

## POT WITHOUT PATRIARCHY: GENDER EQUITY IN THE ADULT-USE CANNABIS INDUSTRY AND THE FEMINIST COOPERATIVE MODEL

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### *Abstract*

*Many states that have legalized recreational cannabis in the last decade have done so with social equity in mind. So-called “cannabis social equity” programs in those states primarily aim to rectify the harms of discriminatory enforcement of cannabis laws before legalization, but they also pursue a broad vision of diversity in cannabis business ownership as the industry rapidly grows. As more data on cannabis industry demographics becomes available, states’ equity programs have received widespread criticism for their failure to realize their racial equity and restorative justice goals. There has been far less discussion of the persistent gender disparities in the cannabis industry, though. Despite states’ equity efforts, the nascency of the industry, and the fact that women are starting and leading businesses in other sectors at higher rates than ever before, women are not pulling ahead in cannabis. This Note seeks to contribute to the holistic, intersectional project of cannabis equity by exploring cannabis’s gender problem—including its causes and potential state-level policy solutions within constitutional limits on gender-based affirmative action. It argues that women’s participation and leadership in the cannabis industry are essential in light of the hidden costs of the War on Drugs on women and women’s historic exclusion from, or exploitation by, other “vice” industries like gambling and tobacco. This Note ultimately advocates for an increased regulatory focus on support for co-op businesses, as their democratic, collective structure renders them uniquely well-suited to achieving gender equity in cannabis while prioritizing community and resisting corporate capture.*

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## INTRODUCTION

As little as thirteen years ago, the existence of a legal recreational cannabis industry in the United States was nothing more than a pipe dream for drug policy reformers<sup>1</sup> and would-be lawful cannabis entrepreneurs and consumers. Today, that industry not only exists but thrives.<sup>2</sup> Nearly half of all states have legalized recreational (“adult-use”) cannabis,<sup>3</sup> and the economic outlook of the industry is undeniably bright: estimates of its worth by 2030 are as high as \$71 billion—double what it is now<sup>4</sup>—making it one of the fastest-growing industries in the country.<sup>5</sup> Crucially, many of the states contributing to that rapid growth have recognized the need to prioritize social and racial justice in structuring their cannabis markets in the shadow of the War on Drugs.<sup>6</sup> So-called “cannabis social equity” programs in those states, implemented at both the state and local levels, vary widely in scope and approach, but they broadly reach towards connected goals of

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1 See, e.g., Paul Armentano, *Colorado: State Democratic Party Announces Support for Marijuana Regulation Measure*, NORML: BLOG (Apr. 17, 2012), <https://norml.org/blog/2012/04/17/colorado-state-democrats-officially-support-marijuana-regulation-initiative/> [<https://perma.cc/3BQ9-7B3V>] (stating that Colorado’s 2012 ballot measure to legalize recreational cannabis was “backed by a broad coalition of drug law reform organizations, including NORML, the American Civil Liberties Union of Colorado, SAFER, Sensible Colorado, Law Enforcement Against Prohibition (LEAP), Students for Sensible Drug Policy (SSDP), the Drug Policy Alliance, and the Marijuana Policy Project”).

2 See, e.g., Tatyana Hopkins, *Road to 2030: Federal Legislative Solutions to Social Equity in a Booming Cannabis Industry*, CONG. BLACK CAUCUS FOUND., <https://www.cbcfinc.org/capstones/economic-opportunity/road-to-2030-federal-legislative-solutions-to-social-equity-in-a-booming-cannabis-industry/> [<https://perma.cc/26GE-9642>] (“[E]ven in the face of federal prohibition, the cannabis market continues to explode. In 2022, the legal U.S. cannabis market was worth an estimated \$29 billion across state medical and recreational sales.”).

3 Will Yakowicz, *Where Is Cannabis Legal? A Guide to All 50 States*, FORBES (Jan. 4, 2025), <https://www.forbes.com/sites/willyakowicz/2025/01/03/where-is-cannabis-legal-a-guide-to-all-50-states/> [<https://perma.cc/S6ZX-GWTT>].

4 Oliver Barnes, *Cannabis Companies Proliferate on List of Fastest-Growing American Businesses*, FIN. TIMES (Apr. 28, 2023), <https://www.ft.com/content/1b2e8e3e-27c8-404b-b90d-cb89352b8b9f> [<https://perma.cc/4W7X-PTUC>].

5 See Justin Pace, *The “Free Market” for Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy*, 24 LEWIS & CLARK L. REV. 1219, 1257 (2020).

6 See Ignacio Diaz Pascual, *America’s War on Drugs – 50 Years Later*, LEADERSHIP CONF. ON CIV. & HUM. RTS.: BLOG (June 29, 2021), <https://civilrights.org/blog/americas-war-on-drugs-50-years-later/> [<https://perma.cc/83R8-LUSQ>] (arguing that the War on Drugs was “brazenly” racially and politically motivated, given that since President Nixon’s 1971 declaration announcing that drug abuse was “public enemy number one,” the War has resulted in a 500% rise in the number of people convicted of drug-related crimes, the majority of whom are Black and Brown).

promoting diversity in cannabis business ownership and allowing communities harmed by discriminatory enforcement of cannabis prohibition to now share in the economic benefits of legalization.<sup>7</sup>

The somewhat limited data on the success of those efforts towards achieving equity in the industry, however, suggests that their promise has not translated to significant results.<sup>8</sup> A 2022 report on diversity, equity, and inclusion in the cannabis industry found that women and non-white executives make up just 23% and 12% of executives in the industry, respectively, with rates of business ownership for those groups hovering around similar numbers.<sup>9</sup> And perhaps even more concerning, the data suggests that those figures are stagnant, if not declining in the long term.<sup>10</sup> There is a rich body of literature dedicated to understanding how state social equity programs and other policy measures can support racial justice efforts in adult-use cannabis<sup>11</sup>—and rightfully so. But there is a gap in the literature on cannabis equity addressing the other major ownership disparity in gender. This Note will discuss that gender disparity, address its far-reaching roots and consequences, and analyze the legality and practicality of potential policy solutions, including more widespread adoption of a cooperative business model in the industry.

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7 See, e.g., *About the Program*, CITY OF L.A. DEP'T OF CANNABIS REGUL., <https://cannabis.lacity.gov/social-equity/about-program/about-program> [<https://perma.cc/EXV9-WHUS>] (stating the mission of the Los Angeles cannabis social equity program: “to promote equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities, and to address the disproportionate impacts of the War on Drugs in those communities”).

8 See, e.g., Katharine Neill Harris & William Martin, *Persistent Inequities in Cannabis Policy*, 60 JUDGE'S J. 9, 10–12 (2021) (citing “persistent disparities in . . . access to the marijuana industry and its profits” and noting that “[e]ven when policymakers try to address racial disparities, effort does not guarantee success”).

9 CASSACHIA ET AL., MJBIZDAILY, DIVERSITY, EQUITY & INCLUSION IN THE CANNABIS INDUSTRY 4–5 (2022), [https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBiz\\_Diversity\\_Equity\\_Inclusion\\_Cannabis\\_Industry\\_Report.pdf](https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBiz_Diversity_Equity_Inclusion_Cannabis_Industry_Report.pdf) [<https://perma.cc/UXP4-QYRS>].

10 See JENEL STELTON-HOLTMEIER, MARIJUANA BUS. DAILY, WOMEN & MINORITIES IN THE CANNABIS INDUSTRY 5 (2021), <https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBizDaily-Women-and-Minorities-in-Cannabis-Report.pdf> [<https://perma.cc/5P6K-X2QP>] (reporting that the percentage of women executives in the cannabis industry has declined from 36% in 2015 to 22% in 2021).

11 See, e.g., Matthew Swinburn & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 276 (2020); Harris & Martin, *supra* note 8; Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. (2020).

Part I of this Note provides a background on existing cannabis social equity programs and common barriers to entry in the cannabis industry for small businesses, especially those owned by women. It summarizes the precarious legal landscape created by the system of “cannabis federalism” and its consequences for cannabis businesses, details existing data on women holding executive and ownership positions in the industry as compared with other business sectors, and explores puzzles that those statistics pose. Part II discusses economic, social, and historical considerations that justify efforts to elevate women in the cannabis industry today. In particular, Part II explores the extensive ties between historically male control of vice industries and harmful social stigmas surrounding women and substance use, ultimately suggesting that adult-use cannabis presents an ideal opportunity to build the first feminist vice industry because of the nature of the substance and the present cultural and economic moment. Finally, Part III evaluates some of the biggest legal and practical challenges to meeting gender equity goals in cannabis, including constitutional limits on preferencing women-owned businesses in states’ social equity schemes and the threat of corporate consolidation of small businesses, especially in the face of future federal legislation lifting prohibitions on cannabis. Part III presents the benefits of the cooperative business model as an alternative to traditional business organization. It argues that such a model is uniquely well-suited to cannabis equity goals, including gender equity, and thus should be more heavily promoted and prioritized through state cannabis regulation.

Nothing in this Note is intended to suggest that states should not continue to center racial justice as foundational in their cannabis policies in response to the indisputably racialized aims and impacts of the War on Drugs.<sup>12</sup> Rather, my hope is that adding gender to the cannabis equity conversation will contribute to holistic and multidimensional understandings of equity,<sup>13</sup> offer new perspectives on longstanding debates about gender disparities in business and entrepreneurship in other sectors, and prompt productive discussion of how this brand-new industry presents a unique opportunity to address the historical exclusion of women from controlling ownership of vices. Additionally, by focusing on gender *equity*

12 See, e.g., André Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 455 (2022) (“[T]he War on Drugs originated with animus against people of color: specifically, with the intent to demonize people of color and to propagate fear within the entire American body politic while assuring disproportionate punishment towards communities of color.”).

13 See Ryan Stoa, *Emerging Issues in Cannabis Law: 2022 and Beyond*, 46 SETON HALL LEG. J. 469, 481 (2022) (“To some, equity means righting the wrongs of the past; for cannabis, this means correcting the harms inflicted by the war on drugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits. A broad understanding of equity surely incorporates both, and a holistic approach to equity in cannabis will require a multidimensional and evolving understanding of what equity means and, perhaps more importantly, what equity requires.”).

rather than equality, this Note recognizes that any discussion of a classification as broad as gender demands attention to intersectionality.<sup>14</sup> Ultimately, this Note is committed to the larger goal of seeing that the legalization and inevitable commercialization of cannabis proceed as equitably and ethically as possible. It focuses on intersectional considerations of gender in the industry under the theory that those considerations must play a part in the achievement of that goal.

## **I. The “Grass” Ceiling of the Adult-Use Cannabis Industry**

There is widespread national recognition that pursuing social equity in the legal cannabis industry is especially critical in the shadow of the War on Drugs.<sup>15</sup> Many equity efforts target future diversity and inclusion in the industry, including by increasing representation of women-owned businesses. However, existing data on cannabis business ownership and control indicates that despite those efforts, neither minority- nor women-owned businesses are achieving anywhere close to an equitable market share.<sup>16</sup> Part I summarizes states’ cannabis social equity efforts and some major challenges they face, reviews some of the existing data on women-owned cannabis businesses, and explores why women-owned businesses may experience unique and compounding barriers to entry in the industry.

### **A. Common Features and Failures of States’ Approaches to Social Equity in Cannabis**

States seeking to tackle inequities using, and related to, their adult-use cannabis markets have a wide array of policy options at their disposal. Forward-facing efforts directed at the diversity of new cannabis business owners, often involving licensing and funding decisions, are the most relevant for fostering gender equity in the industry. But it is important to note first that policy measures rooted in retrospective principles of restorative justice are far more wide-reaching in terms of scale. For example, upon legalization, states can implement mechanisms for sealing or expunging past cannabis offenses—either

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14 See Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 B.U. L. REV. 1003, 1009 (2021) (“While equality generally focuses on ensuring that everyone has access to the same resources, we consider equity as accounting for different starting points and the unique needs of different populations as a result of long-standing systemic and legislated barriers to opportunities to access those resources.”).

15 See, e.g., Swinburn & Hoke, *supra* note 11, at 236 (“State governments have recognized the disjointed relationship between the financial opportunity of legalized marijuana and the damages of the war on drugs.”).

16 See generally CASSACHIA ET AL., *supra* note 9.

through a court petition process or, ideally, automatically—or their governors can simply issue sweeping pardons to individuals with cannabis-related convictions on their records.<sup>17</sup> Indeed, “[i]n terms of directly helping the most people who have been harmed by cannabis prohibition, expunging records is the most impactful, far-reaching measure.”<sup>18</sup> States can also commit to investing a percentage of the tax revenue generated by their adult-use cannabis markets into communities disproportionately harmed by past enforcement of cannabis prohibition.<sup>19</sup> Although the impact of those funds has yet to be fully determined due to their nascency, directing tax revenue toward initiatives like economic development, violence prevention, and job creation in the targeted communities can foster deep, lasting improvements.<sup>20</sup>

On the other hand, states can use their regulatory frameworks for their new adult-use cannabis markets to foster diversity and inclusion in the ownership, leadership, and employment demographics of new cannabis businesses. Social equity-focused states often design their cannabis regimes around two primary goals: first, creating and protecting space for smaller businesses to prevent the rise of “Big Marijuana,” and second, increasing minority representation in the industry early on.<sup>21</sup> The latter category of interventions is often implemented directly through “social equity programs,” in which states preferentially award cannabis-related licenses and, in some cases, the associated funding and various support services to social equity applicants.<sup>22</sup> Each program defines those applicants using distinct criteria, but business owners usually qualify for some version of social equity status according to their residency in the state or in certain geographic areas impacted disproportionately by cannabis prohibition;<sup>23</sup> income thresholds; past cannabis convictions;

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17 See Kilmer et al., *supra* note 14, at 1011–12.

18 *Id.* at 1026.

19 See, e.g., Swinburn & Hoke, *supra* note 11, at 276 (describing the Restore, Reinvest, and Renew (“R3”) Program in Illinois and the Marijuana Regulation Fund in Massachusetts, each funded by marijuana tax revenue).

