HERB'N SPRAWL: ANALYZING CANNABIS ZONING SCHEMES THROUGH THE LENS OF MILL'S LIBERALISM

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ABSTRACT

As cannabis legalization and community support for legalization continue to grow in the United States, local and state governments face the issue of how to regulate the potential influx of cannabis-related businesses in their communities. Using John Stuart Mill's theory of liberalism as a framework, this Note scrutinizes state and municipal cannabis zoning schemes to determine how they fit into Mill's concept of democracy. This Note aims to incorporate Mill's philosophy of liberalism with modern zoning practices in order to create a land use system that reflects the American public's overwhelming support for heightened cannabis access.

INTRODUCTION

Cannabis has long been prohibited in the United States.[1] Recent changes in political support and liberalization of the public's view of cannabis have led to sweeping reforms granting citizens access to the drug at the state level. Currently, thirty-six states and four U.S. territories have adopted some form of cannabis legalization.[2] Of those, fifteen states and three territories have legalized cannabis for both medical use and adult recreational use.[3] These cannabis measures have largely been adopted through ballot initiatives, demonstrating citizens' direct support for legalization of cannabis.[4] Public opinion studies conducted by the Pew

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1. Zachary Nelson, *If It Looks Like A Duck: Equal Protection, Selective Prosecution, and Geographic Differences in the Federal Prosecution of Marijuana Crimes Under the Controlled Substances Act*, 23 LEWIS & CLARK L. REV. 1007, 1011 (2019) (citing United States v. Taylor, No. 1:14-CR–67, 2014 WL 12676320 (W.D. Mich. Sept. 8, 2014)) (stating that cannabis was legal in the US at state and federal levels until the early 20th century and was commonly prescribed by physicians for a wide range of ailments).

2. *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 11, 2021), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/8AMV-L4KE].

3. *Id.*

4. *Id.*

Research Center found that approximately ninety-one percent of Americans support some form of cannabis legalization.[5]

Despite overwhelming support for cannabis legalization across the country, less than one-third of Americans live in a state that has legalized the recreational adult use of cannabis.[6] At the federal level, cannabis remains illegal and is classified under the Controlled Substances Act as a Schedule I drug with no appropriate medical use and a high potential for addiction and abuse.[7]

This Note analyzes the effects of state and municipal regulation of cannabis in relation to public opinion and upholding the integrity of representative democracy. Using John Stuart Mill's theory of liberalism as a framework, the analysis scrutinizes various state schemes to determine how they fit into Mill's concept of democracy. The following examination will focus on cannabis regulations, particularly zoning and land use policies implemented at the state and municipal levels. These regulatory schemes effectively control who can cultivate, manufacture, sell, and consume cannabis and where and when they can do it.

This Note argues that many modern cannabis zoning and land use regulations violate the tenets of liberalism, particularly John Stuart Mill's concept of classical liberalism. Part I discusses the rise and evolution of zoning as a tool of governmental control in the United States. Part II explores the interaction between zoning and citizens' ability to cultivate, manufacture, sell, purchase, and consume cannabis. Part III briefly explains Mill's philosophy of liberalism and how modern zoning practices violate his ideal. Finally, Part IV incorporates Mill's ideology of liberalism into a proposal for a more equitable cannabis regulation scheme in the United States. Taken as a whole, this Note aims to incorporate Mill's philosophy of liberalism with modern zoning practices in order to

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5. Andrew Daniller, *Two-thirds of Americans Support Marijuana legalization*, Pew RES. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/ [https://perma.cc/NF55–6P2B] Of the 91%, 59% surveyed believe that cannabis should be legal for medical and recreational use, while 32% of respondents only supported the legalization for medical use. *Id.*

6. Chris Hudock, *States With Potential to Pass New Cannabis Legalization Measures in 2020*, NEW FRONTIER DATA (Jan. 12, 2020), https://newfrontierdata.com/marijuana-insights/states-with-potential-to-pass-new-cannabis-legalization-measures-in–2020/ [https://perma.cc/T429-FVJR]. *See also* Natalie Fertig & Mona Zhang, *1 in 3 Americans Now Lives in a State Where Recreational Marijuana is Legal*, POLITICO (Nov. 4, 2020), https://www.politico.com/news/2020/11/04/1-in–3-americans-lives-where-recreational-marijuana-legal–434004 [https://perma.cc/UK6V-RB9B].

7. *See* 21 U.S.C. § 812(b) (2018) (explaining that Schedule I drugs are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for the use of the drug even under medical supervision). *See also* 21 C.F.R. § 1308.11 (2020) (listing "marihuana" as a Schedule I substance).

create a land use system that reflects the American public's support for cannabis access.

I. THE RISE AND EVOLUTION OF ZONING IN THE UNITED STATES

Local government controls many facets of citizens' everyday lives, whether that is by designating the schools available to them, managing water and sewage systems, or providing emergency assistance for residents. Local governments also dictate how cities and towns are laid out. As New York's highest state court noted in a 2001 decision, "One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."[8] Zoning was originally intended to organize cities via land use regulation.[9] Over time, however, zoning has evolved into a tool for other types of community rules such as regulation of signage, elimination of vice, and, historically, racial and economic segregation.[10] Although we may not realize it, community options for housing, commerce, and day to day life are largely governed by zoning decisions.[11]

A. A Brief History of Zoning

The first formal zoning ordinance passed in the United States was the NYC Zoning Act of 1916.[12] While the proposed motives for zoning included maximizing efficient use of land and promoting the health and safety of the community, the true reasons underlying zoning were often

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8. DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001).

9. 83 AM. JUR. 2D *Zoning and Planning* § 2 (2021).

10. Martin R. Healy et al., *Zoning Power and Its Limitations*, *in* MASS. ZONING MANUAL (6th ed. 2017 & Supp. 2019).

11. *See* David Walters, *How Zoning Shapes Your Daily Life, Even if You Don't Know It*, UNC CHARLOTTE URBAN INST. (March 30, 2016), https://ui.uncc.edu/story/how-zoning-shapes-your-daily-life-even-if-you-don%E2%80%99t-know-it.

> To understand the degree to which conventional zoning dictates the rhythms, sequences—and financial costs—of our daily routines, consider: Tens, if not hundreds of thousands of people in and around Charlotte endure long daily work commutes in their cars. A large percentage also must fit many other activities into the day. Many readers will relate to the daily hassles of trying to do six or seven different things in the same 12- to 15-hour "working day": taking kids to school, going to work, going to the doctor, stopping off for shopping, picking up kids, going to soccer practice and then some evening activities (if we have the energy).
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> Each activity is probably in a different location, and each requires time and energy to drive from one location to the next. That geographical separation is due almost entirely to modern zoning. Zoning makes the city look the way it does—which is one way it controls your life.

Id.

12. DANIEL R. MANDELKER, LAND USE LAW § 1.01 (5th ed. 2003); JULIAN C. JUERGENSMEYER ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.3 (3d ed.), Westlaw (database updated Jan. 2021).

discriminatory in nature.[13] For example, zoning codes reinforced economic and social segregation by decreeing separate living areas for Black and white families.[14] As racial and economic tensions continued to rise in the early twentieth century, enthusiasm for zoning spread throughout the country in metropolitan areas.[15]

Only a year after the NYC Zoning Act of 1916, the Supreme Court of the United States ruled in *Buchanan v. Warley* that racially-motivated zoning with the aim of segregation and discrimination was an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment.[16] Despite the Court's ruling in *Buchanan*, municipal governments continued with segregationist zoning plans, often with little oversight or reviewability of their decisions.[17] The Advisory Committee on City Planning and Zoning (ACCPZ) was assembled in 1921 by then-acting Secretary of Commerce Herbert Hoover to create a model zoning ordinance that could be easily adopted across the country.[18] Published in 1924, the Standard State Zoning and Enforcement Act (SZEA) governed land already in use and imposed a zoning scheme that promoted regulatorily proscribed land use based on the "best" use of that land.[19] Under the SZEA, states granted municipalities the right to manage their

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13. Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (Manning Thomas et al. eds., 1997).

