.edu/news/story/legacy-of-racism-in-housing-policies-continues-to-impact-maternal-health> (quoting URM Department of Public Health Sciences economist Elaine Hill, “historic redlining was associated with worse outcomes in pregnancy and childbirth experienced by Black women in the modern day.”).

138. *See* NAT’L P’SHIP FOR WOMEN & FAMS., QUANTIFYING AMERICA’S GENDER WAGE GAP BY RACE/ETHNICITY 1 (2020) (“Women of color in the United States experience the nation’s persistent and pervasive gender wage gap most severely”).

139. Aparna Mathur, *The U.S. Does Poorly On Yet Another Metric of Economic Mobility*, FORBES (Jul. 16, 2018), <https://www.forbes.com/sites/aparnamathur/2018/07/16/the-u-s-does-poorly-on-yet-another-metric-of-economic-mobility/#1fe045f06a7b>.

140. *See* Annalisa Merelli, *Poverty in America is so Expensive it now has its Own Inflation Value*, QUARTZ (Nov. 6, 2019), <https://qz.com/1742839/inflation-inequality-is-making-americas-poor-even-poorer/> (“While all official statistics apply the same rate of inflation to the income of people living in all income brackets, evidence highlighted by the [Columbia University] study suggests that inflation is much higher for people at the lower end of the income scale. This is a phenomenon that Xavier Jaravel, a researcher at the London School of Economics and one of the author of the report, calls ‘inequality inflation.’ For the bottom 20%, Jaravel has found, inflation is 0.44 percentage points higher than it is for the top 20%.”); *see also* Jan, *supra* note 135 (“Racial discrimination in mortgage lending in the 1930s shaped the demographic and wealth patterns of American communities today . . . with 3 out of 4 neighborhoods ‘redlined’ on government maps 80 years ago continuing to struggle economically. [A new] study . . . shows that the vast majority of neighborhoods marked ‘hazardous’ in red ink on maps drawn by

the upward economic mobility of low-income and colored communities by doubling-down on the existing wealth gaps and accumulation hurdles.<sup>141</sup>

Regarding cannabis, a connection can be made between the marginalizing effects of its prohibition to the expansion of the broader racial wealth gap in a way that can fit within the environmental justice framework. The practice of *redlining*, and its diversion of homeownership loans and funds, concentrated poverty at the same time (the 1930s) that racialized cannabis prohibition was molding America's enforcement attitude.<sup>142</sup> Despite the eventual cessation of overt *redlining* policies (beginning with the passage of the Fair Housing Act of 1968),<sup>143</sup> the imposed poverty coincided with federal policing incentives (arrest-based awards from the Department of Justice Byrne Memorial Jag Grant funds) to concentrate enforcement of drug laws in low-income communities.<sup>144</sup> The result of this targeted enforcement and racially biased prohibition was disproportionate and systemic harm for minorities, who were relegated to geographic and economic immobility by the structural deficiencies in amassed and accumulable wealth.<sup>145</sup> As cannabis legalization and decriminalization progressed, industry success was aggregated to the largest, best funded, and therefore, "whitest" entrepreneurs. Meanwhile, those with controlled substance (and other) felony convictions were barred from even applying for the licensure necessary to enter the

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the federal Home Owners' Loan Corp. from 1935 to 1939 are today much more likely than other areas to comprise lower-income, minority residents. 'It's as if some of these places have been trapped in the past, locking neighborhoods into concentrated poverty'").

141. PEW CHARITABLE TRUSTS, *COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY* 17–18 (2010) ("Overall . . . the fiscal consequences of the nation's incarceration boom extend well beyond strained state budgets, impairing the livelihoods of former inmates and, by extension, the well-being of their families and communities. . . . Disrupted, destabilized and deprived of a wage-earner, families with an incarcerated parent are likely to experience a decline in household income as well as an increased likelihood of poverty."); *see also* COMMITTEE ON CAUSES & CONSEQUENCES HIGH RATES INCARCERATION, NAT'L RESCH. COUNCIL NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 283 (Jeremy Travis et al. eds. 2013) ("The communities and neighborhoods with the highest rates of incarceration tend to be characterized by high rates of poverty, unemployment, and racial segregation. In particular, the geography of incarceration is contingent on race and concentrated poverty, with poor African American communities bearing the brunt of high rates of imprisonment.").

142. JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 191–92 (2d ed. 2016); *cf.* Jan, *supra* note 135.

143. According to some, it is unclear whether the Fair Housing Act of 1968 actually eliminated the practice. *See* Kriston Capps & Kate Rabinowitz, *How the Fair Housing Act Failed Black Homeowners*, CITYLAB (Apr. 11, 2018), <https://www.citylab.com/equity/2018/04/how-the-fair-housing-act-failed-black-homeowners/557576/> (noting that "[t]oday, Northern and Midwestern cities . . . see huge gulfs in mortgage approvals between black and white households," with as few as "5 percent of black residents in the city of St. Louis receiv[ing] . . . conventional mortgage[s]—despite making up 48 percent of the overall population.").

144. German Lopez, *These Maps Show the War On Drugs is Mostly Fought in Poor Neighborhoods*, VOX (Apr. 16, 2015), <https://www.vox.com/2015/4/16/8431283/drug-war-poverty>.

145. *See* Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>.

cannabis market. With the industry developing in a racially homogenized fashion, it is poised to benefit from the systemic disadvantages of concentrated poverty and nuisance zoning magnified by decades of Drug War enforcement efforts. Ultimately, this process of canna-colonizing concurrently extracts the profits and natural resources from marginalized communities and deprives them of any role or voice in the cannabis industry. The ouroboros of wealth disparity swallows its tail—this is the environmental injustice which lies at the heart of the cannabis industry.

Yet, there remains one angle of injustice left unexposed. In addition to the difficulties presented by licensure, zoning, and natural resources law, the tremendous capital requirements of entering, and remaining, in the cannabis industry begs the question: how can anyone afford such an endeavor? The answer ties together many of the elements laid out in this Article. Simply put, they are not. Beyond the licensing hurdles discussed in Section III(A) of this Article, the capital required for the physical, spatial entry into the cannabis market are prohibitive to all but the most wealthy and well-connected entrepreneurs.<sup>146</sup> If we then consider the existing structures that divert financing options away from low-income and minority communities, those hurdles are compounded by the lack of federal financing for cannabis operations.<sup>147</sup> The subsequent hesitancy of state banks to take cannabis money renders the minority barriers to entry effectively insurmountable.<sup>148</sup>

The only short-term solution that presents itself is some form of massive cash infusion directly into the hands of marginalized individuals and communities. Such a measure is necessary because, assuming that the high cost of entering and competing in the cannabis industry will either stay static or continue to rise, accomplishing industry-wide change means that the barriers to entry must be lowered—at both the community, procedural level

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146. See Kovacevich, *supra* note 93 (noting that, in addition to capital requirements of \$150,000-250,000, annual legal work and opening up an actual storefront can cost a minimum of \$250,000, with additional costs for security measures); see also Posner, *supra* note 28 (“Across all industries, people of color face obstacles to building businesses that whites do not, like lack of access to capital, advisers, and networks, as well as discrimination from banks while applying for small business loans.”); Hammersvik, et al., *supra* note 33, at 462 (stating most cannabis growers are small-scale); Adinoff & Reiman, *supra* note 29, at 679 (discussing how cannabis-related convictions are a barrier to entry in most states); see also Lewis, *supra* note 14 (stating fewer than 1% of cannabis dispensaries are black-owned).

147. *Unlocked Potential*, *supra* note 2, at 9 (statement of Dana Chaves, Senior Vice President, First Federal Bank of Florida) (noting that Schedule I status eliminates availability of Small Business Administration Loans, 504 Certified Development Company loan programs, Microloans, and other sources of federal funding); see also Ben Adlin, *New House Bills Would make Cannabis Businesses Eligible for Federal Small-Business Aid*, MARIJUANA MOMENT (Apr. 20, 2021) (Banking legislation would permit financial institutions to take on cannabis business without fear of the federal government).