20 See *id.* at 277.

21 See *id.*

22 See *id.* at 255–76.

23 Residency criteria have recently been the subject of litigation. Several plaintiffs have challenged states’ use of residence-based qualification for social equity status, claiming that they hinder interstate commerce and unconstitutionally prioritize in-state businesses in violation of the Dormant Commerce Clause. See Andrew Kline & Thomas Tobin, *Cannabis and the Dormant Commerce Clause*, PERKINS COIE (Mar. 27, 2022), <https://www.perkinscoie.com/en/news-insights/cannabis-and-the-dormant-commerce-clause.html> [https://perma.cc/

or their identity as a minority,<sup>24</sup> woman, veteran, person with disabilities, or LGBT individual. Some states have also allocated funding to support qualifying businesses through direct grants or low-interest loans,<sup>25</sup> and have offered training and startup support services or incentivized larger businesses to provide those services to social equity applicants.<sup>26</sup>

Nevertheless, cannabis social equity efforts have largely fallen short of their diversity objectives, including those related to women, due to a number of internal failures and external challenges.<sup>27</sup> Fundamentally, preferential licensing cannot overcome the high costs of starting a new cannabis business when not coupled with funding.<sup>28</sup> As further explained below, cannabis entrepreneurs are effectively excluded from using traditional banking services because of the continued federal prohibition on the drug.<sup>29</sup> Moreover, entrepreneurs may be heavily disadvantaged when existing medical marijuana businesses

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FY2Y-UBS9] (summarizing the application of the Dormant Commerce Clause to the cannabis industry and providing an overview of recent litigation in the area).

24 States must be careful to meet constitutional standards on affirmative action in giving preferential treatment to some businesses over others on the basis of race. In *Pharmacann Ohio, LLC v. Williams*, Ohio's effort to diversify its medical marijuana industry by setting aside 15% of its licenses for members of "economically disadvantaged groups" defined by race was struck down in an equal protection challenge as an improper racial quota. No. 17-CV-010962, 2018 WL 7500067, at \*7 (Ohio Com. Pl. Nov. 15, 2018). The court ruled that discrimination in drug crime enforcement did not equate to past discrimination in the medical marijuana industry. *Id.*

25 See, e.g., Stoa, *supra* note 13, at 486 (describing California's allocation of \$23 million "to be disbursed directly to low-income and minority licensees in the form of low-interest or no-interest loans and grants").

26 See, e.g., *id.* at 485 (describing the program in Massachusetts that "provides training and technical assistance to would-be licensees to understand the regulatory process and move through it effectively"); N.Y. STATE OFF. OF CANNABIS MGMT., NEW YORK SOCIAL AND ECONOMIC EQUITY PLAN 14 [hereinafter N.Y. EQUITY PLAN] ("States have either crafted their own direct support frameworks or have incentivized non-government entities to develop frameworks to support less-resourced operators.").

27 See Stoa, *supra* note 13, at 484 ("Early trends of representation show that White men predominately own legal cannabis businesses."); Amanda Chicago Lewis, *Legalized Pot Was Supposed to Build Black Wealth in Los Angeles. It Failed.*, NEW REPUBLIC (Apr. 4, 2022), <https://newrepublic.com/article/165654/los-angeles-legal-marijuana-build-black-wealth-failed> [<https://perma.cc/ZN93-Y6QH>] ("So far, marijuana legalization has been less a revolution and more a grim continuation of a deeply American form of inequality, in which prosperity and social mobility are technically possible but utterly unlikely.").

28 See Swinburn & Hoke, *supra* note 11, at 256 ("One estimate indicated that the average startup cost (application fees, licensing fees, etc.) for a retail location in the recreational market is \$312,000 and \$500,000 for a cannabis processing business. These startup estimates do not include the capital requirement placed on marijuana businesses by the state, funds the business must have on hand to prove financial viability.").

29 See *infra* Part I.B.



are able to enter a state's newly created recreational market and get a first-mover head start on sales.<sup>30</sup> Allowing, or even mandating, that cannabis businesses be vertically integrated—meaning that they control all stages of cultivation, processing, and selling “from seed to sale”—can also effectively limit access to the market to only the most well-resourced and capitalized businesses.<sup>31</sup> Too much local control in the implementation of a social equity plan can be detrimental, too. In Massachusetts, for example, state law requiring local “host community agreements” between towns and cannabis businesses implemented without sufficient state-level oversight resulted in corruption and the exclusion of many groups from the licensing process.<sup>32</sup> Even the difficulty and cost of navigating a state's complex regulatory scheme in itself can place a heavy burden on entrepreneurs trying to break into the industry.<sup>33</sup>

Sometimes a state's strategic timeline for rolling out a small number of social equity licenses before others works sharply to its disadvantage. Following legalization in New York, the state's Office of Cannabis Management developed a seemingly comprehensive “social and economic equity plan,”<sup>34</sup> but its delay in actually issuing those social equity licenses and getting dispensaries off the ground allowed the illicit, unlicensed market to thrive and compete in the meantime.<sup>35</sup> Unfortunately, those delays and dynamics have

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30 See SHALEEN TITLE, BIGGER IS NOT BETTER: PREVENTING MONOPOLIES IN THE NATIONAL CANNABIS MARKET 5 (2022) (“When states pass recreational legalization laws, existing medical marijuana businesses often lobby or create public relations campaigns seeking a head start on sales, which will always disadvantage and can effectively exclude new entrants to the industry.”); Edward W. De Barbieri, *Excluding Disadvantaged Businesses*, 28 GEO. MASON L. REV. 901, 944 (2021) (“Since states that permit recreational cannabis frequently began by permitting use for medical reasons, first movers have a significant advantage over upstarts, including those owned by marginalized individuals.”).

31 N.Y. EQUITY PLAN, *supra* note 26, at 15.

32 See Natalie Fertig, *Local Rule Is Undermining Massachusetts' Attempt to Create Equity in the Cannabis Industry*, POLITICO (Mar. 6, 2020), <https://www.politico.com/news/2020/03/06/local-rule-is-undermining-massachusetts-attempt-to-create-equity-in-the-cannabis-industry-122655> [<https://perma.cc/N2SP-8HKU>] (describing applicants' and state officials' opinions that Massachusetts' host community agreements program was “sabotaging the licensing process and putting the entire diversity program at risk”).

33 See, e.g., De Barbieri, *supra* note 30, at 911 (“In the recreational cannabis market, it appears to hold true that the cost of complying with regulation alone tends to favor existing businesses rather than newcomers.”); Stoa, *supra* note 11, at 480 (“Small businesses are being pushed out of the industry (or back onto the illicit market) due to the unrealistic regulatory hoops they are required to jump through.”).

34 See generally N.Y. EQUITY PLAN, *supra* note 26.

35 See Michael Hill, *After Troubled Start, New York Is Shaking Up Its Legal Marijuana Market With New Competitors*, ASSOC. PRESS (Oct. 12, 2023) <https://apnews.com/article/new-york-legal-marijuana-cannabis->



been commonplace. In Los Angeles, for example, one of the first places “to legalize weed with social equity in mind,”<sup>36</sup> 1,629 people became verified as social equity applicants in the first five years of the program, but in that time only thirty-five retailers actually opened.<sup>37</sup> Delays in program implementation harm those businesses seeking to operate legally because they must compete with a booming illicit market where sellers can offer lower prices without having to comply with states’ regulatory fees or pay taxes.<sup>38</sup> Often, the heavy competition produced by such limited licensing in a new cannabis market’s critical first few years invites lawsuits from “excluded” businesses, which further “delay the implementation of social equity programs and increase costs to prospective licensees.”<sup>39</sup> These failures give established medical marijuana companies and the wealthiest new recreational firms a competitive advantage while leaving behind the small businesses that social equity programs promise to support, including those that are women- and minority-owned.

### **B. Barriers to Entry Beyond Licensing: Cannabis Federalism and Access to Capital**

Prioritizing equity applicants in licensing, even when done successfully, can only go so far. There is arguably no greater barrier for small businesses—especially those that are women-owned<sup>40</sup>—seeking to break into adult-use cannabis than access to funding.<sup>41</sup>

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493fb260a17c53733dbe39d703268349 [https://perma.cc/B445-XAHX] (explaining that a new issuance of licenses in New York was “expected to boost the number of legal dispensaries in a market now dominated by black-market sellers who simply own retail stores without a license”); *Investor for \$200 Million New York Cannabis Fund Finally Found*, MARIJUANA BUS. DAILY (July 3, 2023), <https://mjbizdaily.com/investor-for-200-million-new-york-cannabis-fund-finally-found/> [https://perma.cc/R2Z8-8X54] (“Meanwhile, as many as 1,400 illegal cannabis sellers, ranging from bodegas to smoke-shops to weed trucks and audacious illegal dispensaries, operate in New York City alone.”).

36 Lewis, *supra* note 27.

37 *Id.*

38 *See id.* (“[T]he legal cannabis market is never, in fact, the entire cannabis market. Today, even in the state with the strongest legal industry, Colorado, an estimated 30 percent of weed is still grown and sold illicitly, which means licenses businesses are competing not only with one another, but also with people who don’t pay taxes or install wheelchair-accessible entrances—and don’t have to pass those extra costs on to consumers.”).

39 MINORITY CANNABIS BUS. ASS’N, MBCA NATIONAL CANNABIS EQUITY REPORT 3 (2022).

40 *See* Part I.C, *infra*.

41 *See* CASSACHIA ET AL., *supra* note 9, at 25 (“In this year’s diversity survey, cannabis business owners and professionals overwhelmingly said access to capital remains their biggest challenge.”).

However, the unusual balance of state and federal authority in the current system of “cannabis federalism” severely constrains states’ ability to address the problem.<sup>42</sup> At the federal level, the Controlled Substances Act (“CSA”) still classifies marijuana as a Schedule I drug—the same class that contains heroin, LSD, and other substances with “no currently accepted medical use and a high potential for abuse.”<sup>43</sup> Nevertheless, state-level cannabis legalization has proceeded under the protection of the constitutional “anticommandeering” doctrine, which shields states from an obligation to enforce federal laws like the CSA,<sup>44</sup> and under the safe harbor of executive guidance beginning in the Obama administration that instructs federal prosecutors to refrain from enforcing the CSA’s marijuana provisions when individuals act in compliance with state laws.<sup>45</sup>

Although “many are willing to declare that, at least for practical purposes, the marijuana federalism battle has been won by the states,”<sup>46</sup> legalization has still taken place “under

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42 See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 599 (2015) (“Whether for medical or recreational use, state legalization of marijuana conflicts with the federal ban. This tension has been called ‘one of the most important federalism disputes in a generation.’”); see also DAVID POZEN, *THE CONSTITUTION AND THE WAR ON DRUGS* 49 (2023) (describing the “current constitutional equilibrium” as “precarious” and noting that “[t]he more states do to support their marijuana companies and consumers, the more their policies will not just deviate from but will actively subvert the federal prohibition”).

43 21 U.S.C. § 812. This classification has been an ongoing subject of debate, and in May 2024, the Biden administration’s Department of Justice published a notice of proposed rulemaking (NPRM) to reclassify marijuana under the Controlled Substances Act from Schedule I to Schedule III. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (May 21, 2024). That reclassification is further supported by U.S. Food and Drug Administration findings that marijuana meets three criteria for Schedule III: lower potential for abuse, currently accepted medical use, and a risk of only low or moderate physical dependence on people who use it. See Katherine Dillinger, *Marijuana Meets Criteria for Reclassification as a Lower-Risk Drug*, *FDA Scientific Review Finds*, CNN HEALTH (Jan. 12, 2024), <https://www.cnn.com/2024/01/12/health/marijuana-rescheduling-fda-review/index.html> [https://perma.cc/4JE3-K7TP].

44 See POZEN, *supra* note 42, at 49 (explaining that in two foundational cases, *New York v. United States* and *Printz v. United States*, the Supreme Court established that “Congress may not compel states to adopt particular laws or administer federal laws”; in doing so, it inadvertently “created some breathing room for drug reformers” because “th[e] doctrine seemed to imply that Congress couldn’t force [states with legalized marijuana] to recriminalize pot or to devote resources to enforce the federal prohibition”).

45 See Nicole Huberfield, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 903 (2021) (“During the Obama Administration, the Cole and Ogden Memoranda instructed U.S. Attorneys to refrain from prosecuting individuals in compliance with state laws that legalize and regulate cannabis, creating a sort of safe harbor.”); see also Lewis, *supra* note 27 (describing the compromise struck between the federal government and states with legalized cannabis, such that “[i]f the states created ‘strong and effective regulatory and enforcement systems’ and did their best to keep out ‘criminal enterprises,’ the DEA would lay off”).

46 Andersen Hill, *supra* note 42, at 599.

an umbrella of federal illegality.”<sup>47</sup> The impact of that precarious dynamic is especially visible in banking, where the federal government has substantial indirect law-enforcement power.<sup>48</sup> Beyond the CSA, the Money Laundering Control Act,<sup>49</sup> the Bank Secrecy Act,<sup>50</sup> the USA PATRIOT Act,<sup>51</sup> and Federal Reserve regulations<sup>52</sup> pose significant threats to banks doing business with cannabis companies.<sup>53</sup> Despite some incremental progress toward facilitating “marijuana banking,” federal guidance and enforcement of both criminal and civil laws could change at any time, leaving financial institutions vulnerable to significant consequences for past practices.<sup>54</sup> As a result, cannabis entrepreneurs face considerable challenges from financial institutions’ extreme reluctance to provide services to businesses touching any part of the industry.<sup>55</sup>

Given that “[b]anks are the traditional backbone of small business financing” but are unwilling to lend to cannabis businesses, hopeful entrepreneurs are confronted with a pervasive lack of capital.<sup>56</sup> With the option of securing traditional loans off the table,

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47 Huberfield, *supra* note 45, at 903.

48 Andersen Hill, *supra* note 42, at 600–01 (“The banking drought extends beyond businesses that directly handle marijuana . . . . When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law.”).

49 18 U.S.C. §§ 1956–57.

50 31 U.S.C. §§ 5311–26.

51 Pub. L. No. 107-56, 115 Stat. 272 (2001).

52 See Andersen Hill, *supra* note 42, at 625–26 (citing Federal Reserve regulations requiring member banks to meet certain “safety and soundness” requirements by monitoring “[c]ompliance with applicable laws and regulations” and explaining that “[t]he Federal Reserve regularly examines state member banks” for “risk management practices and compliance with the Bank Secrecy Act”).

53 See Pace, *supra* note 5, at 1236 (“Federal laws impinging on marijuana businesses’ ability to access the financial system go far beyond the CSA. The Money Laundering Control Act, the Bank Secrecy Act, and the PATRIOT Act all make it more difficult for marijuana businesses to obtain banking services, as do the federal deposit and share insurance scheme and Federal Reserve regulations.”).

54 See Andersen Hill, *supra* note 42, at 631.

55 See *id.* at 600–01 (“When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law. Lack of banking services stands as a formidable barrier to growth of the state-legal marijuana industry. Without access to banking services, marijuana businesses must conduct transactions in cash and spend an inordinate amount of time and resources on cash management. . . . [L]ack of banking services equates to a lack of capital for the marijuana industry.”).