14. RICHARD ROTHSTEIN, THE COLOR OF LAW 44, 47–48 (2017); *see also* Shelley v. Kraemer, 334 U.S. 1 (1948); *see also* Buchanan v. Warley, 245 U.S. 60 (1917). Despite court rulings to the contrary, racial zoning practices continued into the late 1960s.

15. *See* William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 328 (2004).

16. Buchanan v. Warley, 245 U.S. 60, 82 (1917) (citing Booth v. Illinois, 184 U.S. 425, 429 (1902) and Otis v. Parker, 187 U.S. 606, 609 (1903)):

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand.

17. Silver, *supra* note 13 at 7:

> The decade following the *Buchanan* decision saw numerous efforts to fashion a legally defensible racial zoning system in Southern cities and in scattered areas outside the region. Atlanta, Indianapolis, Norfolk, Richmond, New Orleans, Winston-Salem, Dallas, Charleston, Dade County (Florida), and Birmingham, to name only the most prominent places, passed new racial zoning legislation after 1917. Many others discussed the topic seriously and looked to consultants to find a workable approach to planned apartheid.

18. Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3, (1996), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/LULZDFeb96.pdf [https://perma.cc/YTE8-TMEY].

19. Stephen L. Kling, Jr. et al., *Zoning as a Tool of Land Use Control*, 63 J. MO. B. 230, 230–31 (2008).

land via zoning, planning, and subdividing. Almost all states adopted SZEA-based zoning schemes.[20] The ACCPZ published the Standard City Planning and Enabling Act (SCPEA) in 1927 which was intended to complement zoning and serve as a comprehensive plan for zoning decisions.[21] Secretary Hoover's planning committee, as well as many other preeminent land use scholars of the time, subscribed to a "segregationist consensus," the belief that racial segregation was an essential part of successful land use schemes. [22] The planners' beliefs led to the creation of model zoning laws that did not directly reference race or racial motivations, in mock deference to the *Buchanan* decision, but nevertheless handily achieved their segregationist goals.[23]

The bedrock of today's zoning system is Euclidean zoning, which is a reference to the landmark 1926 Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*[24] The Court upheld zoning as a constitutional, valid exercise of a state's police power so long as there is a reasonable link between the zoning measure and a public policy objective.[25] Furthermore, the Court upheld a hierarchical zoning scheme which separates properties into discrete use categories, from residential to industrial, to be developed in separate, single use zones.[26] The *Euclid* decision vested city planners with the authority to decide what they considered a good or bad use of

20. *Id.* at 230 (citing AMERICAN PLANNING ASSOCIATION, GROWING SMART[SM] LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 7–277 (Stuart Meck ed., 2002)).

21. *Id.* at 231 (citing Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL'Y 295, 301–03 (2000)).

22. RICHARD ROTHSTEIN, THE COLOR OF LAW 51–53 (2017) Fredrick Law Olmsted, an influential member of the planning committee told the National Conference on City Planning in 1918 that "in any housing developments which are to succeed, . . . racial divisions . . . have to be taken into account." *Id.* at 51 (no omissions added). Similarly, Alfred Bettman, the director of the National Conference on City Planning, later appointed to the Land Use Planning Committee under President Franklin D. Roosevelt, proclaimed that planning (i.e., zoning) was necessary to "maintain the nation and the race." *Id.* at 51–52.

23. *Id.* at 52. Ernst Freund, a Columbia Law School professor and the country's leading administrative law scholar in the 1920's, promoted segregation via economic zoning claiming that since *Buchanan* made it impossible to find a legal means for segregation, zoning masquerading as an economic measure was the most reasonable means of accomplishing the same end. *Id.*

24. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See infra* note 26.

25. *Id.* at 394 The court justified the zoning ordinances excluding apartments by explaining that multifamily homes were "a mere parasite, constructed in order to take advantage of the open space and attractive surroundings . . . . [T]he coming of one apartment house is followed by others . . . thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities – until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed." *Id.*

26. *See* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263 (2006) ("After Euclid, single- use zoning (also known as 'Euclidean zoning' after the case which upheld that technique) became virtually universal.").

land, encouraging them to inject their own value judgments on the inhabitants of the communities they plan.[27] In *Euclid*, the Court endorsed the idea that multifamily homes, a form of housing typically sought by those who cannot afford single family housing, are a "parasit[ic]" use of land and therefore could be excluded from more desirable areas.[28] It follows, then, that other land uses, judged to be harmful to the sanctity of single-family homes, would be pushed into less desirable, low-income neighborhoods.

While Euclidean zoning was presented as promoting the best interests of a community, it rigidly restricted the liberty of citizens, particularly poor citizens, to live, work, and congregate where they desired.[29] If affordable multifamily housing is only available in the vicinity of heavy industry, low-income individuals have no choice but to reside there. Similarly, if city planners zone out an industry, such as liquor sales, from a high-income area of the city, it is inevitable that most of those businesses will be able to operate exclusively in low-income residential, commercial, or industrial areas. Many states still retain the Euclidian-like zoning models made popular by early twentieth century ideals.[30] Even in localities with updated zoning laws, the lasting impact of the early planners continues to perpetuate racial, social, and economic inequities.[31]

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27. Nicole Stelle Garnett*, Ordering (and Order In) the City,* 57 Stan. L. Rev. 1, 4 (2004) ("Our most significant form of land-use regulation, Euclidean zoning, also reflects a longstanding value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones."). *See also* Ross Netherton, Book Note, 17 CATH. U.L. REV. 131 (1967) (reviewing RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966)).

28. *Ambler Realty Co.*, 272 U.S. at 394.

29. Euclidean zoning heavily protected single-family homes from the "threat" posed by multifamily housing. As a result, Euclidean zoning created ghettos, in which a high concentration of renters, likely lower-income individuals who could not afford to purchase a single-family home, resided in an area separate and apart from single-family homes and their owners. The scheme's disdain for the multifamily dwelling was endorsed by Justice Sutherland. In 1975 the town of Laurel, New Jersey's municipal planners tried to zone all multifamily housing units and the lower-income renters who live there. S. Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (1975).

30. Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 431 (citing a 1999 study by the American Planning Association (APA) that almost half of US states had not updated their zoning regulations since their adoption of SCPEA in 1928 and only eleven states had made any substantial updates to their laws).

31. *See* ROTHSTEIN, *supra* note 22 at 177–78 (explaining that despite half a century of laws prohibiting racial housing discrimination "the public policies of yesterday still shape the racial landscape of today"); *see also* Silver, *supra* note 13 at 12.