148. See Robb Mandelbaum, *Where Pot Entrepreneurs Go When the Banks Just Say No*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html> (“Banks tend to take their cues from the federal government. Not only does selling marijuana violate federal law; handling the proceeds of any marijuana transaction is considered to be money laundering. Very few banks are willing to bear that risk.”).

and the individual, distributive level. But that money must come from somewhere. Given the extant correlation between access to capital resources and success in the cannabis industry, individuals and communities will need to be catapulted to a point on the correlative spectrum that meaningfully ensures competitive success. Such a radical, industry-wide transformation could take the form of a redistributive tax scheme for existing, burgeoning, and forthcoming cannabis markets, preceded by an equitably distributive influx of real dollars that will quickly place marginalized individuals and communities at the helm of competitively viable cannabis operations. However, without some sort of concurrent effort to reduce the up-front costs of achieving viability in the industry, the costs to ensure the transformation alone may doom such a policy even before the radically progressive nature of such a policy would ensure its rapid death in the current political climate.<sup>149</sup>

The United States government is no stranger to compensating marginalized communities who have suffered at the hands of its policies.<sup>150</sup> One example is the creation of the Indian Claims Commission (ICC) for the purpose of compensating federally recognized tribes for land seized by the United States.<sup>151</sup> Conceptually, the ICC was intended to be a funnel for federal money to tribes, but “[t]he results were disappointing for Native Americans.”<sup>152</sup> Despite ultimately paying out approximately \$1,000 for each Native American in the United States by the time the Commission dissolved,<sup>153</sup> the ICC became a tool to foreclose Native Americans from traditional claims for relief, discount their damages, limit the remedies available to them,<sup>154</sup> and limit tribal access to treaty rights.<sup>155</sup> Even in Alaska,

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149. See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L. J. 477, 496–97 (1998) (“Reparations for one group may stretch the resources or political capital of the giver, precluding immediate reparations (or enough reparations) for others. The very dynamic of reparations process, even where salutary for recipients, can generate backlash and disappointment.”).

150. See Adeel Hassan & Jack Healy, *American has Tried Reparations Before. Here is How it Went*, N.Y. TIMES (Jun. 19, 2019), <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html> (“There is no direct template for reparations [to descendants of enslaved African-Americans], but Americans have received compensation for historical injustices before. Examples include Japanese-Americans interned during World War II; survivors of police abuses in Chicago; victims of forced sterilization; and black residents of a Florida town that was burned by a murderous white mob.”).

151. *Id.*

152. *Id.*

153. *Id.*

154. John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323, 337 (2004) (citing ROBERT N. CLINTON ET AL., AM. INDIAN L. 735–36 (The Michie Co., eds., 1991) (1973) (exclusive forum); DAVID H. GETCHES ET AL., FED. INDIAN L. 281 (4th ed. 1998) (discounted relief); JERRY MANDER, IN THE ABSENCE OF THE SACRED, 307–08 (1991)).

155. Carla F. Fredericks, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 531 (2018) (citing Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 360 (2013)).

where tribes were able to achieve a \$962 million victory, the award was placed in the hands of corporations, with tribal beneficiaries only having access to those funds by way of stock shares in those corporations.<sup>156</sup>

An alternative claims-based approach was born of litigation against the United States Department of Agriculture (USDA) for the farming discrimination referred to in Section II of this Article and could present a model for the kinds of corrective and distributive justice ends that cannabis policy should pursue. The settlement in *Pigford v. Glickman*<sup>157</sup> was the first to create a claims process for black farmers impacted by USDA's discriminatory practices, including monetary relief and the opportunity for debt discharges and foreclosure restorations.<sup>158</sup> But after Congress found that the notice process for filing a claim was inadequate, § 14012 of the Farm Bill<sup>159</sup> was enacted to provide a cause of action for class members subsequently affected by the deficient claims process.<sup>160</sup> A series of 17 class action lawsuits followed, and the settlement in the consolidated case expanded the *Pigford II* claims process to make recovery easier.<sup>161</sup> The new claims process, absent the earlier requirement that claimants provide a "similarly situated white person" against whom their discrimination and appropriate relief can be measured,<sup>162</sup> was specifically intended to increase the number of people who would file and prevail on their claims.<sup>163</sup> The result was that "[a]ll individuals: (1) who submitted late-filing requests under Section 5(g) of the *Pigford v. Glickman* Consent Decree on or after October 13, 1999, and on or before June 2, 2008; but (2) who ha[d] not obtained a determination on the merits of their discrimination complaints" were effectively presumed to have been discriminated against by the USDA, and were thus entitled to a claims process that greatly favored their recovery.<sup>164</sup>

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156. Hassan & Sealy, *supra* note 150.