56 *Id.* at 601.

cannabis business owners are forced to resort to private sources of funding, either through their own wealth and personal networks or through securing private venture capital investments.<sup>57</sup> That in itself presents a massive equity problem and particularly leaves women of color with little hope for securing the funding necessary to start a cannabis business.<sup>58</sup>

Even states that have promised to allocate funding to social equity applicants have so far failed to meaningfully overcome this barrier. For example, a year after New York legalized adult-use cannabis in 2021, it ambitiously pledged a \$200 million public-private fund to support social equity licensees in securing real estate and opening up retail locations.<sup>59</sup> But it took an additional year for the state to find a private investor to cover the \$150 million portion of the fund not coming from tax revenue<sup>60</sup>—a critical gap for social equity businesses hoping to be the first movers in the state’s new adult-use market. Many have also raised concerns that the investment deal the state finally achieved with the private equity firm Chicago Atlantic Group is “lopsided” and “undermines [New York’s] commitment to social equity goals while guaranteeing substantial returns to its partner.”<sup>61</sup> In its two-and-

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57 See *id.* (“The state-legal marijuana industry must instead ‘rely on short-term loans from individuals, usually with higher interest rates.’”); Lewis, *supra* note 27 (“State-licensed businesses rely mostly on private capital”); Harris & Martin, *supra* note 8, at 11 (“‘The vast majority of U.S. marijuana companies are privately owned and self-funded by the founders.’ Friends and family can chip in to help, ‘but only a small percentage of cannabis companies . . . will manage to secure funding from private equity/venture capital firms or angel investors . . .’”).

58 See, e.g., Lewis, *supra* note 27 (“State-licensed businesses rely mostly on private capital, something Black people often don’t have access to; in the nearly 160 years after the Emancipation Proclamation, Black families have gone from collectively controlling 0.5 percent of the nation’s wealth to controlling less than 2 percent.”); CASSACHIA ET AL., *supra* note 9, at 25 (“Capital is a common challenge for many young cannabis businesses, no matter the race, ethnicity or gender of the owner. . . . The difference for non-white and female owners is access to funding. Most financial institutions continue to be run by white men, and their business networks often reflect those in positions of leadership. The top 100 venture-capital backers . . . disproportionately gave money to businesses started by white men.”); Harris & Martin, *supra* note 8, at 11 (“Lack of access to capital and systemic economic racism dramatically winnow out the wannabes from the weed field.”).

59 See N.Y. EQUITY PLAN, *supra* note 26, at 30 (“With little to no start-up capital, participating CAURD licensees receive a turn-key cannabis dispensary in an optimum retail location. The licensee pays back the Fund’s investment over time. This approach is intended to provide participating CAURD licensees with the best possible opportunity to succeed, overcome the unjust treatment of the past, and create generational wealth.”).

60 See Rosalind Adams, *How Private Equity Trumped Social Equity in State Cannabis Deal*, CITY (Apr. 24, 2024), <https://www.thecity.nyc/2024/04/24/cannabis-fund-social-equity-dispensary/> [https://perma.cc/QA59-7BF4].

61 *Id.*

a-half years of operation, the fund has financed only twenty-one of the 150 social equity dispensaries it initially set out to, while its managers have earned \$1.7 million.<sup>62</sup>

### C. Women's Ownership and Leadership in the Cannabis Industry: Trends and Intersecting Challenges

These institutional design flaws of social equity programs and across-the-board external challenges to entrepreneurship in the industry have affected all kinds of “disadvantaged” cannabis businesses.<sup>63</sup> It is clear that women-owned businesses are included in that category at least to some degree, as rates of majority ownership and executive leadership by women in cannabis lag significantly behind such rates in comparable business sectors in the United States.<sup>64</sup> In 2022, women made up 23% of executives in the cannabis industry, below the national average of 29%.<sup>65</sup> And the average rate of majority ownership by women in cannabis businesses is similar at 22%, though it varies widely from state to state, dropping as low as 11% in Massachusetts.<sup>66</sup> Importantly, and of concern for any policy initiatives targeted at long-term equity, these numbers do not appear to be growing over time. Instead, they have “remained stagnant or declined in the past five years.”<sup>67</sup>

It is true that small businesses in the United States in general have a gender equity problem.<sup>68</sup> But the national outlook outside of the cannabis sector appears to be trending

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62 See Rosalind Adams, *New York's Cannabis Fund Became a Disaster: Its Managers Earned \$1.7 Million Nonetheless*, CITY (Oct. 24, 2024), <https://www.thecity.nyc/2024/10/24/new-york-cannabis-fund-managers-payout-chris-webber-bill-thompson/> [<https://perma.cc/U58W-YRBP>].

63 See generally CASSACHIA ET AL., *supra* note 9 (describing ineffective state social equity programs designed for minority cannabis entrepreneurs and other impediments that entrepreneurs in the cannabis industry face, including difficulty finding real estate, bureaucratic red tape, competition with established cannabis companies, and limited access to capital).

64 *Id.* at 5.

65 *Id.*

66 *Id.*

67 *Id.* at 4.

68 See, e.g., MAJORITY STAFF OF S. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, 118TH CONG., WOMEN'S SMALL BUSINESS OWNERSHIP AND ENTREPRENEURSHIP REPORT 3 (2023), [https://www.sbc.senate.gov/public/\\_cache/files/b/9/b99ffab8-b62a-48e1-95ba-b14c5451880b/D779F6653743546214AD6E09EAED29F7.women-entrepreneurship-report.pdf](https://www.sbc.senate.gov/public/_cache/files/b/9/b99ffab8-b62a-48e1-95ba-b14c5451880b/D779F6653743546214AD6E09EAED29F7.women-entrepreneurship-report.pdf) [<https://perma.cc/U5QH-PUUS>] (“Women, particularly those from minority communities continue to face persistent barriers to entrepreneurial success . . .”) [hereinafter SMALL BUSINESS REPORT]; see also Andrew W. Hait, *Number of Women-Owned Employer Firms Increased 0.6% from 2017 to*

much sharper upwards. The Senate Committee on Small Business and Entrepreneurship reported that 2023 was the third year in a row that women have created about half of all new businesses—a marked increase from the sub-30% before the pandemic.<sup>69</sup> The number of Black-women-owned businesses increased by an impressive 18% in the three years from 2017 to 2020.<sup>70</sup> Further illuminating progress, the growth rate of businesses majority owned, operated, and controlled by one or more women between 2014 and 2019 increased the most in the utilities, construction, and information industries—all historically male-dominated.<sup>71</sup> Women in other sectors also fare nearly 20% better than women in the cannabis industry with regard to executive leadership representation, having grown steadily in recent years to occupying around 31% of executive positions.<sup>72</sup>

The nascency of the entire adult-use cannabis industry would naturally lead to the opposite prediction: that women would be much more well represented in cannabis than in industries that have many decades—if not centuries—of male domination to overcome. But some of the entrepreneurship challenges unique to the cannabis industry may be especially hard-hitting for women. For instance, the need to rely on private and venture capital poses a formidable obstacle to women entrepreneurs.<sup>73</sup> The world of venture capital today is definitively a man's game on all sides: women-founded companies receive less than 3% of all venture capital investments, and women make up less than 15% of check-writers within venture capital firms.<sup>74</sup> This problem is amplified for women of color. Of that already small

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2018, U.S. CENSUS BUREAU (Mar. 29, 2021), <https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html> [<https://perma.cc/7GUX-2B5D>] (finding that “[a]verage annual earnings of employees of women-owned firms lag behind the national earnings average of the workers of all firms” and “[t]he lack of sex parity was also visible in average annual sales, shipments or revenue”).

69 SMALL BUSINESS REPORT, *supra* note 68, at 3.

70 *Id.*

71 Dana Kanze et al., *Evidence That Investors Penalize Female Founders for Lack of Industry Fit*, 6 SCI. ADVANCES 1, 1 (2020).

72 Chris Gilligan, *States With the Highest Percentage of Female Top Executives*, U.S. NEWS & WORLD REP. (Mar. 6, 2023), <https://www.usnews.com/news/best-states/articles/2023-03-06/states-with-the-highest-percentage-of-women-in-business-leadership-roles> [<https://perma.cc/FF95-7PJZ>].

73 See generally Isabelle Solal & Kaisa Snellman, *For Female Founders, Fundraising Only From Female VCs Comes at a Cost*, HARV. BUS. REV. (Feb. 1, 2023), <https://hbr.org/2023/02/for-female-founders-only-fundraising-from-female-vcs-comes-at-a-cost> [<https://perma.cc/RF9K-H92E>].

74 *Id.*

number of female venture capital partners, only about one-third of them are non-white<sup>75</sup> and businesses owned by Black women in 2022 received less than 1% of venture capital investments.<sup>76</sup> When one Atlanta-based venture capital firm tried to remedy this disparity by implementing a program that specifically invests in and awards grants to businesses run by Black women, it was struck down in the Eleventh Circuit for violating a Reconstruction-era law meant to protect against racial bias in private contracting.<sup>77</sup> And federal efforts to help small women-owned businesses access capital, like the Small Business Association's business development and loan programs,<sup>78</sup> are unavailable to women in the cannabis industry because of federal prohibition.<sup>79</sup>

Women also experience a more significant degree of stigma associated with their involvement in recreational cannabis than men do,<sup>80</sup> likely dampening their willingness to start or join cannabis business ventures. Although cultural perceptions of recreational cannabis use have undoubtedly come a long way in the decade since Colorado became the first state to legalize it in 2012, "sweeping claims of normalization are oversimplified because social and cultural tolerance towards cannabis varies on a number of factors"<sup>81</sup> and those claims "may be symptomatic of unchecked social privileges or social distance from cannabis users."<sup>82</sup> Cannabis use is widely conceptualized as a masculine activity and "[f]emale marijuana users are often stigmatized as their use is seen as a threat to the social and moral status quo."<sup>83</sup> One recent survey found that more than one in four American women use cannabis at least once a month, but the majority of those women keep their

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75 SMALL BUSINESS REPORT, *supra* note 68, at 7.

76 See Nate Raymond, *US Appeals Court Blocks Venture Capital Fund's Grant Program for Black Women*, REUTERS (Oct. 2, 2023), <https://www.reuters.com/legal/us-appeals-court-blocks-venture-capital-funds-grant-program-black-women-2023-09-30/> [<https://perma.cc/6RWS-DKFB>].

77 See *id.*; Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 23-13138, 2023 WL 6520763, at \*1 (11th Cir. Sept. 30, 2023).

78 See, e.g., SMALL BUSINESS REPORT, *supra* note 68.

79 See discussion *infra* Part I.B.

80 See Matt Reid, *A Qualitative Review of Cannabis Stigmas at the Twilight of Prohibition*, 2 J. CANNABIS RSCH. 1, 7 (2020).

81 *Id.* at 3.

82 *Id.* at 10.

83 Amir Mostaghim, *Why Everybody Can't Get Stoned: The Role of Gender and Ethnicity in Mediating the Differentiated Normalisation of Marijuana Use* 38 (2019) (Ph.D. dissertation, University of Guelph).



cannabis use a secret from people in their lives.<sup>84</sup> For women of color, intersecting stigmas between race and gender persist.<sup>85</sup> Women with children experience the added fear of being labeled negligent mothers if they use cannabis.<sup>86</sup> So, legalization may gradually promote normalization, but privileged groups like white men have disproportionately benefited from that normalization, while women and racial minorities continue to face double standards and social backlash for their participation—even when it is lawful.

Social perceptions of cannabis as a “man’s industry” and funding challenges for women entrepreneurs overlap. One recent study found that “[f]emale-led ventures catering to male-dominated industries receive significantly less funding at significantly lower valuations than female-led ventures catering to female-dominated industries” while the opposite is not true for male-led ventures, in what the authors call a “lack of fit” effect that works against female founders.<sup>87</sup> Moreover, and particularly problematic for women cannabis entrepreneurs, it is venture funding allocations that “are particularly vulnerable to this gender bias that underlies the lack of fit phenomenon.”<sup>88</sup> Again, because of the unavailability of bank loans in the industry,<sup>89</sup> venture funding is often a cannabis entrepreneur’s best hope of success.

In addition to industry-specific challenges that may be especially adverse to women, like raising private funds and overcoming social stigma, the cannabis gender disparity is presumably also due in some part to obstacles that have impeded women’s equitable participation in business and entrepreneurship for decades. Childcare challenges, for example, remain pervasive.<sup>90</sup> Childcare is unaffordable, defined by the Department of

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84 Javier Hasse, *37% of American Women Consume Cannabis, But Most Keep It a Secret from Parents, Children and Coworkers, Study Says*, FORBES (Mar. 8, 2023), <https://www.forbes.com/sites/javierhasse/2023/03/08/37-of-american-women-consume-cannabis-but-most-keep-it-a-secret-from-parents-children-and-coworkers-study-says/?sh=8746df32814a> [<https://perma.cc/P87W-A2LV>].

85 See Reid, *supra*, note 80, at 6–7 (offering the related point that “recurring moral panics related to drugs are often accompanied by ideologically constructing minority groups as responsible for drug-related social problems . . . [which] is why sociologist Crag Reinerman calls drugs ‘richly functional scapegoats’ for social fears rooted in racism, xenophobia, classism, ageism, and more”).

86 See *id.*

87 Kanze et al., *supra* note 71, at 1.

88 *Id.*

89 See generally Andersen Hill, *supra* note 42.

90 See generally ALLIE SCHNEIDER & HAILEY GIBBS, CTR. FOR AM. PROGRESS, DATA DASHBOARD: AN OVERVIEW OF CHILD CARE AND EARLY LEARNING IN THE UNITED STATES (2023), <https://www.americanprogress.org/article/>

Health and Human Services as exceeding 7% of family income, in thirty-six states and Washington, D.C.<sup>91</sup> In households headed by a divorced parent or parents of color, childcare costs on average more than one-quarter of household income and can be as high as 60%.<sup>92</sup> Recent survey and Census Bureau data show that women continue to “bear the brunt of child care responsibilities.”<sup>93</sup> Women who cannot afford childcare are unable to participate fully in the workforce,<sup>94</sup> much less start their own businesses—of any kind. Moreover, research has demonstrated that women are more risk-averse than men concerning financial decision making, and “[t]his perception echoes strongly in entrepreneurship, which has historically been considered the domain of bold, aggressive, risk-taking men.”<sup>95</sup> In a circular fashion, these stereotypes impact women’s perceptions of their own entrepreneurial abilities, and in turn lower their involvement in entrepreneurial activities.<sup>96</sup>

## II. Gender’s Place in the Cannabis Equity Conversation

The gender gap in cannabis business ownership and control should concern policymakers and the public as a fundamental issue of fairness and discrimination. But

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data-dashboard-an-overview-of-child-care-and-early-learning-in-the-united-states/ [https://perma.cc/6KRG-SHET].