B. Modern Trends in Zoning

1. New Urbanism and Form-Based Zoning

New Urbanism, a planning scheme that promotes the development of "mixed-use, compact neighborhoods," was created in the 1980s in an attempt to combat the "single-use, low-density sprawl[s]" spawned by Euclidean zoning.[32] Supporters of New Urbanist development argue that pedestrian-friendly neighborhoods with a mix of residences and commercial establishments are critical to healthy community life.[33]

The SmartCode, released by Duany Plater-Zyberk & Company in 2004, is a model code based on the tenents of New Urbanism as an alternative to the predominant single-use zoning scheme.[34] The SmartCode does not organize land by use but rather by "transect" or the development density classification of that zone.[35] There are six transects for land use ranging from the most dense, "urban core," to the least dense, "natural."[36] Form-based zoning governs land use within each transect.[37] As its name suggests, form-based zoning governs "the form that structures on the land can take, not the use to which the land is put."[38] So while a code may dictate the required set-back and height requirements, it does not speak to the uses of those buildings. Advantages of implementing form-based zoning include the code's flexibility for cities of different sizes and composition, and increased convenience and public health for residents by offering more walkability and additional opportunities for affordable housing.[39] Detractors accuse the SmartCode of creating the opportunity for unfair or biased decision-making when determining "discretionary form-

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32. Lewyn, *supra* note 26, at 259.
33. Garnett, *supra* note 27, at 32–33.
34. Quindal C. Evans, *The SmartCode Understanding a Modern Zoning Trend*, 51 No. 10 DRI FOR DEF. 22 (2009).
35. *Id.* at 23–24 ("Transect is simply a term used to describe different development density classifications for land use-in other words, a transect is a zone . . . . The SmartCode uses six transects. Starting with the most densely developed, the transects are (1) urban core, (2) urban center, (3) general urban, (4) suburban, (5) rural, and (6) natural.").
36. *Id.* at 23. (*citing* Andres Duany & Emily Talen, *Making the Good Easy: The SmartCode Alternative*, 29 FORDHAM URB. L.J. 1445, 1453–1454 (2002)).
37. *Id.* at 24 (*citing* Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 641 (2006)).
38. *Id.* (*citing* John M. Barry, *Form-Based Codes*, 41 CONN. L. REV. 305, 308 (2008)).
39. *Id.*; *see also* Sean Doyle, *Have We Zoned Great, Walkable Places Out of Existence?*, SMART GROWTH AM. (Nov. 8, 2018) https://smartgrowthamerica.org/have-we-zoned-great-walkable-places-out-of-existence/ [https://perma.cc/7ZJA-MHKG] ("A form-based code can be used to diversify building sizes and types in a neighborhood, introduce affordable housing incentives, and set development standards to reduce exclusionary requirements.").

based issues."[40] At its most extreme, critics claim that the SmartCode, as well as any form-based land regulations involved in land use planning, could result in "the creation of a legally sanctioned and required aesthetic."[41]

2. Rise of Order Policing

Around the same time New Urbanism emerged, an alternative land use development scheme was introduced to the United States in the March 1982 issue of *The Atlantic*: Kelling and Wilson's "broken-window theory."[42] The authors asserted that "uncorrected manifestations of disorder, even minor ones like broken windows, signal a breakdown in the social order that accelerates neighborhood decline."[43] In response to the broken-windows theory, municipal law enforcement and government authorities prioritized maintaining public order in the hopes of staving off neighborhood decline.44 In the case of property disorder, broken-windows policing took the form of zoning laws.[45] These zoning laws attempted to define and construct the proper ordering of urban land uses in order to curb disorder and eventual decline.[46]

Regulating disorder via zoning laws offered city planners vast discretion and enforcement flexibility without raising the same constitutional concerns surrounding police discretion in disorder enforcement.[47] Unsurprisingly, city officials, who were subject to scant judicial oversight, embraced zoning as a low-liability means to suppress disorder and reinforce social norms.[48] Municipalities also initiated land litigation, bringing claims against property owners or tenants for the tort of nuisance to restrict or eliminate land uses that officials deemed harmful or disorderly.[49] Advocates of the broken-windows theory argue that zoning codes that strictly separate land uses are essential to construct and maintain order and that creating ordered surroundings would change

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40. Evans, *supra* note 34, at 24 (citing Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVIR. L. 395, 416–17 (2008)).

41. *Id*.

42. George R. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/GJ7W–8QPG].

43. Garnett, *supra* note 27, at 2.

44. *Id.* at 2–5.

45. *Id.*

46. *Id.* at 5.

47. *Id.* at 3–4 (citing City of Chicago v. Morales, 527 U.S. 41, 48–49 (1999)).

48. *Id.* at 24.

49. *Id.* at 5.

citizens' behavior to match accordingly.[50] Research on the broken-windows theory is inconclusive at best and indicates that this style of policing is a poor use of scarce law enforcement resources with disproportionate consequences for minority populations.[51]

3. Sustained Growth in Granting of Zoning Variances

Zoning variances (hereinafter "variances") are exceptions to zoning ordinances that exempt a property from one or more restrictions in the zoning code.[52] The primary purpose of modern variances is "to benefit the community and the individual property owner by assuring that property capable of being put to commercial, industrial, or residential use will not lie idle."[53] Normally, variances are available only if the enforcement of the restriction in the ordinance would cause "unnecessary hardship"[54] and should only be granted in rare circumstances.[55] In practice, however, variances are easily obtainable from planning boards.[56]

Two types of variances are available to applicants: (1) a grant to use the land in a way that is restricted by the ordinance, also known as a use variance, or (2) a variance relating to dimensions of the property and the structure erected upon it, such as building height or square footage requirements.[57] The latter is known as an area variance.[58] The rate of

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50. *Id*. at 21–22.

51. *See* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 74 U. CHI. L. REV. 271, 272 (2006). ("A number of leading researchers in sociology, law, and police studies . . . have compiled datasets from different urban areas to explore the broken windows hypothesis, but the evidence remains, at best, mixed"); *see also id.* at 277; Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS (2016). https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/

52. JULIAN CONRAD JUERGENSMEYER, ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 5:14 (3d ed.), Westlaw, (database updated Jan. 2021) ("A variance is an administrative authorization to use property in a manner otherwise not allowed by the zoning ordinance. This authorization alleviates the inevitable hardship situations that arise when zoning boundaries drawn across a community do not fit well due to distinctive features of a parcel or area.").

53. *Zoning Variances*, 74 HARV. L. REV. 1396, 1396 (1961).

54. *Id.* (citing U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7 (rev. ed. 1926)).

55. JUERGENSMEYER, *supra* note 52 ("Stringent rules limit grants of variances. Courts frequently assert that variances are to be granted 'sparingly,' and they commonly describe the variance as a 'safety valve,' so that zoning, which would otherwise be unconstitutional as applied, can be made constitutional.").

56. *Id.* ("Despite the judicial admonition for sparing use of variances, conventional wisdom, backed by numerous studies, has it that in practice applicants too easily obtain variances from boards that are untrained and insufficiently independent. Most grants are not challenged but commentators suspect that if challenged, many variances granted would be found invalid.").

57. *Zoning Variances, supra* note 53, at 1396.

58. 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 13:9 (5th ed.), Westlaw (database updated Dec. 2020) ("A distinction is often made between variances from dimensional restrictions

variances granted continues to rise as outdated single use zoning policies continue to grow further out of touch with modern society's goals and desires for land use.[59] From 1925 to 1940, over half of all variances applied for in large metro areas were granted.[60] From 1945 to 1960, seventy percent or more of variances were approved.[61] More recently, between 1960 and 1990, variance approval rates were in the seventy to eighty percent range across a wide variety of land uses, including rural, urban, and industrial.[62]

The increasing allowance of zoning variances has obfuscated the underlying problem creating the need for so many variances in the first place: current zoning practices are inflexible and incompatible with citizens' needs. If the zoning schemes served citizens' needs, they would not find it necessary to apply for variances. Furthermore, the variance process is "peculiarly susceptible to being used as a means of dispensing special privileges to a select group of property owners."[63] Abuse of the variance scheme has taken the process beyond a method to allow for desirable zoning flexibility and created a mechanism that erodes the effectiveness of planning and responsible land use regulation.[64] By continuing to grant variances, planning boards undermine the effectiveness of their land use ordinances.[65]

Since the advent of municipal zoning in the United States, the country's default land use scheme has perpetuated social, racial, and economic injustices.[66] Meanwhile, those with economic and political power are

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(e.g., setbacks, height limits, lot size requirements, etc.) and variances from usage restrictions (e.g., zones limited to agricultural, residential, commercial uses, etc.). Dimensional or 'area variances' are subject to less onerous standards than use variances in many jurisdictions.)