157. See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (evaluating racial bias in federal financial assistance program).

158. Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 352 (2013); see also Moon, *supra* note 70 (discussing the lasting impacts of USDA discrimination are startlingly apparent over the last century: African-American farmers made up around 14 percent of U.S. farmers in 1910, but just 1.6 percent in 2012.); see also Robinson, *supra* note 70 (claiming USDA discriminated against women farmers).

159. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209-12.

160. Sanders, *supra* note 158, at 353.

161. *Id.* (citing *In re Black Farmers Discrimination Litigation*, 820 F. Supp.2d. 78, 82-84 (D.D.C. 2011)); see also *In re Black Farmers Discrimination Litigation*, 856 F. Supp.2d. 1, 33-34 (D.D.C. 2011) (eliminating the need for proof of a "similarly situated white farmer" to prevail on a "Track A" claim for relief, in light of the prejudice that such a requirement had on claims that would otherwise provide "virtually automatic relief" to claimants lacking any documentary evidence).

162. *Pigford*, 185 F.R.D., at 95.

163. *Black Farmers Discrimination*, 856 F. Supp.2d., at 34.

164. *Id.* at 79-80.

Two rounds of class-action litigation should not be a preferred means of seeking immediate and structurally impactful redress at either the state or the federal level. If a presumed-discrimination model could be adopted into an economic-oriented policy solution, built on strong data and sound, environmentally-just regulations, marginalized individuals would be better incentivized to join the cannabis industry and be positioned for success.

At least on the level of individual states or communities, existing momentum for cannabis equity could be translated into policy efforts lifting up those individuals and communities who: (1) could plausibly state an individual or community nexus to cannabis prohibition or the War on Drugs (e.g., low-income or minority status) and (2) were subsequently unable to enter the cannabis industry, through disqualifying convictions, lack of access to startup resources, commercial favoritism, or other barriers discussed in this Article. This would function similarly to the *Pigford* and *Black Farmers Discrimination* settlements by establishing a built-in assumption that the industry has disproportionately impacted and excluded marginalized voices and their respective communities.

One advantage of blueprinting a litigation settlement into a policy proposal (besides avoiding the time and resources needed for class action litigation) is that it would not require individuals to take on the federal government or a massive corporate entity—at least not directly. Rather, it is an example of how a community or a state legislature could codify their interests in a way that the federal government currently cannot—and arguably should not. Because the individual and community most acutely experience how systemic disadvantage impacts them, they are better positioned to discreetly perceive the reform that is best for them. Again, the inclusion of those voices is the only way to protect against further, enhanced, disproportionate environmental impacts related to cannabis prohibition. The *Black Farmers Discrimination* settlement is, therefore, remarkable in how neatly it fits in as a model for building policy within the environmental justice framework, and which comports with the United States Environmental Protection Agency's (EPA) definition of environmental justice.<sup>165</sup>

If we can similarly target the licensing, natural resources, and financial barriers to entry of the cannabis industry with marginalized interests at the forefront, we can build the industry around those marginalized persons to transform the relationship the industry currently has with marginalized

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165. "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys: the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a health environment in which to live, learn, and work." EPA, ENV'T JUST. (last updated Mar. 27, 2020), <https://www.epa.gov/environmentaljustice>.



communities. This would then allow those communities to alter the colonial narrative that has wrought systemic harm upon them. Such a radical, restorative alteration of the industry is necessary in order to reach the ends of distributive, procedural, and social justice.

As an example, a targeted policy effort may be found in California's Community Reinvestment Grants (CalCRG).<sup>166</sup> This program intends to divert a baseline \$10 million per year (until fiscal year 2022–2023, when the annual baseline disbursement becomes \$50 million) to “local health departments” of Drug-War impacted communities in order to oversee the administration of job placement programs, mental health and substance abuse treatment, “system navigation services,” legal services addressing reentry barriers, and other medical treatments.<sup>167</sup> Without question, CalCRG's focus on funding programs that remedy some of the unique, structural harms resulting from state and federal drug enforcement is important—focusing on the cannabis misses the forest for the trees. CalCRG has, however, shown slow progress in awarding grants “to cannabis-industry specific community reinvestment measures.”<sup>168</sup> This might be because less-aggressively framed policy is more palatable at all levels.<sup>169</sup> It may also be because CalCRG only factors in drug enforcement impacts by prioritizing the direction of funds to impacted *communities*, rather than to impacted *applicants*.<sup>170</sup>