91 See SMALL BUSINESS REPORT, *supra* note 68, at 8.

92 *Id.* at 7.

93 Julia Haines, *Gender Reveals: Data Shows Disparities in Child Care Roles*, U.S. NEWS & WORLD REP. (May 11, 2023), <https://www.usnews.com/news/health-news/articles/2023-05-11/gender-reveals-data-shows-disparities-in-child-care-roles> [https://perma.cc/X38Z-P5MZ].

94 See LEILA SCHOCHET, CTR. FOR AM. PROGRESS, THE CHILDCARE CRISIS IS KEEPING WOMEN OUT OF THE WORKFORCE (Mar. 28, 2019), <https://www.americanprogress.org/article/child-care-crisis-keeping-women-workforce> [https://perma.cc/9RXC-CQ57] (“Child care challenges have become a barrier to work, especially for mothers, who disproportionately take on unpaid caregiving responsibilities when their family cannot afford child care.”).

95 Patrick Reichert et al., *Gender and Entrepreneurial Propensity: Risk-Taking and Prosocial Preferences in Labour Market Entry Decisions*, 17 SOC. ENTER. J. 111, 112 (2021); see also Maria Bastida et al., *Female Entrepreneurship: Can Cooperatives Contribute to Overcoming the Gender Gap? A Spanish First Step to Equality*, 12 SUSTAINABILITY 1, 3 (2020) (“The entrepreneurship literature has suggested that women have a greater fear of failure than men, so they behave more conservatively when they undertake a business venture.”).

96 See Nan Langowitz & Maria Minniti, *The Entrepreneurial Propensity of Women*, 31 ENTREPRENEURSHIP THEORY & PRAC. 341, 341 (2007) (concluding that “women tend to perceive themselves and the entrepreneurial environment in a less favorable light than men across all countries in [the] sample and regardless of entrepreneurial motivation” and “perceptual variables may be significant universal factors influencing entrepreneurial behavior”).

that gap is also a troubling manifestation of the exploitative and exclusionary historical relationship between women and the “vice” industries that came before cannabis, as well as the broader societal and legal refusal to acknowledge women’s pursuit of pleasurable activities including responsible substance use. Part II argues that the cannabis industry presents the ideal opportunity to change course. It suggests that cannabis could be the first truly feminist vice industry because of its nascency, the existing attention to equity in the field, the nature of the substance, and the present cultural attitudes towards cannabis.

### A. An Opportunity for Women’s Economic and Cultural Empowerment

From a basic economic perspective, supporting women-owned cannabis businesses is a worthwhile pursuit in and of itself. Research suggests that women generally fare better in women-owned businesses with respect to hiring, retention, and promotion<sup>97</sup>—and businesses themselves do better too. One review of investment and revenue data found that startups founded and cofounded by women perform better over time, despite garnering less funding in investments.<sup>98</sup> In the cannabis industry specifically, women’s representation at the highest level is associated with higher retail sales.<sup>99</sup> This means that executive-level gender diversity in cannabis could generate greater tax revenue for those states that invest that revenue into communities disproportionately harmed by the War on Drugs. It is also well-documented that women make up a significant majority of both consumer purchasing and healthcare decisions nationwide,<sup>100</sup> and that women’s consumption of cannabis is on the rise,<sup>101</sup> so obtaining women’s business is central to the developing industry. Naturally, women business owners and executives know how to market to other women, and women

97 See Pat Roberson-Saunders et al., *Do Women Fare Better in Female-Owned Businesses?*, 19 J. DEV. ENTREPRENEURSHIP 1, 1 (2014) (“[A]t each step in the [human resource management] process, female business owners in this study fulfill expectations by hiring, promoting and retaining significantly more women than male business owner counterparts.”).

98 See Katie Abouzahr et al., *Why Women-Owned Startups Are a Better Bet*, BOS. CONSULTING GRP. (June 6, 2018), <https://www.bcg.com/publications/2018/why-women-owned-startups-are-better-bet> [https://perma.cc/99R7-LMXV] (reporting that startups founded and cofounded by women generated 10% more in cumulative revenue over a five-year period).

99 See Casey Camors et al., *The Cannabis Industry Within the USA: The Influence of Gender on Cannabis Policy and Sales*, 11 SUSTAINABILITY ACCT. MGMT. & POL’Y J. 1095, 1095 (2020).

100 See *id.* (“[W]omen make up about 85 per cent of all consumer purchasing decisions and 85 per cent of healthcare decisions.”).

101 See *Exploring Cannabis Consumer Trends & Demographics in 2021*, HEADSET (Jan. 31, 2022), <https://www.headset.io/industry-reports/exploring-cannabis-consumer-trends-demographics-in-2021> [https://perma.cc/R9QA-3CLJ] (“[S]ales to Female customers [are] rising slightly faster than sales to Male customers. When

are nearly twice as likely to consciously shop from women-owned businesses than are men.<sup>102</sup> On a macro-scale, female labor market participation in the United States lags behind levels seen in other developed countries, and catching up could give the American economy an estimated \$1 trillion boost over the next decade.<sup>103</sup> Most fundamentally, women's economic empowerment is central to women's rights and gender equality, and the rapidly growing cannabis industry is fertile ground for that empowerment.

From a social and cultural perspective, the elevation of women in the adult-use cannabis industry presents an opportunity to erode the harmful stereotypes and stigma surrounding women's cannabis consumption—and even substance use more broadly. As explained further below, the entire realm of “intoxicating leisure,” including cannabis consumption and the exercise of agency and control within vice industries, has historically excluded women.<sup>104</sup> Elevating outspoken and public-facing women in cannabis could therefore make a powerful social statement. Further, because social perceptions impact women's own affinity for risk-taking in particular industries, as well as funders' “industry fit” biases,<sup>105</sup> chipping away at the gender stereotypes surrounding cannabis use can in itself support the economic goal of uplifting female founders—if the cannabis industry is no longer seen as male-dominated, the “fit” of women entrepreneurs to receive the funding necessary to break into the industry will be less likely subject to negative bias.<sup>106</sup>

## B. Women and the War on Drugs

The intentional prioritization of women of color in the cannabis industry finds support in principles of restorative justice.<sup>107</sup> The War on Drugs has undeniably operated as a

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comparing Q1 2020 to Q4 2021, sales to Female customers increased by 55% while sales to Male customers increased by 49%.”) [hereinafter *Cannabis Trends*].

102 See Danielle Commisso, *How Brand Values and Women-Owned Businesses Influence Women's Consumer Choices*, CIVIC SCI. (Mar. 23, 2023), <https://civicscience.com/how-brand-values-and-women-owned-businesses-influence-womens-consumer-choices/> [https://perma.cc/G3SZ-7P4Q].

103 See SMALL BUSINESS REPORT, *supra* note 68, at 4.

104 See *infra* Part II.C.

105 See Kanze et al., *supra* note 71.

106 See *id.*

107 See generally Jasmin Mize, *Reefer Reparations*, 3 SOC. JUST. & EQUITY L.J. 1, 1 (2020); see also Magaly Ordoñez, *Are Cannabis Social Equity Programs Truly Equitable?*, UNIV. OF MINN.: THE GENDER POL'Y REP. (Feb. 13, 2024), <https://genderpolicyreport.umn.edu/are-cannabis-social-equity-programs-truly-equitable/>

project in racial subordination,<sup>108</sup> but its codification as a war on *men* minimizes the harm and suffering it has pervasively, but more often indirectly,<sup>109</sup> inflicted on women of color: “the roll call of female causalities of the war on drugs is both hidden and long.”<sup>110</sup>

Black and Latina women, in particular, experience highly gendered and sexualized policing in large part due to drug policies.<sup>111</sup> Black women are more likely than any other group to be subject to searches of their bodies and personal effects by Customs and Border Protection agents—nine times more likely than white women to be X-rayed after being patted down, and two-to-three times more likely to be strip-searched—despite being half as likely to be found with illicit substances.<sup>112</sup> Those statistics are just the tip of the iceberg. Invasive police searches ostensibly conducted to locate weapons or drugs are frequently “part of a pattern of sexual harassment and intimidation” of female suspects, and police violence often takes gendered forms like extortion for sexual favors under the threat of a drug arrest.<sup>113</sup> In many ways, the drug war has “serve[d] as the backdrop against which broken windows policing and the policing of prostitution, poverty, and motherhood are superimposed.”<sup>114</sup>

Beyond the mass incarceration of African American men, the drug war has also enabled the state to tear apart Black families by targeting Black mothers and pregnant women using

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[<https://perma.cc/NBP9-DHU4>] (“Cannabis social equity provisions can be seen as a form of racial reparations, by transferring wealth to those most ravaged by racial capitalism and over-policing.”).

108 See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Graham Boyd, *The Drug War Is the New Jim Crow*, ACLU (July 31, 2001), <https://www.aclu.org/documents/drug-war-new-jim-crow> [<https://perma.cc/5KTP-U8HE>].

109 The indirect consequences of the drug war on women should not obscure the direct harms of increased incarceration that fell on women as well as men: between 1986 and 1996, women experienced an 888% increase in incarceration for drug-related offenses. See Garrett Halydier, *We(ed) Hold These Truths to Be Self-Evident: All Things Cannabis Are Inequitable*, 19 U. MASS. L. REV. 39, 71 (2024).

110 Andrea Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color*, LONGREADS (Aug. 3, 2017), <https://longreads.com/2017/08/03/the-war-on-drugs-is-a-war-on-women-of-color/> [<https://perma.cc/BL6C-D9Q9>].

111 See *id.*

112 See *id.*

113 *Id.*

114 *Id.*

the child welfare system.<sup>115</sup> Black mothers have regularly lost custody of their children because they are disproportionately targeted for drug screening while pregnant and they face a higher likelihood of being reported to the child welfare system after delivery, even though “women of all races use substances during pregnancy at similar rates.”<sup>116</sup> Similarly, at one point, 70% of all pregnant women prosecuted for the crime of “fetal abuse,” largely under the pretense of drug use, were Black.<sup>117</sup> Before the 1980s, those kinds of prosecutions of women for drug use during pregnancy did not exist.<sup>118</sup> In essence, “[d]rug use was just one mechanism of punishing [Black women] for their pregnancies” as the “the War on Drugs turned a public health issue of drug use during pregnancy into a crime.”<sup>119</sup>

Women have also been systematically denied the support of public assistance programs, including housing, employment, and education, because of policies associated with the War on Drugs.<sup>120</sup> Many housing authorities, landlords, and managers participating in subsidized housing programs implemented policies to evict tenants or terminate housing benefits based solely on unsupported allegations regarding drug use on the premises,<sup>121</sup> and because women of color disproportionately depend on the government for public housing programs, they are particularly impacted by those policies and practices.<sup>122</sup> Housing policies that broadly excluded *any* family members with criminal records, as opposed to examining individual tenants’ records, similarly resulted in evictions and housing denials for the people who most needed those programs, including women with children.<sup>123</sup> Cannabis social equity

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115 See generally Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 SOC. POL. 258 (2020).

116 *Id.* at 263.

117 Bernida Reagan, *The War on Drugs: A War Against Women*, 6 BERKELEY WOMEN’S L.J. 203, 206 (1991).

118 See Dorothy E. Roberts & Colette Ngana, *Killing the Black Body: The Urgency of Reproductive Justice*, 10 INT’L J. ETHICAL LEADERSHIP 95, 98 (2022) (“[S]tarting from the late 1980s, early 1990s, that was when I began to notice the prosecutions of women for being pregnant and using drugs . . . They weren’t being punished for drug use. They were being punished for being pregnant and using drugs.”).

119 *Id.* at 98.

120 Lenora M. Lapidus, *The War on Drugs = A War on Women and Families*, ACLU (June 8, 2011), <https://www.aclu.org/news/smart-justice/war-drugs-war-women-and-families> [<https://perma.cc/2HQP-9FA9>].

121 See Reagan, *supra* note 117, at 207–08.

122 See Lapidus, *supra* note 120.

123 See *id.*

programs built around prioritizing candidates with marijuana-related convictions therefore may not capture the full story of drug war-related harms that have fallen on women.

### **C. Patriarchy, Historical Control of Vice, and the Disregard of Women's Pleasure**

Patriarchal control and the exploitation of women have historically been central to the success of other “vice” industries. While an exploration of the complex relationship between patriarchy and the sex work or pornography industries is beyond the scope of this Note, the historically male control of commercial industries like gambling, tobacco, and alcohol offers relevant background for the cannabis industry. Because women have long been on the periphery of, or exploited by, the sale of such commercial vices, it is crucial that they are given the opportunity to participate as business owners and operators with agency in the recreational cannabis market, which, as a nascent industry, is uniquely unburdened by those histories.

First, the gambling industry is undoubtedly “checkered with notions of male dominance and control in almost every aspect of its foundation, development, and operation.”<sup>124</sup> Women in Las Vegas casinos have long been placed in highly sexualized roles designed to attract male clientele, often with the implication of access to those women.<sup>125</sup> Courts have rejected discrimination challenges to casino dress code policies that require their female employees to wear short skirts and dresses, high heels, and specific hair and makeup styles, finding that those policies “further legitimate business interests and do not impose unequal burdens on men and women.”<sup>126</sup> Appearance-based hiring practices in casinos create a hierarchy among women employees according to race, gender identity, and age.<sup>127</sup> And these establishments exploit women’s labor by using “model” contracts rather traditional employee agreements, so they can be more selective and “dictate virtually every aspect of how the female employees look and dress.”<sup>128</sup> Though women in the industry have made

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124 Abigail K. Stanley, *The Feminizing of the Nevada Gaming Industry – Conditions and Consequences*, 11 UNLV GAMING L.J. 207, 230 (2020).

125 *See id.* at 218.

126 *Id.* at 214–15.

127 *See id.* at 216.