59. David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295 (2004).

60. *Id.*

61. *Id.*

62. *Id.* at 295–96.

63. *Zoning Variances, supra* note 53, at 1406.

64. Owens, *supra* note 59, at 296–97.

65. *Zoning Variances, supra* note 53 at 1406; Owens, *supra* note 59 at 296–97.

66. *See* Silver, *supra* note 13. Zoning has strong racial roots in the U.S., as evidenced by early twentieth century cases such as *Buchanan v. Warley* and *Shelley v. Kraemer*, as well as racial zoning schemes enacted across the country during the same time period. Certain social objectives, such as segregation and discrimination were directly evident in early zoning regulations. Racial zoning was adopted throughout the U.S. in response to fears of "Black encroachment" and these early policies informed the foundational aims of land use regulations; s*ee also* Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 459–62 (explaining that, historically, zoning regulations have been hostile towards high-density housing, raised the price of land, and restricted the amount of land available for uses such as affordable housing); *see also* Alan C. Weinstein, Reflections on the Persistence of Racial Segregation in Housing, 45 CAP. U. L. REV. 59, 64–68 (2017) (positing that zoning practices such as requiring large minimum lot sizes and restricting multi-family housing prevents lower income individuals from living in certain areas).

likely to exert influence over zoning decisions or if all else fails, obtain a variance to manipulate the zoning system to their advantage.[67]

As medical and recreational cannabis legalization sweeps the country, states and their municipalities have pursued a wide array of zoning schemes to control cannabis-related activities—some less equitable than others.

II. ZONING AND CANNABIS

Zoning regulations are not all about aesthetics, form, or putting the land in question to its most economically efficient use. Many municipal zoning regulations aim to subdue the secondary effects of businesses that city administrators deem incompatible with community standards.[68] Prior to the push for legalization of cannabis in the United States, secondary effect zoning regulations targeted liquor stores and sex-oriented businesses including strip clubs and adult video and bookstores.[69] Many cannabis zoning measures closely mirror regulations imposed to restrict adult businesses. These measures include restricting cannabis businesses to industrial zoned areas, requiring minimum setbacks from schools and religious buildings, and requiring a minimum distance between cannabis-related businesses.[70] Several municipalities have gone as far as zoning cannabis businesses completely out of a community, either by not creating a permitted land use for cannabis businesses or by explicitly designating all cannabis related business uses as non-permitted land uses.[71]

Some municipalities have adopted an alternative scheme, relegating commercial cannabis to hyper-competitive "green zones," forcing cannabis businesses to operate alongside each other within a narrow geographic footprint. This leads to high market saturation, unsustainable

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67. Owens, *supra* note 59, at 298–99 ("[B]oards consistently applied a considerably less strict interpretation of the degree of hardship than required by the courts. In some instances boards . . . . engaged in providing lax application of community standards to favored interests on the basis of political, economic, or ideological bases.").

68. Ian Morrison, *Where to Put It? The Confusing Question of How to Deal with Marijuana Dispensaries*, 3 U. BALT. J. LAND & DEV. 79, 82 (2013) (using the example of adult entertainment businesses, which are often subject to zoning requirements such as minimum setbacks from schools and churches, relegation to industrial zones, and limitations of how many adult entertainment businesses are allowed within a given area).

69. Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 448 (2004).

70. Morrison, *supra* note 68, at 82.

71. Alexis Holmes, *Zoning, Race, and Marijuana: The Unintended Consequences of Proposition 64*, 23 LEWIS & CLARK L. REV. 939 (2019); Jessica A. Vogele, *Municipal Regulation and the Compassionate Care Act – Preemption or Local Control?*, 17 NY ZONING LAW L. & PRAC. REP. 3 (2016) (using the city of Massapequa, New York, as an example, which preemptively passed zoning to keep dispensaries out of the city).

levels of competition, skyrocketing land prices, and unmanageable overhead expenses.[72] If cannabis businesses become unsustainable due to overly restrictive zoning regulations, even citizens for whom cannabis is a medical necessity will have trouble obtaining it, despite the fact that cannabis is legal in the state. The following subsections highlight the diverse zoning schemes implemented by states and their municipalities to control cannabis businesses and provide a brief analysis of the impact of these regulations.

A. Robust Municipal Control and the Effects of Narrow Zoning Regulations on Cannabis Businesses and City Residents

1. The Creation of Green Corridors and the Disparate Impact on Denver's Predominantly Minority and Low-Income Communities

Colorado legalized the cultivation, manufacture, and sale of medical cannabis in 2000 via Amendment 20 to the state's Constitution.[73] In 2012, Colorado became one of the first states to legalize the cultivation, manufacture, and sale of cannabis for recreational use.[74] In both instances, the state included very little guidance on zoning. Instead, the state relied on municipalities to address the issue as they saw fit for their communities. The amendments left regulation to the municipal police power as delegated under the home rule concept.[75]

Denver has enacted strict zoning regulations surrounding cannabis businesses, including minimum setbacks from schools and other cannabis businesses as well as restrictions to nonresidential and nonmixed-use areas.[76] Approximately 3.1 percent of Denver property is available for cannabis cultivation, limited almost exclusively to industrial areas.[77] By limiting cannabis businesses to such a narrow area, Denver has created a green corridor, or small geographic area with a high concentration of cannabis commerce. Forcing cannabis businesses to operate within a

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72. Morrison, *supra* note 68, at 85.

73. COLO. CONST. art. XVIII, § 14.

74. Keith Coffman & Nicole Neroulias, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS, (Nov. 6, 2012, 6:53PM), https://www.reuters.com/article/us-usa-marijuana-legalization/colorado-washington-first-states-to-legalize-recreational-pot-idUSBRE8A602D20121107; *see* COLO. CONST. art. XVIII, § 16.

75. Colorado is a home rule state, which grants certain powers to municipalities to govern their own affairs. *See* COLO. CONST. art. XX, § 6.

76. DENVER, COLO., ZONING CODE art. 11 (2019).

77. Charlotte West, *Pot Warehouses in Denver are Booming – at the Detriment of Low-Income Neighborhoods*, PACIFIC STANDARD (April 26, 2018), https://psmag.com/economics/pot-warehouses-in-denver-are-booming-but-at-the-detriment-of-low-income-neighborhoods. [https://perma.cc/X24M-KXZG].

limited geographical area greatly restricts the supply and inflates the cost of properly zoned real estate for cannabis businesses.[78] The best-capitalized ventures that can sustain the high operating costs will eventually monopolize the market and gain the ability to raise prices in the face of ever-increasing demand for cannabis products.[79] If prices for legal cannabis are forced too high by monopolization, cannabis users may return to purchasing the drug on the black market. These transactions occur outside of the purview of state taxation and zoning controls.[80] As a result, governments that overregulate cannabis businesses to the point of creating unsustainably high prices may risk losing a valuable source of tax revenue.