The approach may have the practical effect of a utilitarian distribution of resources to organizations with the most capacity and resources to put together proposals. The end result may be a diversion of funds away from

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166. See CAL. REV. & TAX. CODE § 34019(d) (2017) (establishing reinvestment grants fund designed to rebuild “communities disproportionately affected by past federal and state drug policies.”). For those interested, Massachusetts and Illinois have established similar programs; see also MASS. GEN. LAWS ANN. CH. 94G § 14(b)(v) (2017) (establishing Marijuana Regulation Fund, allocating tax revenue to “programming for restorative justice . . . services for economically disadvantaged persons in communities disproportionately impacted by high rates of arrest and incarceration for marijuana offenses.”); see also 410 I.L.C.S. § 705/10-40 (2019) (establishing Restore, Reinvest, and Renew Program, giving preference in cannabis licensure to persons “disproportionately impacted by both poverty and cannabis drug law enforcement,” and “provide[s] low-interest rate loans . . . job training and technical assistance to these businesses.”).

167. CAL. REV. & TAX. CODE § 34019(d) (2017).

168. See Eva Silva, *NDICA and Dorsey Academy of Entrepreneurs Win California State Community Reinvestment Grant*, EIN PRESSWIRE (Oct. 3, 2019), [https://www.einnews.com/pr\\_news/498230446/ndica-and-dorsey-academy-of-entrepreneurs-win-california-state-community-reinvestment-grant](https://www.einnews.com/pr_news/498230446/ndica-and-dorsey-academy-of-entrepreneurs-win-california-state-community-reinvestment-grant) (noting that, of 69 grants, the grant to NDICA and the Norris Dorsey Academy of Entrepreneurs is the first of its kind to target such reinvestment measures).

169. Indeed, California's relevant jurisprudence strongly suggests that racially focused measures may be just short of impossible. See *Coral Constr. Inc. v. City & Cnty. S.F.*, 235 P.3d 947, 960 (Cal. 2010) (“even in the rare case in which racial preferences are required by equal protection as a remedy for discrimination, the governmental body adopting such remedies must undertake an extraordinary burden of justification ‘to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’”).

170. See Andrew Bowen, *San Diego Missing Out on Revenues From Pot Legalization*, KPBS (Dec. 16, 2019), <https://www.kpbs.org/news/2019/dec/16/san-diego-missing-out-cannabis-tax-revenues/> (discussing the relevance of an applicant's location and community).

organizations in marginalized communities that specifically wish to host, be engaged in, and benefit from the cannabis industry itself. This tension once again raises the need for more targeted legislation that prioritizes marginalized procedural involvement beyond the community and facial levels of priority allocation. While legislative relief can strengthen broader social services and programs addressing the societal harms of drug prohibition, such relief should concurrently divert funds to organizations and individuals seeking competitive establishment within the industry.<sup>171</sup> To that end, local organizations with that focus should be empowered and given priority among other, non-industry organizational applicants.<sup>172</sup> Ultimately, even those policies that do not reach the most progressive ends of these proposals and solutions can still push the industry in a more inclusive, restorative direction that equitably distributes procedural opportunities in policy- and business-crafting. This is a result worth fighting for.

#### IV. BALANCING INTERESTS: TOUGH QUESTIONS AND PATHS FORWARD

##### *A. Competing Justice Interests and Definitions*

The tension identified at the end of Section III begins to touch on a broader set of difficult questions: how do we balance the diversity of interests implied by environmentally-just cannabis policy? Must certain interests be prioritized? Why or why not? What does “justice” actually look like in the context of structural, societal indifference? Can the demand for cannabis be met by environmentally just policies for cultivation, production, and distribution? Should that demand be met, or is it more environmentally just to cap the available amount of cannabis?

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171. See MINORITY CANNABIS BUS. ASS’N, MODEL STATE ADULT-USE LEGISLATION (last visited Apr. 22, 2020), <https://minoritycannabis.org/mcbs-model-state-legalization-bill/> (for a progressive, working model of this kind of cannabis legislation).