128 *Id.*



significant progress towards reform in recent years through developments like the #MeToo movement,<sup>129</sup> the gambling industry remains far from an equitable or a feminist one.<sup>130</sup>

On the other side of the same coin, the tobacco industry has a long history of using predatory marketing tactics to attract women customers at the expense of their health.<sup>131</sup> In the early twentieth century, tobacco companies contributed to and capitalized on the evolving perception of women's tobacco use from heavily stigmatized and associated with prostitution<sup>132</sup> to sociable and stylish. Lucky Strike's notorious 1925 campaign, "Reach for Lucky instead of a sweet," capitalized on the era's obsession with women's slimness as a symbol of fashion.<sup>133</sup> In 1929, Great American Tobacco hired women to smoke cigarettes as they marched in protest against women's inequality.<sup>134</sup> In the 1960s, Phillip Morris launched a woman-specific cigarette brand, Virginia Slims, co-opting the women's liberation movement with the slogan "you've come a long way, baby" to promote it.<sup>135</sup> Even today, the tobacco and vaping industries continue these long-standing exploitative tactics, leveraging social media to market smoking products as symbols of style and empowerment

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129 See *id.* at 226–28 (describing industry changes after #MeToo such as managers "cracking down on sexual harassment" and "[f]emale employees and activists . . . continu[ing] to actively seek protection in a variety of ways, including seeking the creation of and membership in unions").

130 See, e.g., *id.* at 208 (describing challenges to women in the gaming industry like "rampant discrimination, exploitation, sexual abuse and harassment, hostile working environments, and low job security" as ongoing); see also Toni Repetti & Shekinah L. Hoffman, *Glass Ceilings & Leaky Pipelines: Gender Disparity in the Casino Industry*, 22 UNLV GAMING RSCH. & REV. J. 38, 39 ("Despite a growing industry and a strong female customer base, this representation is not reflected in gaming leadership.").

131 See, e.g., Amanda Amos & Margaretha Haglund, *From Social Taboo to "Torch of Freedom": The Marketing of Cigarettes to Women*, 9 TOBACCO CONTROL 3, 3 (2000) (explaining the way that "the tobacco industry capitali[z]ed on changing social attitudes towards women by promoting smoking as a symbol of emancipation, a 'torch of freedom'").

132 See *id.* ("[I]n the 19th century women smokers were viewed as fallen women, with smoking the occupational symbol of prostitution . . . So widespread was the social stigma attached to women smoking that as late as 1908 a woman in New York was arrested for smoking a cigarette in public, and in 1921 a bill was proposed in the US Congress to ban women from smoking in the District of Columbia.").

133 *Id.* at 4.

134 See *id.*

135 CAMPAIGN FOR TOBACCO-FREE KIDS, A LIFETIME OF DAMAGE: HOW BIG TOBACCO'S PREDATORY MARKETING HARMS THE HEALTH OF WOMEN AND GIRLS (2021), [https://assets.tobaccofreekids.org/press\\_office/2021/womens-report.pdf](https://assets.tobaccofreekids.org/press_office/2021/womens-report.pdf) [<https://perma.cc/BKK4-5TPX>].

through female influencers.<sup>136</sup> In contrast to both gambling and tobacco, the emerging legal recreational cannabis market presents a unique opportunity for women to take control of their role in the industry, rather than be exploited by industry forces.

The history of women's relationship with the alcohol industry—and critically, its regulation—offers a different perspective, highlighting women's resilience in the face of challenging circumstances. In the late nineteenth and early twentieth centuries, the Women's Temperance Movement aimed to improve the lives of women enduring hardship from drunk, violent husbands and fathers by advocating for Prohibition.<sup>137</sup> To achieve their goals, the women of the Temperance Movement successfully linked the legal regulation of alcohol to the movement for women's liberation.<sup>138</sup> They ultimately used political advocacy for Prohibition as a tool for empowerment, as “[t]he Prohibition Amendment reduced the power of men in relation to women in the home by abolishing spaces of toxic masculinity like the saloon and by reducing the political power of the corporate liquor industry.”<sup>139</sup> The temperance movement is therefore recognized by some scholars “not [as] a call for repression but rather a demand for liberation.”<sup>140</sup> Conversely, women outside of the Temperance Movement during Prohibition found another kind of liberation in their newfound abilities to *participate* in drinking culture—many even becoming successful entrepreneurs by running their own speakeasies.<sup>141</sup> And notably, over a decade later, women played a key role in the repeal of Prohibition, after it had served as a “relatively successful

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136 See Gabriela F. Gil et al., *How Tobacco Advertising Woos Women*, THINK GLOB. HEALTH (May 30, 2021), <https://www.thinkglobalhealth.org/article/how-tobacco-advertising-woos-women> [https://perma.cc/GM23-NHAC].

137 See Tara Isabella Burton, *The Feminist History of Prohibition*, JSTOR DAILY (Jan. 6, 2016), <https://daily.jstor.org/feminist-history-prohibition/> [https://perma.cc/SA5T-XWCD] (describing the goals of the temperance movement as including “improving the lives of women whose drunken husbands were driven to abuse”); see also JULIE C. SUK, *AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT* 126 (2024) (“[T]he injuries that women sustained because of men’s excessive drinking habits . . . included harassment and violence on the streets, as well as domestic violence at the hands of drunken husbands.”).

138 See SUK, *supra* note 137, at 138.

139 *Id.* at 124.

140 Burton, *supra* note 137.

141 See Jennifer González, *Broads and Bootlegging: A Brief History of Women During the Prohibition Era*, LIBR. OF CONG.: IN CUSTODIA LEGIS (Sept. 18, 2024), <https://blogs.loc.gov/law/2024/09/broads-and-bootlegging-a-brief-history-of-women-during-the-prohibition-era/> [https://perma.cc/8L9Q-LZWQ].

resetting tool” from the perspective of women’s societal status.<sup>142</sup> Against a very different backdrop, women in cannabis can similarly harness the influence and power of a popular vice to shape the future of cannabis culture and policy.

More broadly, women who use illicit substances have always been regarded as a threat to the social order.<sup>143</sup> Even considering *licit* substance use, like alcohol (beyond the health risks of drinking during pregnancy), some media representations suggest that “‘good’ mothers would never be tempted by alcohol.”<sup>144</sup> On the other hand, recent popular culture trends like the “wine mom” persona have served as tools for some women and mothers to assert agency and a sense of liberated motherhood with regard to drinking.<sup>145</sup> However, these trends have also been commodified by businesses selling products that “announce a mother’s membership in a group that aligns with white, middle class values,”<sup>146</sup> and the lack of diversity in representation in these movements may reinforce social understandings of *which* mothers can and cannot consume alcohol responsibly.<sup>147</sup>

Moreover, American courts have rarely been receptive to arguments centered on pleasure for anyone.<sup>148</sup> Yet their treatment (or lack thereof) of women’s pleasure and their tendency to medicalize everything pertaining to women’s bodies stands out. For example, in its path to decriminalizing abortion and extramarital contraception, the Supreme Court focused on the potential medical harms of pregnancy without any mention of the individual

142 SUK, *supra* note 137, at 149. For the Woman’s Christian Temperance Union, “one goal of Prohibition was to reduce the excessive power of the liquor industry, because it induced toxic male behavior that imposed hardships or disempowered women. The movement for Prohibition—if not the actual legal regime of Prohibition—achieved that.” *Id.*

143 See, e.g., Fiona S. Martin, *Engaging with Motherhood and Parenthood: A Commentary on the Social Science Drugs Literature*, 68 INT’L J. DRUG POL’Y 147, 147 (2019) (“Being a mother comes with normative expectations that are widely considered incompatible with illicit drug use . . .”).

144 Kelly D. Harding et al., *#sendwine: An Analysis of Motherhood, Alcohol Use and #winemom Culture on Instagram*, 15 SUBSTANCE ABUSE: RSCH. & TREATMENT 1, 1–2 (2021).

145 See *id.* at 2 (“Alcohol consumption may also be used to establish and communicate the ability to maintain agency while fulfilling the performance of the mother role.”).

146 *Id.*

147 See *id.* at 4 (“Analysis of the images presented on Instagram revealed that who can be a ‘wine mom’ is tied to race, class, gender and sexuality.”).

148 See Susan Reid, *Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure*, 37 VT. L. REV. 47, 47 (2012) (“Despite the American emphasis on ‘Life, Liberty, and the Pursuit of Happiness,’ you will rarely see a court acknowledge that seeking pleasure can be an important part of pursuing happiness.”).

interest in having sex without conceiving and carrying a fetus to term.<sup>149</sup> Even more striking, courts considering the criminalization of “obscene devices”—namely, sex toys—as late as 1999 and 2000 “focused solely on the individual’s interest in using the devices for some kind of medically legitimate treatment, despite ample evidence that the specific devices at issue were intended for recreational use.”<sup>150</sup>

Cannabis use, of course, is distinct from extramarital sexual behavior, but it, too, was initially legalized with a medical justification.<sup>151</sup> Now, the existence of legal, recreational cannabis presents a symbolic opportunity for women to establish leadership in an industry that, for some, represents the pursuit of relaxation and the enjoyment of a recreational substance for no medical purpose at all. A more diverse representation of women in the industry—as opposed to the overwhelmingly white, middle-class #winemom<sup>152</sup>—can ensure that these symbolic social gains do not merely benefit the women who already enjoy the privilege of “acceptable” substance use.

#### **D. Adult-Use Cannabis as the First Feminist Vice Industry**

Apart from social and political gains women made through their activism around Prohibition, the history of American vice industries—and of pleasure-seeking activity more broadly—demonstrates that women have not had the luxury to control the forms of intoxicating leisure that men have long blissfully enjoyed. Women of color have been even further excluded.<sup>153</sup> Rather than being empowered participants, women have consistently been exploited by, or excluded from, that entire realm.

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149 See *id.* at 63 (noting that these key decisions (*Eisenstadt*, *Roe*, and *Carey*) “deal directly with non-procreative sexual behavior”).

150 *Id.* at 87 (citing *State v. Hughes*, 792 P.2d 1023, 1027 (Kan. 1990); *State v. Brennan*, 772 So.2d 64, 67 (La. 2000)) (explaining that “the courts also relied on the fact that vibrators were originally developed for medical purposes and on the existence of FDA regulations concerning ‘powered vaginal muscle stimulators’ and ‘genital vibrators’ for the treatment of sexual dysfunction”).

151 See *About Cannabis Policy*, ALCOHOL POL’Y INFO. SYS., <https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy> [<https://perma.cc/PDC6-Q5N2>] (“In 1978, New Mexico was the first State to recognize [cannabis] legitimate medical use. In 1996, California became the first State to legalize the use of medical marijuana.”).

152 See Harding et al., *supra* note 144, at 4 (“[A]lmost all of the women in the #winemom posts were white, young and cisgendered.”).

153 See *supra* Part II C.

On a more philosophical level, and somewhat counterintuitively, it seems anti-feminist that only men have been able to control the commercialization of “bad things” (or good, depending on one’s standpoint). Adult-use cannabis has the potential to be the first vice industry to counteract that inequity from its inception. The industry, still in its infancy, is nearly a blank slate in terms of gender balance, unlike more established male-dominated industries that have developed gender imbalances over time—for example, due to physical job demands in fields like construction or manufacturing,<sup>154</sup> or because of gender gaps in educational attainment in STEM fields.<sup>155</sup> Now is the opportune time to push the cannabis industry to fulfill its potential to support women. As discussed in Part I, there is already widespread attention to equity in the field; women’s ownership and leadership in other business sectors are making substantial gains, and cannabis is among the fastest-growing industries in the United States, with women themselves growing as a consumer base.<sup>156</sup>

Cannabis, unlike popular vices before it, may also be an especially suitable intoxicating product to level the gender playing field from a social standpoint. While the prohibition of a substance could be protective of women to the extent that it causes violence (as with alcohol), decades of evidence indicate that cannabis is a comparatively pacifying—or at the very least, non-threatening—force.<sup>157</sup> As early as the 1960s and early 1970s, a series of research studies conducted by expert committees in the United States and abroad found that cannabis is objectively more benign than alcohol;<sup>158</sup> even President Nixon’s National Commission on Marihuana and Drug Abuse concluded that “neither the marihuana user

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154 See ROSE KHATTAR, CTR. FOR AM. PROGRESS, EXPANDING WOMEN’S ACCESS TO MALE-DOMINATED JOBS (2024), <https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/expanding-womens-access-to-male-dominated-jobs/> [<https://perma.cc/JGU6-MRCZ>] (“Men are overrepresented in infrastructure-related jobs, such as those in the manufacturing and construction industries.”).

155 See *id.* (“Women constitute just 22 percent of engineering graduates, slightly higher than rates seen in the 1990s, suggesting that there has been slow progress over the past few decades to close gender gaps in STEM educational attainment.”).

156 See *Cannabis Trends*, *supra* note 101 (“[O]ver the previous two years, sales to both Female and Male customers have grown, with sales to Female customers rising slightly faster than sales to Male customers.”).

157 See, e.g., POZEN, *supra* note 42, at 51–52 (describing studies from the 1960s that largely “agreed that marijuana does not produce physical dependency, does not lead to lethal overdose, and poses little threat to most adults,” which “debunked the rationales for marijuana prohibition that the government had touted for decades” like claiming that the drug “induces violent conduct directly”).

158 *Id.* Of course, heavy cannabis use is not entirely risk free: “Although moderate cannabis use is usually unproblematic, daily and near-daily use can pose multiple health risks.” Kilmer et al., *supra* note 14, at 1008.

nor the drug itself can be said to constitute a danger to public safety.”<sup>159</sup> In the wake of these findings, the government’s rationale for prohibiting the drug pointed in the opposite direction of a fear of violence: “[T]he Nixon administration described marijuana as the source of stupefying lethargy and passivity, an ‘amotivational syndrome’ that threatened capitalist production.”<sup>160</sup>

Indeed, the intoxicating effects of cannabis may be ideally situated to erode harmful gender norms surrounding substance use precisely because of those “stupefying” tendencies. Traditional masculinity tends to celebrate substance use and the aggression, bravado, or competitiveness that often accompanies it.<sup>161</sup> However, male cannabis users—like all cannabis users—assume *less* aggressive mannerisms in social interactions after consuming the substance, thereby subverting those gender expectations.<sup>162</sup> Cannabis use may therefore “represent an alternative and gentler way of ‘doing masculinity.’”<sup>163</sup> In one study in Canada, adolescent boys described cannabis as a “happy drug” that facilitated their emotional openness and ability to talk honestly—a characterization that sharply contrasts with the well-known intoxicating effects of alcohol, which the same boys reported resulted in aggressive behavior and fights.<sup>164</sup> Conversely, female cannabis users can “resist dominant feminine ideals . . . by engaging in cannabis-use activities traditionally identified as more masculine.”<sup>165</sup> This cannabis-specific disruption of traditional gender associations with substance use benefits men and women alike and positions cannabis as a uniquely stereotype-defying drug.

### III. A Way Forward through Cannabis Cooperatives

As discussed in Part I, cannabis social equity programs vary considerably in their goals and approaches to both racial and gender equity but have generally been unsuccessful

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159 POZEN, *supra* note 42, at 51.