An area made up of three north Denver communities—Globeville, Elyria-Swansey, and Northeast Park Hill—has the highest concentration of cannabis businesses in the city.[81] This area is primarily occupied by low-income minority residents where residentially zoned properties are directly adjacent to areas zoned for commercial and industrial land uses.[82] As one of the only areas in the city zoned for cannabis cultivation, commercial property values in these North Denver neighborhoods have skyrocketed along with the taxes on both commercial and residential properties.[83] Residents have seen no direct benefit from the cannabis businesses

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78. As Morrison detailed in his analysis of the interplay between Seattle's and Colorado's cannabis and zoning requirements and market forces:

> Given the demand for marijuana and the lack of space for dispensaries, prices for land within these areas will be at a premium as cultivators fight for the space to farm…. Building space will be at a premium for cultivators as the fight for the few areas of the city where they can legally operate. The situation is further complicated by the fact that both retailers and farmers are oftened zoned in the same areas… This only means one thing: that industrial property prices will go up as entrepreneurs in the marijuana business want a place to set up shop.

Morrison, *supra* note 68, at 84–85,

79. Sean Williams, *Ready or Not, Big Business is Taking Over the Marijuana Industry*, THE MOTLEY FOOL, (Feb. 25, 2017) https://www.fool.com/investing/2017/02/25/ready-or-not-big-business-is-taking-over-the-marij.aspx [https://perma.cc/3AZ6-NNAD]. While examining the effects of corporate involvement in the cannabis industry, Williams noted, "As with any industry, if big business can push the little guy out, they'll have considerably more liberties down the road to raise their prices back up and capture a juicier margin, along with a greater market share."

80. *Morrison, supra* note 68, at 86 (citing Susan Gardner, *Economic Impact of Marijuana Legalization Subject of Presentation,* REDWOOD TIMES, (Sept. 10, 2013 10:00PM), http://www.redwoodtimes.com/garbervillenews/ci_23852451/economic-impact-marijuana-legalization-subjectpresentation).

81. David Migoya & Ricardo Bacam, *Denver's Pot Businesses Mist in Low-Income Minority Neighborhoods*, DENVER POST (last updated Jan. 23, 2017, 11:18 AM), https://www.denverpost.com/2016/01/02/denvers-pot-businesses-mostly-in-low-income-minority-neighborhoods/ [https://perma.cc/B65D–8Q7V].

82. *Id.* Denver's zoning scheme highlights the discriminatory legacy of the value judgements about land use promoted by Euclidean zoning. The city's regulations place low-income residents next to industry keep the residents away from desirable areas and put "undesirable" cannabis businesses in the same neighborhoods so as to protect the sanctity of single-family homes. *Id.*

83. *Id.*

operating in their midst, yet they are paying much higher taxes to remain in their homes and neighborhoods with the same resources and services.[84] Denver's Globeville, Elyria-Swansey, and Northeast Park Hill neighborhoods illustrate the deleterious effects of creating a hyper-competitive cannabis bubble via zoning regulation.[85]

2. The Intent Behind California's Compassionate Use Act Trampled by Unchecked, Overly Zealous Municipal Regulations

California voters approved the Compassionate Use Act in 1996, legalizing medical cannabis to ensure that "seriously ill Californians have the right to obtain and use marijuana for medical purposes."[86] The law was subsequently updated by SB 420 in 2003 which specified how many plants and what quantity of dried cannabis a patient may possess without criminal penalties.[87] In 2016, voters passed a ballot measure legalizing the cultivation, manufacture, and sale of recreational cannabis.[88] Finally, in 2017, California legislators enacted the Medicinal and Adult-Use Cannabis Regulation and Safety Act (hereinafter "MAUCRSA").[89]

Much like Colorado's law, California's cannabis statutes provide little guidance for or oversight of municipal zoning practices. Under MAUCRSA, all cities and counties in California have the power to regulate the cultivation, manufacture, and sale of cannabis within their jurisdictions.[90]

Municipal governments across California adopted a variety of zoning strategies to address cannabis-related activity. For example, the City of Monterey's zoning code did not provide a commercial use classification for the operation of a medical cannabis dispensary. In *City of Monterey v. Carrnshimba*,[91] the city attempted to enjoin the operation of a dispensary

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84. *See* Lance Hernandez, *Globeville, Elyria-Swansea Residents fear Impact of Rising Property Valuations*, THEDENVERCHANNEL.COM (last updated May 1, 2019, 11:02 AM) https://www.thedenverchannel.com/news/local-news/globeville-elyria-swansea-residents-fear-impacts-of-rising-property-valuations; *see also* Michael Roberts, *Here's How Much Property Taxes Went Up for Denver Homeowners*, WESTWORD (Feb. 14, 2020, 6:45 AM) https://www.westword.com/news/denver-property-tax-increases-for–2020–11635499 (citing a twenty-four percent increase in property tax in the Elyria-Swansea neighborhood).

85. Migoya & Bacam, *supra* note 81.

86. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2017).

87. *Senate Bill 420, 2003 Cal. Stat. ch. 875 (codified at Cal. Health & Safety Code* §§ 11362.7–11362.85).

88. Control, Regulate and Tax Adult Use of Marijuana Act of 2016, 2016 Cal. Legis. Serv. Prop. 64 (West) (adopted as Proposition 64 in a voter initiative).

89. CAL. BUS. & PROF. CODE § 26000(b) (West 2017).

90. *Id.*

91. City of Monterey v. Carrnshimba, 156 Cal. Rptr. 3d 1 (Ct. App. 2013).

as a public nuisance in violation of its municipal zoning scheme. The court concluded that "unlisted commercial uses that could not reasonably be included in any listed use classification were not permitted and thus were deemed to be public nuisances per se under provision declaring any uses contrary to the provisions of this ordinance to be public nuisances."[92] Similarly, the City of Riverside banned the cultivation, manufacture, and sale of cannabis within its jurisdiction by explicitly declaring a cannabis dispensary an unpermitted land use and treating cannabis businesses as public nuisances.[93] In *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*,[94] the court held that state law, namely the legalization of medical cannabis through the Compassionate Use Act[95] and the Medical Marijuana Program,[96] did not preempt municipal ordinances banning medical cannabis dispensaries or declaring them nuisances.[97]

In 2017, the municipal government of Agoura Hills declared that "a prohibition on all commercial marijuana activity, for medical, non-medical, or any other purpose, is necessary for the preservation and protection of the public health, safety, and welfare for the city and its community."[98] Approximately sixty-two percent of registered voters in Agoura Hills voted in favor of the Adult Use of Marijuana Act in 2016.[99] Despite the city's majority consensus in favor of permitting adult use of recreation cannabis, in *Conejo Wellness Center, Inc.* the court upheld zoning regulations that banned dispensaries from operating in the City of Agoura Hills.[100]

States that grant municipalities wide latitude to regulate cannabis activities in their jurisdictions also grant cities the opportunity to frustrate the intent of the statute even when the majority of residents are in favor of cannabis access in their community. Broad municipal zoning power allows localities to contravene the will of the majority at the whims of the zoning

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92. George L. Blum, Annotation, *Zoning Ordinances Addressing Medical Marijuana Businesses*, 30 A.L.R. 7th Art. 3 (2017).

93. *See* City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc., 300 P.3d 494, 496 (2013) ("In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a '[m]edical marijuana dispensary' . . . is a prohibited use of land within the city and may be abated as a public nuisance. . . . The City's ordinance also bans, and declares a nuisance, any use that is prohibited by federal or state law.").

94. *Id.*

95. CAL. HEALTH & SAFETY CODE §§ 11362.7–11362.85.

96. California Control, Regulate and Tax Adult Use of Marijuana Act of 2016.

97. *City of Riverside*, 56 P.3d at 512.