172. An example of the kind of entrepreneur and organization that should be so prioritized is Andrew DeAngelo, co-founder of the Last Prisoner Project, whose work focuses on “free[ing] and reintegrate[ing] cannabis prisoners into society” as well as “helping equity businesses, start-ups, and international cannabis organizations.” Warren Bobrow, *An Interview with Cannabis Industry Pioneer Andrew DeAngelo, A Visionary Leader*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/warrenbobrow/2020/04/20/an-interview-with-cannabis-industry-pioneer-andrew-deangelo-a-visionary-leader/#2698456d2a6c>. Along the same lines, California has just recently announced the provision of \$30 million in grant money in support of “equitable business development,” including \$23 million for “licensees or business applicants ‘identified by local jurisdiction as being from communities most harmed by cannabis prohibition.’” Kyle Jaeger, *California Announces \$30 Million Grant Program to Promote Marijuana Industry Social Equity*, MARIJUANA MOMENT (Apr. 21, 2020), <https://www.marijuanamoment.net/california-announces-30-million-grant-program-to-promote-marijuana-industry-social-equity/>. To address financing concerns, willing states could support financing organizations like Colorado credit union “Partner Colorado,” who “provides checking accounts expressly for the marijuana industry, in clear violation of federal law.” Mandelbaum, *supra* note 148.

Speaking to the first set of generally justice-related questions, the concerns are well-captured by Chicago Mayor Lori Lightfoot's efforts to lay the foundations for cannabis' entry into the city. When she first unveiled her proposed zoning rules, which would have created a cannabis dispensary "exclusion zone" in downtown Chicago, Mayor Lightfoot stated her belief that such a measure would create "unique opportunities for entrepreneurs from communities victimized by (the) war on drugs to be at the forefront of developing equity and wealth from this emerging industry."<sup>173</sup> The proposal was immediately met with backlash, facing criticism for its removal of economic opportunity from neighborhoods that stood to benefit from the industry's presence.<sup>174</sup> After residents, business owners, industry advocates, and city alderpersons voiced these concerns at community meetings, Mayor Lightfoot then revised her proposal to allow cannabis businesses to operate much closer to the so-called "Magnificent Mile,"<sup>175</sup> an attractive location for cannabis entrepreneurs to take advantage of a prime retail location.<sup>176</sup> On the one hand, the equity from such a forced distribution of industry may be derived from the enabling of otherwise disadvantaged entrepreneurs to have competitive opportunities outside of the geographical corridor where commercial cannabis may be better positioned to corner the market. But on the other hand, the relocation of cannabis opportunities may overall reduce the amount of money raised by those operations.

One other question posed by Chicago's model: if the business and regulatory model intends tax revenue to be drawn back down to benefit marginalized communities—and under Illinois' "R3" program, it is<sup>177</sup>—is it a just distribution of opportunity to force all industry operations outside a corridor that would likely provide the industry with the most profits for reinvestment? Thinking about it another way, even if the R3 program can create competitive cannabis industry opportunities for marginalized persons, if those opportunities are located such that they are comparatively disadvantaged in terms of competitiveness and profit-potential, at what point are those opportunities tokenistic? How can these programs be structured to

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173. Gregory Pratt & Lauren Zumbach, *Legal Marijuana Dispensaries Would be Banned in Most of Downtown Chicago Under Mayor Lori Lightfoot's Proposed Zoning Rules*, CHI. TRIBUNE (Sep. 18, 2019), <https://www.chicagotribune.com/marijuana/illinois/ct-chicago-dispensary-rules-zoning-lightfoot-20190918-j5scteu2gfhute2d5o2nqle7ce-story.html>.

174. *Id.*

175. Tom Schuba, *Under Pressure, Lightfoot Scales Back Plan to Prohibit Pot Sales in Downtown Area*, CHI. SUN. TIMES (Oct. 14, 2019), <https://chicago.suntimes.com/cannabis/2019/10/14/20914749/under-pressure-lightfoot-scales-back-plan-prohibit-pot-sales-in-downtown-area>.

176. Pratt & Zumbach, *supra* note 173.

177. 410 I.L.C.S. § 705/10-40 (2019); *see also* A.D. Quig, *Who Gets Weed Tax Revenue? Illinois is Still Working on That.*, CHI. BUS. (Mar. 6, 2020), <https://www.chicagobusiness.com/marijuanacannabis/who-gets-weed-tax-revenue-illinois-still-working> (discussing weed tax revenue in Chicago).

balance industry success and the environmental injustices which have historically come with it? Without adequate economic support, minority-championed cannabis operations may fall victim to the structural and cyclical harms that motivated the redistribution of procedural, restorative, and socially-just cannabis opportunities in the first place.