160 *Id.* at 52.

161 *See, e.g.*, Russell Lemle & Marc E. Mishkind, *Alcohol and Masculinity*, 6 J. SUBSTANCE ABUSE TREATMENT 213, 216 (1989) (explaining the status of alcohol as a long-time symbol of masculinity and connected to male aggression).

162 *See* Mostaghim, *supra* note 83, at 27.

163 Natalie Hemsing & Lorraine Greaves, *Gender Norms, Roles and Relations and Cannabis-Use Patterns: A Scoping Review*, 17 INT’L J. ENV’T RSCH. & PUB. HEALTH 947, 961 (2020).

164 *Id.*

165 *Id.*

in elevating women-owned businesses.<sup>166</sup> And as discussed in Part II, there are a variety of compelling justifications for elevating women in the cannabis industry as it grows, in hopes of creating the first vice industry with feminist values at its foundation. This Part first presents two of the biggest challenges to legislating with women-owned cannabis businesses in mind: constitutional limits on gender-based affirmative action and the growing threat of unchecked corporate takeover of small cannabis businesses, especially in the case of federal legalization. It then contemplates how a cooperative business model could contribute to gender equity in the industry and argues that policy initiatives providing incentives to create cooperative businesses and offering protections for those businesses are a promising and practical way forward for gender equity in cannabis and beyond.

### **A. The Limits of Traditional Solutions: Women-Centered Policymaking and Capitalist Business Organization**

#### **1. Constitutional Limits on Gender-Based Affirmative Action**

Existing cannabis social-equity programs are an obvious place to turn for more meaningful and effective inclusion of women-owned businesses in the industry. Some social-equity programs aim to include the women and families affected by the War on Drugs by granting priority license eligibility to businesses majority-owned or controlled by individuals who have a parent, child, sibling, or spouse with a past cannabis-related offense.<sup>167</sup> But in New York, for example, “qualif[ication] based on a conviction is weighted higher than one based on a family member,” which “brings up some tricky issues for women seeking licenses.”<sup>168</sup> Other qualifications for social equity programs are more general—

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166 See *supra* Part I.

167 See, e.g., *Social Equity Licensee Eligibility Criteria*, COLO. OFF. OF ECON. DEV. & INT’L TRADE, <https://oedit.colorado.gov/cannabis-business-office> [<https://perma.cc/89MS-J6EG>] (describing one means of eligibility for a social equity “accelerator” license in Colorado as being: “[a]pplicant or [a]pplicant’s parent, legal guardian, sibling, spouse, child, or minor in their guardianship was arrested for a marijuana offense, convicted of a marijuana offense, or was subject to civil asset forfeiture related to a marijuana investigation”) [hereinafter *Social Equity Criteria*].

168 Mona Zhang, *Why New York’s Cannabis Equity Program Is Stranding Women Entrepreneurs*, POLITICO (Mar. 12, 2023), <https://www.politico.com/news/2023/03/12/new-yorks-cannabis-equity-women-entrepreneurs-00085236> [<https://perma.cc/PZF9-5EB5>] (citing Damion Fagon, the chief equity officer of New York’s Office of Cannabis Management).



targeting residency in certain areas<sup>169</sup> or income levels below a certain threshold<sup>170</sup>—or more specific—targeting individual past convictions or arrests without including the family members of those affected.<sup>171</sup> And some programs combine these criteria to offer multiple paths towards social equity licensing.<sup>172</sup> Overall, though, most cannabis regulatory schemes do not explicitly offer women-owned businesses a path to prioritized social equity status simply by nature of their ownership without meeting some additional criteria.

Past evidence of success in local governments' efforts to preference women-owned businesses in their award of government contracts<sup>173</sup> suggests that more explicit and widespread inclusion of "women-owned businesses" as a criterion for priority licensing in cannabis could similarly work to achieve gender equity goals. But that kind of concrete gender preferencing and broad inclusion of *all* women-owned businesses may draw constitutional challenges,<sup>174</sup> and the Supreme Court's Equal Protection jurisprudence

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169 See, e.g., *Social Equity Criteria*, *supra* note 167 (describing a means of eligibility for a social equity license in Colorado: "resided for at least 15 years between 1980 and 2010 in a census tract designated by the Colorado Office of Economic Development and International Trade as an Opportunity Zone or designated as a 'Disproportionate Impacted Area'").

170 See, e.g., *id.* (describing a means of eligibility for a social equity license in Colorado: "household income in a year prior to application did not exceed 50% of the state median income as measured by the number of people who reside in the [a]pplicant's household").

171 See, e.g., *Equity Project State Briefing: Michigan*, MINORITY CANNABIS BUS. ASS'N, <https://minoritycannabis.org/equitymap/michigan/> [<https://perma.cc/UMZ5-N24L>] (listing "conviction of a marijuana-related offense" as one criterion to qualify for Michigan's social equity program, with no provision for applicants who have family members with convictions).

172 See, e.g., *Social Equity Criteria*, *supra* note 167 (stating that an applicant must meet one of three possible criteria).

173 See DEP'T OF JUST., THE COMPELLING INTEREST TO REMEDY THE EFFECTS OF DISCRIMINATION IN FEDERAL CONTRACTING: A SURVEY OF RECENT EVIDENCE 19 (2022), <https://www.justice.gov/crt/page/file/1463921/download> [<https://perma.cc/XK73-JMK6>] (explaining that local governments' use of preferential policies in favor of minority- and women-owned businesses successfully ameliorates the effects of public and private discrimination, and detailing one study on the L.A. County Metropolitan Transportation Authority that found that on contracts with goals encouraging the utilization of minority- and women-owned businesses, those businesses earned ninety-six cents on the dollar, as opposed to only fifty-three cents on the dollar without that explicit preferencing) [hereinafter DOJ, COMPELLING INTEREST].

174 Many scholars have begun to consider how the Supreme Court's overturning of affirmative action precedent will impact the racial components of social equity programs. At the very least, state social equity laws can avoid triggering equal protection challenges by "concentrat[ing] relief to those individuals who were actually arrested, convicted and/or incarcerated (and the immediate families they were separated from) in a completely race-neutral manner." Khurshid Khoja, Opinion, *How to Save Marijuana Social Equity Programs*

indicates that such preferencing in cannabis likely would not survive judicial review under the federal Constitution.

It is unclear which standard of review a court would apply to a gender-based affirmative action policy in a cannabis regulatory scheme.<sup>175</sup> Although it is a well-settled principle of constitutional law that Equal Protection challenges to statutory classifications made on the basis of gender generally warrant intermediate judicial scrutiny,<sup>176</sup> federal appeals courts have technically split over whether strict or intermediate scrutiny is the appropriate standard of review for gender-based affirmative action programs, particularly in the adjacent realm of employment, ever since the Supreme Court's 1989 ruling in *Richmond v. Croson*.<sup>177</sup> Though *Croson* concerned a racial classification, the Court's unequivocal statement of the need for strict scrutiny's exacting factual requirements in the affirmative action context "to determine whether the problem the state seeks to remedy actually exists"<sup>178</sup> led the Sixth Circuit to later interpret the case to require strict scrutiny review for even gender-based affirmative action programs.<sup>179</sup> And further entangling the line between the two standards of review, some courts applying intermediate scrutiny to gender-based affirmative action programs have essentially maintained that "the *Croson*-style factual predicate [i]s applicable

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from the Supreme Court's Affirmative Action Ruling, MARIJUANA MOMENT (June 30, 2023), <https://www.marijuanamoment.net/how-to-save-marijuana-social-equity-programs-from-the-supreme-courts-affirmative-action-ruling-op-ed/> [https://perma.cc/B4M7-Y6WB]. But limiting qualification for social equity status to applicants who can demonstrate specific past instances of cannabis-related justice involvement would fail to meaningfully achieve gender equity goals, as discussed in Part II.

175 See Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 J. GENDER SOC. POL'Y & L. 797, 799 (2013) (describing how "federal appeals courts have developed a tripartite split over the appropriate level of scrutiny for gender-based affirmative action programs" which includes strict scrutiny, intermediate scrutiny, and a version of intermediate scrutiny with a heightened factual predicate).

176 The Supreme Court settled on intermediate scrutiny as the appropriate standard of review for statutes that differentiate on the basis of sex in *Craig v. Boren*. "As stated by the Court, for a statute that differentiates on the basis of gender to be sustained, it 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.'" *Id.* at 803 (2013) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The Court further clarified in *United States v. Virginia* that intermediate scrutiny requires an "exceedingly persuasive justification" for applying a classification based on gender. 518 U.S. 515, 531 (1996).

177 *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); Quereshi, *supra* note 175, at 799.

178 Quereshi, *supra* note 175, at 812.

179 *Brunet v. City of Columbus*, 1 F.3d 390, 403 (6th Cir. 1993) (affirming the district court's holding that "[g]ender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause").

to the intermediate standard.”<sup>180</sup> Producing similar confusion, some courts have used a single strict scrutiny standard for affirmative action programs that contain both gender and racial components, without separating their analyses of those classifications.<sup>181</sup>

*United States v. Virginia* arguably clarified that intermediate scrutiny applies to all gender-based classifications, even those made through affirmative action policies.<sup>182</sup> And more recent examples of judicial review of policies preferencing women-owned businesses also lend support to that rule. For example, in *Vitolo v. Guzman*, the Sixth Circuit applied intermediate scrutiny to the Small Business Association’s Restaurant Revitalization Fund (“RRF”) targeted at COVID relief, which included a priority applicant period for restaurants that were majority-owned by women (among other “socially and economically disadvantaged” categories).<sup>183</sup> But despite these indications towards intermediate scrutiny, the Supreme Court technically has yet to resolve this ambiguity, as it has never reviewed a gender-based affirmative action law under the Equal Protection Clause.

Assuming a court would apply the more forgiving intermediate scrutiny standard, it would still require a statute making a sex-based classification to be “substantially related” to an “important governmental objective.”<sup>184</sup> Cannabis social equity programs granting all women-owned businesses eligibility for priority status will likely struggle to meet both prongs as that test has been applied thus far. Using the recent restaurant industry COVID-relief case discussed above, *Vitolo*, the Sixth Circuit struck down the RRF’s prioritization of women-owned businesses in part because “[t]he government’s statistics were insufficient to show actual evidence of discrimination, and the RRF prioritized *all* women-owned restaurants, not just those who were economically disadvantaged.”<sup>185</sup> Conversely, where courts have upheld those kinds of broad, benign sex-based classifications, they have

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180 Peter Lurie, Comment, *The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson*, 59 U. CHI. L. REV. 1563, 1577 (1992); see also Quereshi, *supra* note 175, at 815 (“[T]he Fourth, Eleventh, and D.C. Circuits, after *Croson*, have maintained the characterization of the scrutiny applied to gender-based affirmative action programs as ‘intermediate’; however, in application, each circuit has required a factual predicate equivalent to that required by the Supreme Court in *Croson*.”).

181 See Quereshi, *supra* note 175, at 814 (referring to *Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), and *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2022)).

182 See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ to advance full development of the talent and capacities of our Nation’s people.”) (internal citations omitted).

183 *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021); DOJ, COMPELLING INTEREST, *supra* note 173, at 14.

184 *Virginia*, 518 U.S. 515 (1996).

185 DOJ, COMPELLING INTEREST, *supra* note 173, at 15 (citing *Vitolo*, 999 F.3d at 365).

emphasized their findings of historical discrimination within the particular “economic sphere” or department that is the focus of the program.<sup>186</sup>

This reasoning is instructive for cannabis laws. Courts requiring “actual evidence of discrimination” in the same industry or field will be fundamentally unable to find *past* instances of gender discrimination in the nascent legal cannabis industry.<sup>187</sup> And offering broad societal and vice industry discrimination against women, or examples of current statistical disparities between men and women in the industry as justification, would fare no better; to prove an important governmental objective sufficient to withstand intermediate scrutiny, “general claims of societal discrimination are not enough”<sup>188</sup> and “the mere recitation of a benign, compensatory purpose is not an automatic shield” against that requirement.<sup>189</sup> The Tenth Circuit’s approach to intermediate scrutiny review offers a slightly more hopeful picture, as it upheld a Denver construction and professional design program preferencing women and racial minorities after only requiring the city to “introduce evidence which raised the *inference* of discriminatory exclusion in the local construction industry” and “link[] its spending to that discrimination.”<sup>190</sup> And the court held that such an inference “can arise from statistical disparities.”<sup>191</sup> Still, the multifaceted barriers that women seeking to break into the cannabis industry<sup>192</sup> face may not amount to *discrimination* in a court’s eyes.

Overall, courts would need to both apply “true” intermediate scrutiny and substantially loosen that standard’s requirements to suit a brand-new industry without historical discrimination if a cannabis law preferencing women-owned businesses were to withstand constitutional scrutiny. The current Supreme Court’s hostility towards race-based affirmative action<sup>193</sup> does not lend confidence to the likelihood of its adaptability in the

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186 See, e.g., *Danskine v. Mia. Dade Fire Dep’t*, 253 F.3d 1288, 1296 (11th Cir. 2001) (finding past discrimination against women to be “in the economic sphere at which the affirmative action program is directed”).

187 Kilmer et al., *supra* note 14, at 1012 (“[N]ormally preference programs must be specifically designed to redress past discrimination within that industry. Yet, no matter how severe the disparate impacts of cannabis *prohibition* were, they did not arise because of disparate treatment within the modern legal cannabis industry.”).

188 *Vitolo*, 999 F.3d at 364 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727–29 (1982)).

189 *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

190 Quereshi, *supra* note 175, at 817–18 (citing *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 970 (10th Cir. 2003)) (emphasis added).

191 *Concrete Works*, 321 F.3d at 971.