98. AGOURA HILLS, CAL., CODE OF ORD. art. 9, ch. 6, pt. 2, div. 10, § 9660 (2019).

99. *Searchable Database: See How Cannabis Laws, Support Differ Among California Cities*, CANNIFORNIAN (Jan. 4, 2018), http://www.thecannifornian.com/cannabis-business/database-see-cannabis-laws-support-differ-among-california-cities/ [https://perma.cc/6BZH-GMG2]

100. Conejo Wellness Ctr., Inc. v. City of Agoura Hills, 154 Cal. Rptr. 3d 850 (2013).

board as they did when banning cannabis businesses in Agoura Hills despite a strong majority vote by the city's population in favor of such businesses only a year earlier. State lawmakers who intend for legislation to apply equally across the state, as a reflection of constituents' opinions and beliefs, must add some safeguards to ensure that municipalities remain aligned with and respect residents' rights as citizens of the municipality and of the state.

B. States that Limit Municipalities' Power to Restrictively Zone Cannabis Businesses More Effectively Uphold Democratic Intent

1. Hawaii's Legislative Act Ensured Continued Patient Access to Medical Cannabis

In 2000, Hawaii became the first state to legalize medical cannabis through a legislative act, as opposed to a ballot initiative.[101] The drafters foresaw and accounted for potential conflicts of law and impacts of the proposed legislation and thus constructed the law to account for those situations. To that end, Hawaii's legislature added an additional layer of security for the state's citizens, ensuring they would be able to access medical cannabis in their municipalities by including a clause in the state zoning regulations that reads: "Neither this section nor any other law, county ordinance, or rule shall prohibit the use of land for medical cannabis production centers or medical cannabis dispensaries established and licensed pursuant to chapter 329D; provided that the land is otherwise zoned for agriculture, manufacturing, or retail purposes.[102]" In 2015, legislators passed a subsequent medical cannabis law, H.B. 241, but took care to ensure the continued protection of constituents' access to medical cannabis.[103] The bill's language required medical cannabis producers and dispensaries to abide by municipal zoning regulations, provided that such regulations do not prevent cannabis production on land zoned for agricultural use.[104] This is especially important in the island state, as arable

101. HAW. REV. STAT. ANN. §§ 329–122 – 329–131 (2000). *See also History of Marijuana on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/History_of_marijuana_on_the_ballot [https://perma.cc/8TR8-AQQR]; Associated Press, *Hawaii Becomes First State to Approve Medical Marijuana Bill*, N.Y. TIMES (June 15, 2000), https://www.nytimes.com/2000/06/15/us/hawaii-becomes-first-state-to-approve-medical-marijuana-bill.html [https://perma.cc/6UEQ-F8EQ].

102. HAW. REV. STAT. § 46–4(f) (2020).

103. HAW. REV. STAT. § 329D–22 (2020) ("A medical marijuana production center shall be permitted in any area in which agricultural production is permitted . . . .").

104. *Id.*

land and resources are limited.[105] In the absence of such provisions, it is likely that patient access to medical cannabis would be restricted.

2. Missouri's Medical Cannabis Provision Prohibits Municipalities from Enacting Zoning Regulations in Contravention to Statutory Intent

In 2018, Missourians voted strongly in favor of Amendment 2, a ballot measure that legalized the use of medical cannabis.[106] In many ways similar to the Hawaiian medical cannabis statute,[107] Missouri's new cannabis law preserved citizens' access to medical cannabis by specifying that: "No local government shall prohibit medical marijuana cultivation facilities, medical marijuana testing facilities, medical marijuana-infused product manufacturing facilities, or medical marijuana dispensary facilities . . . either expressly or through the enactment of ordinances or regulations that make their operation unduly burdensome in the jurisdiction."[108] Unlike the Hawaii statute, Amendment 2 does not enumerate zones where medical cannabis must be permitted. Instead, the Missouri law ensures greater protection of a citizen's right to access medical cannabis by forbidding any local ordinance or regulation that would make the operation of medical cannabis related activities unduly burdensome.[109] Given the relatively recent enactment of Amendment 2, courts have yet to clarify what constitutes an unduly burdensome regulation on medical cannabis operations. Based on the construction of the statute, it seems that any judicial opinions on the matter will defer to the statutory intent (patient access to medical cannabis) over municipal restrictions.

C. Lessons from State and Municipal Approaches to Cannabis Zoning

Colorado, Hawaii, California, and Missouri all took different approaches to regulating cannabis land use. Some states, such as Colorado, gave municipalities nearly unchecked control over zoning, leading to the development of green corridors in Denver's low-income

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105. *See Land Use Division,* STATE OF HAWAII, OFFICE OF PLANNING https://planning.hawaii.gov/lud/#:~:text=According%20the%20Hawaii%20Data%20Book,percent%20is%20designated%20as%20rural [https://perma.cc/3XLN–7VHQ].

106. Official Election Results: General Election, November 06, 2018, https://enrarchives.sos.mo.gov/enrnet/. Approximately sixty-six percent of voters approved Amendment 2. *Id.*

107. HAW. REV. STAT. § 329D–2 (2015)

108. MO. CONST. Art. XIV, § 1

109. *Id.* The law also puts quotas in place to ensure patient access: one license to manufacture for every 70,000 residents and one licensed dispensary for every 100,000 residents. *Id.*

neighborhoods. Similarly, in California, where municipalities have robust zoning powers, cities have completely zoned out cannabis, despite overwhelming resident support for legalization. As demonstrated by the cases in Denver and Agoura Hills, when states fail to include legislative safeguards to ensure residents' access to cannabis, municipalities have the power to limit or completely deprive citizens of cannabis via overly restrictive zoning measures. In contrast, the statutes implemented in Hawaii and Missouri cannot be circumvented by municipal zoning ordinances. As a result, these states better uphold the legislative intent of ensuring a basic level of access to medical cannabis for residents throughout the state.[110]

III. AN ANALYSIS OF CONTEMPORARY CANNABIS ZONING THROUGH THE LENS OF JOHN STUART MILL'S CLASSICAL LIBERALISM

A. A Brief Introduction to the Political Theory of Liberalism

America was founded on the tenets of liberalism, a political theory that values protection of personal liberties above nearly all else.[111] The political theory of liberalism should not be confused with "liberalism" or "liberals" as they relate to twenty-first century politics but should be understood as a separate political philosophy developed by theorists including Locke, Rousseau, Hobbes, Mill, Kant, and more recently Feinberg and Rawls, among others.[112] Liberalism developed during the Enlightenment as a response to Europe's seventeenth and eighteenth century authoritarian and monarchical governments and societies that greatly limited citizens' rights to self-determination.[113] In the eighteenth and nineteenth centuries, a liberal was one who "wanted more liberty, that is, more freedom from restraint; whether the restraint was exercised by police, or by law, or by social pressure . . . . The liberal thought that men needed far more room to

110. *See* HAW. H.R. COMM. REP. NO. 172–18 (2018) ("The purpose of this measure is to amend the current statutes . . . to facilitate appropriate access to medical cannabis by patients with debilitating medical conditions and ensure patient safety."); *see also* MO. CONST. Art. XIV, § 1 ("The section allows patients with qualifying medical conditions the right to . . . use medical marijuana under the supervision of a physician. This section is intended to . . . allow for the limited legal production, distribution, sale and purchase of marijuana for medical use.")