We can still learn from the Chicago saga that a justice-oriented cannabis regulation regime, which meaningfully involves the interests of communities whose land and resources are at stake, can produce material alterations and shifts in how cannabis opportunities are distributed. Alderpersons, residents, business owners, and other interests are capable not only of coalescing to fundamentally alter municipal approaches to legalizing and regulating cannabis, but also coming to an understanding of the different justice issues implied by zoning proposals. But the voices must be loud and the policymakers properly oriented and receptive to hearing them. Without any kind of meaningful involvement, efforts at environmentally just cannabis regulation will be doomed to fail.

### *B. Proceeding in a Legally Uncertain and Unstable Climate*

It is also essential to consider how to balance the competing federal and state interests in a world that seems to be trending towards a substantive federal legalization effort. While the Tenth Amendment police powers generally serve to guarantee the states' rights to enact cannabis legalization schemes, the uncertain possibility of federal enforcement still lurks in the shadows until some sort of federal recognition of cannabis makes it through either the courts or the legislature. The Department of Justice has continued to functionally follow Obama-era guidelines regarding non-enforcement of the Controlled Substances Act (CSA) against cannabis businesses.<sup>178</sup> That said, and without diving into a thorough exploration of federalism,<sup>179</sup> the benefit that a federal legalization scheme may have in producing "uniformity" in the interpretation and application of law.<sup>180</sup> In addition to removing the fear of federal CSA enforcement, a uniform body of federal, environmentally just cannabis law may be preferable for addressing certain aspects of cannabis' environmental injustices. It could ensure greater

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178. See Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031/> (discussing intensifying state and federal laws in the cannabis industry).

179. See David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 575 (2013) (A comprehensive discussion of the federalism issues inherent to the current state of cannabis legalization).

180. See generally Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 541 (2010) (noting that "[t]he weight of commentary . . . favors uniformity" in federal law and the vindication of rights).

protections against exploitation by recognizing existing land and water rights. It could also trigger environmental assessments and other wildlife protections for proposed large-scale (or commercial) cannabis operations. Finally, it could structure financing programs and tax incentives which enable historically disenfranchised communities better access to industry and law.

That being said, it is by no means abundantly clear that a federal cannabis regulatory scheme would be the best solution to address the environmental justice goals this Article discussed for future cannabis regulations. But if the alternative is a patchwork of laws across the 50 states, it is difficult to imagine that such an inconsistency would produce more environmentally just outcomes.

Without taking a position on the precise contours of federal cannabis legalization, perhaps the most obvious (if not vague) answer, then, is to tow a line somewhere in the middle. The federal government could eliminate most cannabis-related offenses in the United States Code, creating a sort of baseline upon which states can continue to craft targeted, inclusive, community and population-specific zoning, natural resource, and community reinvestment schemes. A federally centralized authority in cannabis policy making may be unable or unwilling to address those unique and localized harms of the War on Drugs. Policies may face immense political and legal scrutiny within the current socio-political milieu, at least to the extent that they are progressive, federal, environmental, racially motivated, and financially redistributive.<sup>181</sup>

Simply de-scheduling cannabis at the federal level and removing the lion's share of its criminal penalties could open the way for federal financing opportunities to would-be marginalized entrepreneurs. At the same time, states and local governments could help marginalized entrepreneurs by taking the lead on specializing licensure and zoning procedures, as well as relevant environmental laws and regulations. There is at least one proposal that a clear and strict application of the "clear statement" rule—requiring an "unmistakably clear" statement within a statute to commandeer and direct the actions of state officials—could allow heterogeneous industry development without upending state-level cannabis efforts as they exist

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181. Compare Jonathan Turley, *Elizabeth Warren Fuels Class Warfare with New Wealth Redistribution Idea*, HILL (Mar. 20, 2021), <https://thehill.com/opinion/finance/544112-elizabeth-warren-fuels-class-warfare-with-new-wealth-redistribution-ideas>, with Max Boot, *Opinion: There They Go Again. For 90 years, Republicans have been Crying Wolf about Democratic 'Socialism.'*, WASH. POST (Nov. 2, 2021), <https://www.washingtonpost.com/opinions/2021/11/02/here-we-go-again-90-years-republicans-have-been-crying-wolf-about-democratic-socialism/>.pdf.

now.<sup>182</sup> However, this Article is only intended to focus on the immediate and local efforts that advocates, regulators, and industry can focus on to deliver environmentally just cannabis to all communities—especially those marginalized by the structural devastation wrought by the War on Drugs.