192 See *supra* Part I.

193 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding that achieving student-body diversity is not a “compelling interest” sufficient to withstand strict scrutiny review).

realm of gender. Although the most recent *Students for Fair Admissions* (“*SFFA*”) cases concerned race-based affirmative action programs in the college admissions context, the Court’s holding indicates the triumph of a formal equality approach to Equal Protection that will likely hamper diversity measures for other traditionally legally marginalized groups.<sup>194</sup>

## 2. Protecting Against Corporate Consolidation and the Growth of “Big Marijuana”

Aside from the constitutional limits on social equity laws, another threat to the survival of small cannabis businesses and states’ equity efforts in general looms large: corporatization. If—or perhaps, when<sup>195</sup>—the federal government entirely de-schedules cannabis from the CSA, it will force a dramatic shift from dozens of intrastate cannabis markets to one national market. A similar result could even occur with proposed federal legislation that would open access to traditional banking services for cannabis businesses, even without fully amending the CSA.<sup>196</sup> If Congress enables that shift to occur without adequately protecting existing state cannabis equity laws and preventing market consolidation through antitrust measures, it will inevitably “advantage the wealthiest, most privileged actors” and foster the survival-of-the-fittest pattern of big industry.<sup>197</sup> Companies that already have

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194 *Id.*; see also Jeannie Suk Gersen, *What Would Sandra Day O’Connor Have Thought About Affirmative Action for Men?*, NEW YORKER (Dec. 8, 2023), <https://www.newyorker.com/news/daily-comment/what-would-sandra-day-oconnor-have-thought-about-affirmative-action-for-men> [https://perma.cc/5C4F-2K2M] (explaining that, at least in the college admissions context, *SFFA* “made it more likely that a court would hold that a public-college- or university-admissions process which considers applicants’ gender as a factor violates Title IX and the Fourteenth Amendment”).

195 Most scholars believe that some federal action on cannabis is inevitable. See, e.g., Tamar Todd, *How to Federally Legalize Cannabis Without Violating the Constitution or Undermining Equity and Justice*, PARABOLA CTR., <https://www.parabolacenter.com/img/interstate.pdf> [https://perma.cc/T6NU-WTCD] (stating that “[i]nvariably, the federal prohibition on cannabis will end” and noting that “popular support for cannabis legalization has steadily increased over the past several decades, and is currently one of a small handful of bipartisan issues that majorities of Americans support, in every state, and across political lines”).

196 See, e.g., SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021) (prohibiting “a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business”).

197 TITLE, *supra* note 30, at 4; see also Philip Ewing, *Growing Up: Vertical Integration in the Cannabis Industry*, 38 DRUG ENF’T & POL’Y CTR, STUDENT PAPER SERIES 1 (2021) (“Despite the best efforts of U.S. Attorney General William Barr, who launched multiple antitrust investigations into cannabis industry deals in 2019, and the black swan event of the COVID-19 pandemic, mergers and acquisitions activity in the cannabis industry has not stopped in 2020 (though it is slower than in recent years), continuing to contribute to the growth of large cannabis companies.”).

expertise and supply chains for related products—for example, in tobacco, alcohol, and pharmaceuticals—could easily and rapidly grow their national market share in cannabis if given the opportunity through a lift on federal prohibition.<sup>198</sup> That threat is particularly concerning in the cannabis industry, as “[p]ublic health concerns take a back seat when the alcohol and tobacco industries seek to maximize profits by maximizing consumption” and “similar dynamics helped fuel the nation’s opioid epidemic when some pharmaceutical companies aggressively marketed certain products.”<sup>199</sup> Advocates urge the inclusion of policy components in federal cannabis legalization legislation that would proactively address the issue of corporate monopolization,<sup>200</sup> but Congress’s adherence to those proposals would require a significant departure from its usual loyalty to corporate lobbyists and the interests of big businesses.<sup>201</sup>

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198 See Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 529 (2015) (explaining that tobacco companies are the most likely to move into the cannabis industry if the “legal conflicts get worked out” because “they have the farmers, supply chains, and industry expertise to create a strongly branded product” and cannabis would also provide “a strong new revenue source to supplement the slowly declining cigarette market”); see also ANH-THU NGUYEN, DEMOCRACY AT WORK INST., ENSURING CANNABIS EQUITY THROUGH SHARED OWNERSHIP 4 (2021), <https://democracy.institute.coop/cannabis-equity-shared-ownership> [<https://perma.cc/47LN-3C4D>] (noting that many established tobacco, alcohol, and pharmaceutical corporations have already made substantial investments in marijuana companies).

199 TITLE, *supra* note 30, at 5; see also Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69 (2020) (analyzing the emerging cannabis industry in the historical context of the tobacco industry).

200 See Todd, *supra* note 195 (advocating for three specific policy components in federal cannabis legalization legislation: explicitly allowing existing state cannabis laws to operate as designed and without disruption (rather than preempting them); allowing bona-fide social equity businesses, small businesses, and worker-owned businesses to engage in interstate commerce; and limiting large corporations in the market through restrictions on size and ownership, anti-monopoly provisions, and limitations on tax deductions and credits).

201 See TITLE, *supra* note 30, at 3 (noting that large companies are already “expanding, consolidating, and lobbying for licensing rules to create or maintain oligopolies”); see also Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> [<https://perma.cc/YPV4-6ZUW>] (reporting that “[c]orporations now spend about \$2.6 billion a year on reported lobbying expenditures” and describing how “[t]he self-reinforcing quality of corporate lobbying has increasingly come to overwhelm every other potentially countervailing force”).



## B. The Case for the Cooperative Business Model in the Adult-Use Cannabis Industry

The disappointing results of states' social equity efforts thus far in achieving gender equity, the constitutional limits on expanding and solidifying those efforts, and the very real threat that large corporations will subsume newer small businesses collectively paint a bleak picture for the future of cannabis as a revolutionary, feminist vice industry. On a fundamental level, some legal scholars question the compatibility of corporate profit-maximization goals with principles of social equity or genuine commitment to social responsibility.<sup>202</sup> A more promising path forward, for a true community- and equity-focused cannabis industry, may lie in the promotion and protection of a different structure of business organization altogether: the cooperative.

### 1. The Cooperative Structure and its Contribution to Gender Equity

The idea of cooperation is not new—there is a rich history of cooperative efforts that dates back centuries. Cooperatives, or co-ops, range globally from small-scale mutual aid groups to multi-million-dollar businesses, but co-ops of all types and sizes are connected by a set of core, shared principles: open membership; democratic member control; member economic participation; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for community.<sup>203</sup> Structurally, co-ops are most simply understood as “companies owned by the people who use their services”<sup>204</sup> in which the members become the equivalent of shareholders, thereby “collectively retain[ing]

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202 See, e.g., Deborah Doane, *The Myth of CSR*, 3 STAN. SOC. INNOVATION REV. 23 (2005) (exploring the rise of the corporate social responsibility (“CSR”) movement “premised on the notion that companies can ‘do well’ and ‘do good’ at the same time”; finding, among other issues with that premise, that “ultimately, trade-offs must be made between the financial health of the company and ethical outcome, and when they are made, profit undoubtedly wins over principles”); Katharina Pistor, *Green Markets Won’t Save Us*, PROJECT SYNDICATE (Mar. 16, 2021), <https://www.project-syndicate.org/commentary/green-markets-esg-investments-risky-bet-on-climate-change-by-katharina-pistor-2021-03> [<https://perma.cc/FV5X-F8MR>] (arguing, in the context of climate change and the COVID-19 pandemic, that “governments in advanced economies have decided to double down on private property rights and markets” but that markets are unreliable guides for navigating such complex issues).

203 See *Cooperative Identity, Values & Principles*, INT’L COOP. ALL., <https://ica.coop/en/cooperatives/cooperative-identity> [<https://perma.cc/7X9A-PV6C>].

204 JESSICA GORDON NEMBARD, *COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE* 3 (2014).



the equity in the enterprise.”<sup>205</sup> And co-ops can take a variety of forms depending on the relationship between their member-owners and their purpose—the three major categories are producer, consumer, and worker co-ops.<sup>206</sup>

Though the cooperative structure is undoubtedly a departure from capitalist norms of business organization, “[c]ooperation works within existing governmental structures” and is not fundamentally at odds with the idea of individual freedom.<sup>207</sup> There is widespread, bipartisan support for cooperation in the United States.<sup>208</sup> President Reagan touted employee ownership as “a path that befits a free people,” and conservative media outlets like the *American Conservative* “speak favorably about cooperative businesses and how they can save communities.”<sup>209</sup> Furthermore, co-ops can already be found in the mainstream of American commerce: well-known companies like Land O’ Lakes, Sunkist, Ocean Spray, REI, and Ace Hardware all operate cooperatively.<sup>210</sup> Research has shown that co-ops in the United States are more likely to survive their first six to ten years than traditional small businesses.<sup>211</sup> The major differences between publicly traded (as well as private, equity-backed)<sup>212</sup> companies and cooperative enterprises ultimately “mean that the member decision makers have a greater stake in the outcomes and care about the long-term sustainability of the enterprise, the welfare of its members, and their environment, rather than the immediate or short-term value of the corporation.”<sup>213</sup> The deep and longstanding

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205 BERNARD HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 65 (2023).

206 See GORDON NEMBARD, *supra* note 204, at 3.

207 HARCOURT, *supra* note 205, at 12.

208 See *id.* at 15 (“Polling data show broad support for worker cooperatives across the political spectrum. A survey conducted by Data for Progress in 2021 found that nearly 79 percent of Democrats and 66 percent of Republicans support ‘transition where small businesses become worker cooperatives.’ There is as well broad bipartisan support for programs that assist states in establishing or expanding worker cooperatives.”).

209 *Id.* at 15–16.

210 *Id.* at 16.

211 See *id.*; see also GORDON NEMBARD, *supra* note 204, at 14 (citing research that has found “that worker cooperatives and employee-owned firms have survival rates that equal or surpass those of conventional firms”).

212 See HARCOURT, *supra* note 205, at 64 (“Today, with the rise of private equity and hedge funds, wealthy investors have found ingenious ways to mimic the publicly traded corporation without having to abide by all the regulations surrounding reporting, publicity, and public offerings. Functionally, though, they operate in the same way, insofar as investors can move their capital relatively easily and typically do not play a role in managing the enterprise, and the entities can raise capital from third parties.”).

213 *Id.* at 68.

history of the African American cooperative tradition in the United States exemplifies the potential of cooperative enterprises to empower and strengthen communities.<sup>214</sup>

Cooperative policies have achieved success in the realm of workplace gender equality,<sup>215</sup> and research has shown that women have a propensity to start or join co-ops to avoid many of the gendered challenges of traditional hierarchical businesses.<sup>216</sup> For example, in one study on all-women collectives in England and Wales, many women reported joining collectives for relief from discrimination they had faced in seeking jobs or working in traditional organizations—discrimination based on their age and family commitments, non-continuous and part-time employment profiles, or non-conformity to heterosexual femininity.<sup>217</sup> Those women also valued their ability to have autonomy and control over their work in organizations in which men did not dominate.<sup>218</sup> Other studies on worker cooperatives in Spain and in the United States have documented that women in cooperatives have higher salaries and greater job security than those in private companies,<sup>219</sup> and in Argentina, women in worker-recovered businesses<sup>220</sup> have increased access to leadership positions, more control over their time, and equal pay.<sup>221</sup> Those positive results may be due in part to women's ability to use their collective strength in co-ops to organize for better pay and working conditions.<sup>222</sup>

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214 For a comprehensive historical analysis on this topic, see GORDON NEMBARD, *supra* note 204, at 25 (“Many of the great African American thinkers, movers, and shakers were also leaders in the Black cooperative movement.”).

215 See Katherine Sobering, *Producing and Reducing Gender Inequality in a Worker-Recovered Cooperative*, 57 SOCIO. Q. 129, 129 (2016).

216 See Sarah Oerton, *Exploring Women Workers' Motives for Employment in Cooperative and Collective Organizations*, 3 J. GENDER STUD. 289 (1994).

217 See *id.* at 294.

218 See *id.* at 295.

219 See Sobering, *supra* note 213, at 132.

220 See *id.* at 133 (“Worker-recovered businesses are companies that were converted from privately owned businesses into worker-controlled enterprises during times of crisis.”).

221 See *id.* at 132.

222 See *Cooperatives and Women: Promoting Self-Empowerment*, OFF. BLOG OF THE INT’L YEAR OF COOPS. (Apr. 18, 2012), <https://uncoopsyear.wordpress.com/2012/04/18/cooperatives-and-women-promoting-self-empowerment/> [<https://perma.cc/6PZA-B596>] (describing women domestic workers in the United States who “have used cooperatives as a means of organizing themselves to ensure fair wages and reduce exploitation”).

There is also a positive association between co-ops and women's entrepreneurial activity.<sup>223</sup> As discussed in Part I, *supra*, entrepreneurship literature suggests that women are more risk-averse than men. But women may perceive cooperative business ventures as less risky than traditional ones, given that co-ops fundamentally operate by sharing startup costs and profits among their members.<sup>224</sup> Co-ops are by no means a perfect solution to gender gaps in entrepreneurship and workplace equality,<sup>225</sup> but generally, because they "pay special attention to collective needs and social problems, they are especially sensitive to issues related to gender equality and the adoption of socially responsible behaviour."<sup>226</sup> Their democratic structure gives women an equal voice in governance and an equal share of assets, untethered to the proportion of shares they hold or their ability to work their way up a gendered leadership ladder.<sup>227</sup> As a normative matter, the egalitarian relationships fostered by cooperative business structures fit much more closely with feminist values and the goal of rectifying past exploitation in other vice industries than traditional hierarchical structures.

## 2. A Vision for Cannabis Cooperatives

Cooperative business organization could lend itself particularly well to the realization of cannabis equity goals. First, co-ops offer a promising defense against the threats of corporate consolidation and corporate abuse of social equity licensing schemes,<sup>228</sup> as they "are naturally resistant to consolidation or to being sold to the highest bidder after getting a license."<sup>229</sup> Critically, co-ops are not beholden to corporate legal principles of shareholder

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223 See Bastida et. al, *supra* note 95, at 12 (highlighting that the study's findings "emphasize the need for responsive policies and [programs] that promote the cooperative model since it promotes female employment and women's entrepreneurial activity even in periods of economic austerity.").

224 See *id.* at 3.

225 Sobering, *supra* note 215, at 132 ("Research on gender in collectivist organizations suggests that women are better off than they are working in traditional firms, but are still underrepresented, have lower status, and participate less in decision making in comparison to men.").

226 Bastida et. al, *supra* note 95, at 4.

227 GORDON NEMBARD, *supra* note 204, at 170.

228 See Orenstein, *supra* note 197, at 4 (exploring how large corporate entities have exploited social equity programs by, for example, "manipulating partnerships with equity-eligible persons to improve positioning for competitive licensure").