111. ARTHUR M. SCHLESINGER, THE POLITICS OF HOPE AND THE BITTER HERITAGE: AMERICAN LIBERALISM IN THE 1960S 83 (1956). ("In a sense all of America is liberalism . . . . With freedom thus a matter of birthright and not of conquest, the American assumes liberalism as one of the presuppositions of life.").

112. Gerald Gaus, et al., *Liberalism*, STAN. ENCYCLOPEDIA PHIL. https://plato.stanford.edu/entries/liberalism/ [https://perma.cc/YZ6e-VRBB] (last revised Jan. 22, 2018).

113. *Id.*

act and think than they were allowed by established laws and conventions in European society."[114] Liberalism promoted broad freedom for citizens with minimal governmental or societal interventions, so long as citizens' actions or beliefs did not bring harm to others (often referred to as the "harm principle").[115] Since the ideology of liberalism gained popularity, it has evolved from a classical philosophy to a range of works that contemplate political liberalism, economic liberalism, and social liberalism.[116] This Note focuses primarily on the tenets of classical liberalism as first posited by European thinkers in the Enlightenment and post-Enlightenment eras.

Liberalism has had a particularly salient impact on the development of Anglo-American society, culture, and politics. In 1776, Thomas Jefferson enshrined the principles of liberalism in the United States' first founding document, the Declaration of Independence.[117] The tenets of liberalism also permeate the United States Constitution. The Bill of Rights guarantees citizens fundamental, undeniable personal liberties including freedom of speech, freedom of association, freedom of religion, and equal protection of the laws.[118]

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114. OWEN CHADWICK, THE SECULARIZATION OF THE EUROPEAN MIND IN THE NINETEENTH CENTURY 22 (1975).

115. JOHN STUART MILL, ON LIBERTY 23 (Ticknor and Fields 2d. eds. 1863). Mill's "Harm principle" is that harm prevention is the sole justifiable reason to restrict individual liberties.

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Id.

116. *See* Gaus et al., *supra* note 112.

117. The Declaration of Independence unequivocally enshrines individual liberty as a foundation of American governance. Jefferson elucidated many libertarian ideas including a belief in "unalienable Rights" to "Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776). In perhaps the ultimate libertarian nod, Jefferson included: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it." *Id.*

118. *See* U.S. CONST. AMEND. I–X.

B. Mill's Democratic Liberalism: Liberty Governed by the Harm Principle and the Greatest Happiness Principle

John Stuart Mill was a prominent nineteenth century British liberal philosopher.[119] Mill's liberalism was governed by two distinctive features, the aforementioned harm principle and the greatest happiness principle.[120] Mill reasoned that individual liberty was integral to happiness, and as such a person's liberty to act or think in a certain manner should only be restricted if those thoughts or actions pose a harm to others, often referred to as "the harm principle."[121] According to Mill, in the absence of harm to others, there exists no other valid justification—including ethical, moral, or paternalistic motives—for restraining one's personal liberties.[122]

Mill was also a staunch advocate of a participatory government, and he was the pioneer of democratic liberalism in England.[123] Mill viewed suffrage and voluntary governmental participation as crucial to the success of a liberal society.[124] He argued that individuals can only maximize their happiness by participating in democratic self-governance and collective decision-making, thereby exerting control over matters that may restrict their liberties.[125] Mill's ideal democratic government is one composed of competent representatives, informed by the public's interest and opinions, and which operates primarily to protect its citizens' personal liberties.[126]

The following section analyzes trends in cannabis land use law through the lens of Mill's liberalism focusing on the harm principle and the greatest happiness principle.

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119. JOHN STUART MILL, AUTOBIOGRAPHY (Jonathan Bennet ed., 2017) (1873).

120. Mill was heavily influenced by the philosophy of utilitarianism, which promoted the greatest good for the greatest number of people. *See id.*

121. *See* MILL, ON LIBERTY, *supra* note 115, at 107 ("[M]en should be free to act upon their opinions – to carry these out in their lives without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril."); *see also id.* at 108 ("[I]f he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself . . . he should be allowed, without molestation, to carry his opinions into practice at his own cost."); *id.* at 109 ("[F]ree scope should be given to varieties of character, short of injury to others . . . .").

122. *Id. See also* Cristina de Maglie, *Punishing Mere Immorality? Skeptical Thoughts from a Comparative Perspective*, 23 BERKELEY J. CRIM. L. 323, 332 (noting that the harm principle served as a "fundamental limit to the arbitrariness of courts and legislative bodies").

123. J. Salwyn Schapiro, *John Stuart Mill, Pioneer of Democratic Liberalism in England*, 4 J. HIST. IDEAS 127 (1943). I would argue that the purest form of liberalism would preclude most forms of government which acts as a barrier to the protection of personal liberties.

124. *Id.*

125. Bruce Baum, *J.S. Mill on Freedom and Power*, 31 POLITY 187 (1998); DENNIS FRANK THOMPSON, JOHN STUART MILL ON REPRESENTATIVE GOVERNMENT 13 (1976) ("[T]he only government which can fully satisfy all the exigencies of the social state, is one in which the whole people participate.").

126. Schapiro, *supra* note 123.

C. Analysis of Cannabis Policies on Zoning through the Lens of Mill's Democratic Liberalism

Mill's liberalism rests on two primary distinctions: (1) a requirement of representative government in order to fulfill the greatest happiness principle; and (2) the presence of harm to others as the sole valid justification for limiting another's personal liberties.[127] The two following subsections analyze trends and examples of modern cannabis zoning policy as understood in the context of Mill's requirements of classical liberalism.

1. Cannabis Zoning Regulations, Limiting Liberty, and the Harm Principle

According to Mill, "the burthen of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition . . . . The *a priori* pressumption is in favour of freedom."[128] It follows, then, that in the case of a state with legalized cannabis, Mill would argue that the burden of proof for imposing any limits on a citizen's ability to cultivate, manufacture, sell, or consume cannabis rests with the party seeking to impose such a restriction.[129] To meet the burden of proof under Mill's harm principle, the party seeking to impose such a restriction on one's personal liberties must show that harm exists or is caused by the action or belief held by the individual.[130] In the case of legalized cannabis and zoning, Mill would only validate a restrictive zoning ordinance if the municipality could demonstrate that the citizen's cultivation, manufacturing, sale, or consumption of cannabis would harm others.

Harmful acts, according to Mill, are not inherently immoral, and morality alone is never a valid basis for limiting personal liberties.[131] Early studies of the effect of cannabis operations on municipalities fail to conclusively show that cannabis businesses inflict any harm upon the city or community.[132] In fact, a 2017 study indicated that the presence of retail cannabis dispensaries actually reduced crime in the neighborhoods where

127. *Id*.

128. 21 JOHN STUART MILL, *The Subjection of Women, in* THE COLLECTED WORKS OF JOHN STUART MILL, 259, 260–61 (J. M. Robson ed., 1984)

129. *Id.*

130. *See* MILL, ON LIBERTY, *supra* note 115, at 22.

131. Gaus, *supra* note 112; *see also* MILL, ON LIBERTY, *supra* note 116, 107–08.

132. *See* Lorin A. Hughes et al., *Marijuana Dispensaries and Neighborhood Crime and Disorder in Denver, Colorado*, 37 JUST. Q. 461 (2019).

they operated.[133] A retrospective study conducted in 2019 indicated that homicides increased in cities after cannabis was legalized, but this same trend was observed in major cities across the U.S. regardless of cannabis legalization; the country as a whole experienced an increase in murder rates from 2010 to 2018.[134]

Considered another way, it is plausible that overly restrictive zoning ordinances actually harm residents by limiting their right to self-determination and their ability to access or use cannabis. For example, treating cannabis dispensaries differently than other retail—such as relegating it to industrial areas, to the detriment of the owners' and consumers' liberties without evidence that the operation of such a facility causes harm to others—is a direct violation of the harm principle. Taken a step further, completely zoning out cannabis operations when no harm is proven to exist in connection with those activities is an egregious violation of the harm principle bordering on arbitrary government action.