In the context of federal cannabis legalization, localized laws, regulations, and ordinances must not be commandeered or preempted by federal law, otherwise the most meaningfully opportune junctures for the involvement of marginalized persons will disappear. Although some maintain that full-fledged federal legalization is inevitable, it may be worthwhile to think about the form that federal legalization can and should take.<sup>183</sup>

#### CONCLUSION

Despite the multi-faceted and oftentimes competing interests and definitions of justice, the explosion of the cannabis industry presents unique opportunities for the reclamation of criminalized spaces and the advancement of minority stake in—and agency over—themselves and their communities. Indeed, the ACLU has demanded that:

[w]hen states legalize, they must center legalization in racial justice by seeking to repair past harms wrought on communities of color by marijuana prohibition and ensure that people of color have opportunity and access to the burgeoning marijuana marketplace. Upon legalization, states should offer expungement and re-sentencing for past convictions, so that hundreds of thousands of people—disproportionately Black and Brown—do not remain marginalized for prior offenses.<sup>184</sup>

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182. See Schwartz, *supra* note 179, at 626, 638 (stating the “clear statement” rule and concluding that “[a]pplying the anti-commandeering clear statement rule, the CSA would not apply to state officials at all.”).

183. See, e.g., David L. Nathan et al., *The Physicians’ Case for Marijuana Legalization*, 107 AM. J. PUB. HEALTH 1746, 1746 (positing that “[f]ederal support of state cannabis laws is critical and all but inevitable, because more than 60% of Americans in both red and blue states now favor full legalization for adults.”); see also Reihan Salam, *Is It Too Late to Stop the Rise of Marijuana, Inc.?*, ATL. (Apr. 19, 2018), <https://www.theatlantic.com/politics/archive/2018/04/legal-marijuana-gardner/558416/> (looking at the future of legalized cannabis as it relates to business and politics).

184. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (Apr. 17, 2020), [https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/?initms\\_aff=aa&initms\\_chan=soc&utm\\_medium=soc&initms=200420\\_420\\_marijuanareport\\_aff&utm\\_source=aff&utm\\_campaign=420&utm\\_content=200420\\_criminallaw\\_marijuanareport&ms\\_aff=aa&ms\\_chan=soc&ms=200420\\_420\\_marijuanareport\\_aff&redirect=marijuanadata](https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/?initms_aff=aa&initms_chan=soc&utm_medium=soc&initms=200420_420_marijuanareport_aff&utm_source=aff&utm_campaign=420&utm_content=200420_criminallaw_marijuanareport&ms_aff=aa&ms_chan=soc&ms=200420_420_marijuanareport_aff&redirect=marijuanadata).

The ACLU's demands are tantamount to, and encompass demands for, environmental justice. Future cannabis policies should be environmentally just to recognize the marginalizing effects that the structure of cannabis prohibition has had on the birth, growth, and explosion of the cannabis industry. The solutions should account for the land and resource impacts of cannabis cultivation, production, and distribution to best accomplish these ends.

By acknowledging and codifying the interests and underlying principles supporting such a re-distributive reconstruction of the cannabis industry, the tools of law related to zoning, business licensure, natural resource rights, and tax schemes can be utilized in future cannabis legislation. This would mitigate the harms of the industry's physical and socio-economic impacts of the Drug War on marginalized communities. These tools give individual entrepreneurs, community leaders and advocates, and legislators at all levels the tools to re-shape the predominantly white, commercially-dominated cannabis industry, and re-write the narrative to which impacted communities have been confined. Although balancing the competing interests and definitions of justice under such a restructuring of a multibillion-dollar industry begs tremendously difficult questions, it is essential that any future cannabis-regulating policies account for—and specifically include—marginalized voices. This necessarily includes the voices of our land and natural resources. If we, as a nation, wish to continue our relationship with cannabis, we must listen.