229 Kyle Sosebee, *What is a Cannabis Co-op?*, THE EMERALD MEDIA GRP. (Aug. 14, 2020), <https://theemeraldmagazine.com/what-is-a-cannabis-co-op/> [https://perma.cc/Q2L2-ZBNG]; GORDON NEMBARD,

profit maximization but instead function on a model that prioritizes the well-being and livelihoods of their members.<sup>230</sup>

Co-ops also achieve some of the community-investment, restorative-justice goals of social equity laws through the very nature of their structure and operation. They stabilize their communities by creating jobs with increased benefits and wages,<sup>231</sup> stimulating local economic activity, and encouraging civic participation.<sup>232</sup> Because the profits from cooperative enterprises flow directly to their members, those funds remain in the local economy,<sup>233</sup> allowing capital to accumulate locally. Co-ops offer a much-needed economic alternative for people of color, low-income communities, and undocumented immigrants who may face discrimination or exploitation in the traditional business sector.<sup>234</sup> Beyond just providing otherwise inaccessible employment opportunities, co-ops can empower marginalized individuals by giving them ownership over their labor and resources and power to direct how they are used.<sup>235</sup> Of course, cooperation does not erase the funding challenges inherent in starting a new cannabis business; similar to traditional business owners, cooperative organizers continue to cite funding as a key barrier to breaking into the industry.<sup>236</sup> But through their resource-pooling structure—“aggregat[ing] the market power of people who on their own could achieve little or nothing”<sup>237</sup>—they offer a significantly more feasible means of entrepreneurship for groups of people without access to extensive, private sources of capital. This benefit is particularly significant for women entrepreneurs

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*supra* note 202, at 12–13 (“Cooperatives address issues such as community control in the face of transnational corporate consolidation and expansion”).

230 See HARCOURT, *supra* note 205, at 10 (“The logics of profit detach the shareholder from any real investment in the lives of all those who are associated with the enterprise.”).

231 Employee-owners have 33% higher median income from wages and 53% higher job tenure than average employees. *Ensuring Equity through Shared Ownership*, *supra* note 198, at 8.

232 GORDON NEMBHARD, *supra* note 204, at 14.

233 NGUYEN, *supra* note 198, at 8.

234 Alexander Lekhtman, *Bringing the Worker Co-Op Revolution to Legal Weed*, FILTER MAG. (Nov. 13, 2019), <https://filtermag.org/cannabis-worker-co-op/> [<https://perma.cc/GA6P-ST3C>].

235 *Id.*

236 *Id.*

237 GORDON NEMBHARD, *supra* note 204, at 13.

of color, since, as discussed in Part I.C., *supra*, the world of private funding remains deeply discriminatory in favor of white men.

Some cooperative organizers and advocates have already contemplated broader adoption of the cooperative business model in the cannabis industry.<sup>238</sup> Massachusetts, for example, includes a licensing category for “Craft Marijuana Cooperatives” in its cannabis regulatory scheme, which is intended to allow local farmers to cultivate cannabis on their own farms and split costs for things like production, packaging, and marketing.<sup>239</sup> New York and California’s cannabis programs both include space for cooperative licensing.<sup>240</sup> But progress, as with other social equity businesses, has been slow, and the few existing co-ops are already increasingly struggling to compete with bigger consolidated operations.<sup>241</sup> Overall, co-op cannabis businesses that are licensed and operational are few and far between.<sup>242</sup> Although they offer great potential in securing steadier, more quality-controlled supplies of cannabis, more consistent marketing at larger scales, and lower operation costs, cannabis cooperatives have struggled to compete with larger corporate operations that are “stacking” small-grow licenses and offering lower prices to consumers.<sup>243</sup>

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238 See, e.g., *Making Cannabis Cooperative: Community Ownership and Racial Justice in the Cannabis Industry*, U.S. FED’N OF WORKER COOPS. (Oct. 25, 2024) (YouTube), <https://www.usworker.coop/blog/making-cannabis-cooperative-community-ownership-and-racial-justice-in-the-cannabis-industry/> [https://perma.cc/AMA9-YDY5] (discussing “cooperative-building projects to create community-based and economically-just cannabis markets at local and statewide levels”).

239 See Shira Schoenberg, *Craft Marijuana Cooperatives, Made Up of Local Farmers, Struggle to Start Up*, MASSLIVE (Aug. 12, 2019), <https://www.masslive.com/news/2019/08/craft-marijuana-cooperatives-made-up-of-local-farmers-struggle-to-start-up.html> [https://perma.cc/8T3J-2URB].

240 See Sosebee, *supra* note 229; Adult-Use Cooperative License, N.Y. CANNABIS LAW § 70 (2021).

241 See Lekhtman, *supra* note 234.

242 See, e.g., Zach Huffman, *Mass Cannabis Regulators May Reconsider Craft Cooperative Licenses*, TALKING JOINTS MEMO (July 18, 2023), <https://talkingjointsmemo.com/mass-cannabis-regulators-may-reconsider-craft-cooperative-licenses/> [https://perma.cc/7PBB-M8WW] (noting that no craft cooperative cannabis businesses in Massachusetts have received final approval or commenced operation despite the issue of four provisional licenses).

243 See Bart Schaneman, *Smaller California Marijuana Farmers Form Co-Ops to Save on Costs, Compete with Large Growers*, MARIJUANA BUS. DAILY (Dec. 17, 2021), <https://mjbizdaily.com/smaller-california-marijuana-farmers-form-co-ops-save-costs-compete-large-growers/> [https://perma.cc/GA46-K3WR].

Importantly, the existence and success of co-ops in other related sectors—and the legal structure to support them<sup>244</sup>—suggests that they could feasibly achieve greater prevalence in the cannabis industry if state cannabis regulations sufficiently prioritized them. Cannabis cultivation is essentially agriculture, and farming and food production co-ops have been around in the United States since the early nineteenth century.<sup>245</sup> On the retail side, cooperative retail enterprises are already some of the most common examples of consumer co-ops,<sup>246</sup> giving cooperative cannabis dispensaries plenty of business models to learn from. A growing trend of “cooperative conversions”—co-ops created by retiring business owners who sell their businesses to their employees rather than close the doors—especially in the farming and food production sectors, could also serve as a relevant model for worker-owned cannabis businesses.<sup>247</sup> In other words, the legal infrastructure and established business methods for cooperation in both food production and retail already exist;<sup>248</sup> strengthening that infrastructure and prioritizing the model’s more widespread adoption in cannabis is a matter of awareness, advocacy, and will.

### C. Ideas for Policymaking in Support of Cannabis Cooperatives

The most straightforward and immediately feasible policy options to support cannabis co-ops—and, by extension, women in cannabis—are those that work within existing state social equity programs. States can work to better tailor their cannabis licensing categories to suit the specific structural and regulatory needs of cooperative businesses, and they can create carveouts to policies meant to limit the market control of large corporations to allow co-ops to better compete. For example, bans on vertical integration—preventing

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244 See U.S. DEP’T OF AG. & RURAL DEV., UNDERSTANDING COOPERATIVES: LEGAL FOUNDATIONS OF A COOPERATIVE 1 (1995), <https://www.rd.usda.gov/sites/default/files/CIR45-9.pdf> [<https://perma.cc/UA6M-MPLJ>] (explaining in summary that “[c]ooperatives, like other private businesses, are organized according to a State statute” and some “cooperatives are organized under a Gender Not-for-Profit Corporation statute”) [hereinafter DOA, UNDERSTANDING COOPERATIVES].

245 See LYNN PITMAN, CTR. FOR COOPS., HISTORY OF COOPERATIVES IN THE UNITED STATES: AN OVERVIEW (2018), [https://resources.uwcc.wisc.edu/History\\_of\\_Cooperatives.pdf](https://resources.uwcc.wisc.edu/History_of_Cooperatives.pdf) [<https://perma.cc/W3D3-WPJG>] (“The first recorded dairy and cheese cooperatives were organized in 1810, and cooperatives for other agricultural commodities followed.”).

246 GORDON NEMBHARD, *supra* note 204, at 3.

247 NGUYEN, *supra* note 198, at 8–9.

248 See, e.g., DOA, UNDERSTANDING COOPERATIVES, *supra* note 244; *The Cooperative Model of Grocery Store Ownership*, ILL. INST. FOR RURAL AFFS. (Dec. 2014), <https://www.ruralgrocery.org/learn/rural-grocery-toolkit/step2-resources/The-Cooperative-Model-of-Grocery-Store-Ownership.pdf> [<https://perma.cc/AKW5-RFS2>]

cannabis businesses from operating at every stage of the supply chain—generally function as a check on the largest, most well-capitalized businesses.<sup>249</sup> But allowing an exception for co-ops would amplify their social and economic impact, as well as incentivize cooperation *among* co-ops to work together at different points in the cannabis supply chain.<sup>250</sup> For the reasons discussed in Part III.B.i., *supra*, these types of cooperative-friendly policies have the potential to increase women’s representation in the industry, especially for women of color, because co-ops may alleviate some of the challenges that disproportionately affect women and minority entrepreneurs, like the individual burden of startup costs and securing private capital, as well as hierarchical business structures that tend to push women away.

Successful cooperative-friendly policies outside of cannabis, and even outside the United States, could serve as instructive models for effectively integrating equity concerns in the development of states’ cannabis cooperative policies. Several European countries use tax exemptions to incentivize cooperative enterprises, and many have also created “social cooperatives” to integrate socially disadvantaged groups into the workforce.<sup>251</sup> Italy, for example, requires that 30% of workers in co-ops have physical or learning disabilities, have or have a history of treatment for mental illness or substance abuse, or have formerly been imprisoned.<sup>252</sup> Creating this kind of “social cooperative” category within cannabis licensing frameworks could be another opportunity for states to intentionally include women-centered businesses (in this case, cooperative ones), particularly those with members who have overlapping social equity characteristics like connections to cannabis-related convictions or residency in economically disadvantaged areas. Italy also implemented an asset forfeiture plan wherein it channeled property and funds seized from mafia-related criminal activity to social co-ops in disadvantaged communities, especially those that suffered the most from organized crime.<sup>253</sup> States could adapt such a model to

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249 See Ewing, *supra* note 197, at 11 (explaining that vertical integration is good—and possible—only for big businesses because of the “prohibitively expensive” cost of starting a cannabis business that “has to control every aspect of cultivation, post-production, and retail sale”).

250 See DOA, UNDERSTANDING COOPERATIVES, *supra* note 244, at 12 (recommending an exception to a vertical integration ban for “a second level distribution and/or multi-stakeholder cooperative made up of cooperative business members working elsewhere in the value chain (cultivation, processing, or retail”).

251 See *id.* at 9.

252 See *id.*

253 See *id.* at 10.



redirect forfeited assets from drug trafficking to cooperative cannabis entrepreneurs in the form of zero-interest loan funds and grants.<sup>254</sup>

The so-called “Cleveland Model” offers a way to unite private business resources with cooperative, social equity initiatives.<sup>255</sup> It earned its name from a partnership between the City of Cleveland, the Cleveland Clinic, the Cleveland Foundation, Case Western Reserve University, and University Hospital, which came together as “anchor institutions”<sup>256</sup> providing a guarantee to purchase products and services from local co-ops in the area.<sup>257</sup> In doing so, the anchor institutions help create employment and wealth in their local communities and provide solutions for some of the co-ops’ biggest challenges, like start-up financing and growth.<sup>258</sup> The nature of Cleveland’s anchors as city government and educational institutions also allows them to lend technical expertise to co-ops in local economics, service delivery, customer support, and business management.<sup>259</sup> Other cities and their own nonprofit institution mainstays could follow suit. While most large nonprofit businesses likely will not directly purchase cannabis products, they could still provide financial and technical support to cannabis co-ops in their communities. Some organizers focused on building cannabis co-ops in New York cited the need for this kind of increased community involvement—in the form of business incubators, free attorney services, and funding—to help co-ops remain resistant to selling their businesses to big corporations.<sup>260</sup> Taking inspiration from this model, existing women-run or women’s empowerment-focused nonprofits with the necessary resources could partner and collaborate specifically with women-led cannabis co-ops.

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254 *See id.*

255 *See* Democracy Collaborative, *The Cleveland Model: How the Evergreen Cooperatives Build Community Wealth*, YOUTUBE (Sept. 23, 2014), [https://www.youtube.com/watch?v=s\\_kLye\\_6VBc](https://www.youtube.com/watch?v=s_kLye_6VBc) [<https://perma.cc/PHZ6-TENY>].

256 These are all large, nonprofit entities that are “anchored” to the city, unlikely to move away, and serve as the city’s economic powerhouses. *See id.*

257 *See Worker-Owned Cooperatives—The Cleveland Model*, URB. SUSTAINABILITY DIRS. NETWORK, <https://sustainableconsumption.usdn.org/initiatives-list/worker-owned-cooperatives-the-cleveland-model> [<https://perma.cc/WX43-WHCE>].

258 *See id.*

259 *See id.*

260 *See* Lekhtman, *supra* note 234.

At a most basic level, policymakers and cannabis equity activists should work to advance the general visibility of co-ops, spread public knowledge about their benefits, and create policy support systems that encourage the development of worker-owned businesses of all kinds. City and state governments can offer tax deductions for investments in co-ops, fund local “incubators” that offer technical assistance for co-ops, and center cooperative policy as a key job creation and economic development tool, since its potential goes far deeper and wider than the cannabis industry in terms of both social and gender equity.<sup>261</sup> The same basic legal tools that lawyers regularly wield to turn assets into capital could just as easily be used for cooperation,<sup>262</sup> and a success story of cannabis co-ops could lay the groundwork for equity, support for women workers, and community-centered justice in businesses far beyond cannabis.

## CONCLUSION

As the cannabis industry rapidly grows and big businesses seek to take advantage of a market ripe for monopolization, it is more important than ever to not lose sight of social equity in cannabis regulatory schemes and support for diverse entrepreneurs. Race and restorative justice in response to the War on Drugs must be central to that vision of social equity, but gender, too, must be a key component of holistic cannabis equity efforts. Despite the industry’s nascency, women—and especially women of color—have so far fared worse in adult-use cannabis with respect to small business ownership and executive leadership than they do in other business sectors, and data indicates that they are losing rather than gaining control as the industry expands. That gap in representation is particularly troubling considering the historical exclusion of women from other vice industries, the continued impacts of the War on Drugs on women of color, and the potential for women’s leadership in cannabis to erode harmful social stereotypes surrounding women and substance use. Prioritizing a cooperative, worker-owned business model—which can secure women’s democratic participation, ease entrepreneurship-related gender imbalances, and offer more workplace flexibility with less hierarchy—comports with feminist values. A cooperative model also avoids the practical and constitutional challenges associated with gender-based affirmative action for traditional, private, women-owned businesses as part of states’ regulatory schemes. The vision for a truly equitable, feminist vice industry is a radical one,

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261 See Noah Franklin et al., *Worker Cooperatives in New York City: A Model for Addressing Income Inequality*, 16 REG’L LAB. REV. 10, 14–16 (2014).

262 See HARCOURT, *supra* note 205, at 72.(

and solutions based in cooperation, outside of the dominant corporate mainstream, may be the best vehicle to bring it into fruition.