If statistics later emerge that indicate harm such as increased crime or environmental pollution as a result of cannabis business functions, Mill's liberalism would support the imposition of restrictions on those operations. So long as the party advocating to restrict another's liberty can prove that the exercise of liberty would cause true harm to others, classical liberalism would support and encourage such a regulation.

2. Cannabis Zoning Regulations, Representative Government, and the Greatest Happiness Principle

In contrast to the harm principle, the greatest happiness principle dictates that government and political systems should operate in such a way that they maximize utility or bring the greatest happiness to the greatest number of people.[135]

Mill's greatest happiness principle extends to governance, as he believed that a lack of self-determination impairs fulfillment of greatest happiness principle. As such, a system of representative self-governance is crucial to maximize utility.[136] On the state level, Mill would support a government that is competent and representative of its constituents and

133. Jeffrey Brinkman & David Mok-Lamme, *Not in My Backyard? Not So Fast. The Effect of Marijuana Legalization on Neighborhood Crime* (Fed. Reserve Bank of Phila., Working Paper No. 17–19, 2017).

134. Valeriy Zvonarev et al., *The Public Health Concerns of Marijuana Legalization: An Overview of Current Trends*, CUREUS (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6837267/.

135. JOHN STUART MILL, UTILITARIANISM 10, 14 (Batoche Books 2001) (1863).

136. *Id.*

open to citizen involvement such as a referendum to legalize cannabis. On the municipal level, if cannabis was legalized at the state level via majority vote, Mill would support municipal regulations that allow residents to exercise their self-determination and preserve their rights. In such a situation, municipal regulations blocking community members' access to cannabis via overly restrictive zoning would frustrate the citizens' right to self-determination and decrease overall happiness.

IV. PROPOSED SOLUTION: THE IDEAL ZONING SCHEME THAT UPHOLDS PERSONAL LIBERTIES AND LEGISLATIVE INTENT

The following section seeks to develop an ideal zoning scheme that promotes individual liberties while adhering to Mill's harm and greatest happiness principles. The first section considers zoning schemes for medical cannabis while the second section examines zoning schemes for recreational cannabis. Taken as a whole, both proposed schemes are intended to ensure cannabis access for citizens who need or want access to legal cannabis in their communities.

A. Zoning for Medical Cannabis

Just as it would be unjust to zone out a pharmacy and restrict citizen access to prescription pharmaceuticals, zoning out medical cannabis dispensaries would deprive residents of their access to medically necessary cannabis treatment. If municipalities are authorized to zone out medical cannabis businesses, patients who are often battling chronic pain or terminal illness will be forced to travel out of their communities to obtain relief or may be precluded from accessing the treatment altogether.

For these reasons, in states with legal medical cannabis, municipalities should be prohibited from zoning out dispensaries and other business functions like cultivation and extraction.[137] Ideally, municipalities should treat medical cannabis dispensaries the same as any other retail business in the city, subject to the same zoning, signage, and safety requirements of similar establishments.

Under this proposed scheme, while municipalities cannot implement overly restrictive zoning, they can still exercise significant control over

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137. *See* Alexander Beadle, *Advances in Cannabis Extraction Techniques*, ANALYTICAL CANNABIS (June 25, 2019), https://www.analyticalcannabis.com/articles/advances-in-cannabis-extraction-techniques–311772 [https://perma.cc/3EQ6-EEDL]. Extraction refers to the process used to convert cannabis plant compounds from their natural state into a usable, concentrated, forms. Extraction allows patients and consumers to ingest cannabis in a variety of ways such as sub-lingual tinctures, edible products, and capsules.

medical cannabis via licensure requirements. To that end, statutes should also include safeguards against overly restrictive licensure processes that would substantially restrict patient access to medical cannabis.

B. Zoning for Recreational Cannabis

Recreational cannabis does not carry the same gravitas as medical cannabis in terms of a "right" or liberty to be protected because recreational use is merely for enjoyment as opposed to medical necessity. In terms of land use regulation, recreational cannabis businesses should be treated as other adult recreational businesses such a liquor stores or adult entertainment venues. Under this statutory scheme, municipalities can regulate cannabis businesses but not in an overly discriminatory fashion (i.e., applying much more restrictive zoning rules to cannabis dispensaries than liquor stores). While some may argue that any restriction is too much, advocating for cannabis to be treated in the same way as other adult recreational businesses is a strong first step towards ensuring residents' access to cannabis and upholding the ideals of self-determination.

If a state-level initiative for recreational cannabis fails, municipalities should consider allowing a vote on recreational cannabis at the city-wide level. It may be the case that while a majority of voters at the state level oppose access, residents of certain cities may hold different ideals and be heavily in favor of recreational cannabis. Conversely, if over 50% of a city's voters opposed a state-wide measure to legalize recreational cannabis, municipalities should hold a subsequent local vote to decide whether to opt out of permitting recreational marijuana businesses.[138] These processes would fulfill Mill's principle of self-determination at the local level by allowing residents direct input into the future of their city.

When citizens' rights are restricted by municipal regulations that exceed state statute, such as limiting access to recreational cannabis via zoning, the process must be as democratic and representative as possible.

138. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (enacted as 2014 Oregon Laws Ballot Measure 91), https://www.oregon.gov/olcc/marijuana/Documents/Measure91.pdf. *See also Summary of Oregon's Measure 91*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/states/oregon/summary-of-oregons-measure–91/ [https://perma.cc/7TSA-Y32A]. Oregon implemented a similar process after the state legalized recreational cannabis with the passage of Measure 91 in 2014. In counties where more than fifty-five percent of voters opposed Measure 91, the local government could opt out of permitting recreational cannabis businesses via ordinance. In counties where more than forty-five percent of voters supported Measure 91, the opt-out measure would go to the local electorate for a vote. *Id.*

CONCLUSION

Cannabis legalization continues to gain momentum in the United States, and as a result, municipalities of all sizes and cultures are faced with the task of regulating cannabis-related activities within the town, city, or village's borders. As demonstrated in Part II, municipalities have historically favored zoning regulations to control the economic and social functions of the city. Many municipalities have employed highly restrictive zoning regulations that preclude any cannabis operations within their borders, despite a state statute legalizing cannabis.[139] Some state lawmakers have included language directly in the bills to prevent this type of preclusive zoning and uphold the original intent of the legislation: to ensure patient access for medical treatment.[140]

Mill's liberalism extols the importance of personal liberties and views the government's main role as a body with limited authority that should primarily concern itself with protecting and expanding the personal liberties of its citizens. On that basis, a statutory scheme that upholds the law's legislative intent, such as Hawaii and Missouri's medical cannabis laws, by preventing municipalities from limiting residents' liberties via restrictive zoning laws, would be most in line with Mill's theory of liberalism.

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139. *See* City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc., 300 P.3d 494 (2013); *see also* AGOURA HILLS, CAL., CODE OF ORD. art. 9, ch. 6, pt. 2, div. 10, § 9660 (2019); *see also* Conejo Wellness Ctr., Inc. v. City of Agoura Hills*,* 154 Cal. Rptr. 3d 850 (2013).

140. *See* HAW. REV. STAT. § 329D–22 (2019); *see also* MO. CONST. Art. XIV, § 1.; *see also supra* note 111.