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## High Priorities: Land Use, Marijuana, and Meta-Values

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# HIGH PRIORITIES: LAND USE, MARIJUANA, AND META-VALUES

SPENSER OWENS <sup>1\*</sup>

## INTRODUCTION

Zoning ordinances are legislative tools that cities and counties use to regulate the location, use, and physical character of land in their jurisdiction.<sup>2</sup> Decisions about zoning affect the manner by which cities are organized, especially to the extent that they determine the number and nature of businesses that choose to locate within a given municipality.

This Note will examine the motivations surrounding the adoption of zoning ordinances pertaining to the production and sale of marijuana through the lens of John Dewey's theory of valuation. Applying Dewey's theory to the zoning ordinances of a sampling of state and local governments, I will argue first that the choice of land uses to be regulated and restricted through local zoning ordinances is ultimately referable to values held by the community in which the ordinances are enacted. Second, I will argue that the decisions made on the state level carry more "value" as defined by Dewey's theory and are, thus, entitled to greater weight if local zoning ordinances conflict with state law.

The decisions that a municipality makes with respect to its zoning ordinances are of particular concern to businesses involved in the recently created legalized marijuana industry. There are 27 states that authorize the cultivation and sale of medical marijuana to treat certain medical conditions.<sup>3</sup> Additionally, eight states permit the cultivation and sale of marijuana for adult recreational use.<sup>4</sup> Municipalities in states where marijuana is legal in some form (medical or recreational) have two choices: to permit and regulate the production and sale of marijuana in accordance with state law, or to attempt to ban the production and sale of marijuana outright.

Part I of this Note is a discussion of local zoning ordinances pertaining to marijuana businesses, beginning with a general overview of the

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<sup>2</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>3</sup> As of the writing of this Note, there are 8 states that passed legalization initiatives during the 2016 election cycle. Four of such states legalized marijuana for medical purposes, and another four states legalized recreational marijuana.

<sup>4</sup> *State Policy*, MARIJUANA POLICY PROJECT (Nov. 3, 2016, 9:01 AM), <https://www.mpp.org/states/>.

mechanics of zoning policies at the state and local level and their applications to medical and recreational marijuana. Part II introduces John Dewey's theory of valuation and explains valuation in the context of group decision-making. Dewey's normative-valuation theory is applied to state-level policy decisions regarding marijuana in Part III, and it is then applied to local-level marijuana zoning policies in Part IV to illustrate conflicts between state and local policies. Part V synthesizes specific examples of conflicts between state and local policies and argues that values about values, or meta-values, ultimately govern such policy conflicts.

### Part I: Marijuana Zoning Ordinances

#### A. Overview of Zoning Law and Authority

Cities and counties are generally permitted, within constitutional limits, to regulate and restrict uses, population densities, physical characteristics, and locations of land and buildings within their jurisdictions with zoning ordinances.<sup>5</sup> Localities derive their authority to zone land from their state zoning enabling statute<sup>6</sup> or home rule constitutional provision.<sup>7</sup> Zoning ordinances are generally legislative documents drafted and enacted by city and county governments and which may be enforced by specialized boards or commissions.<sup>8</sup> Through such ordinances, municipalities set forth classifications of permitted and prohibited uses of land, and divide the locality into districts inside which certain uses are allowed. Use restrictions in zoning ordinances vary from locality to locality, typically due to varying legislative decisions that each municipal legislative body makes when drafting and amending the zoning ordinance.<sup>9</sup> While a municipality may base its zoning decisions on an almost unlimited number of criteria, municipalities usually justify particular zoning decisions by arguing that public health, safety, and welfare are best served by the zoning decision.<sup>10</sup>

<sup>5</sup> *Euclid*, 272 U.S. at 388-89. The Supreme Court endorsed the constitutionality of zoning as a concept, and it preserved the ability of municipalities to enact zoning ordinances, so long as such ordinances do not run afoul of the Constitution of the United States and of the states in which the municipalities are located.

<sup>6</sup> See e.g., MICH. COMP. LAWS ANN. § 125.3201 (West 2016).

<sup>7</sup> See e.g., G.A. CONST. ART. IX, § 2, PARA. IV. It is important to note that the authority conferred upon home rule municipalities may be modified to the extent authorized by the home rule provisions of the state constitution.

<sup>8</sup> See e.g., CAL. GOV'T CODE § 65850 (West 2000).

<sup>9</sup> See e.g., *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *W.R. Grace & Co.-Comm. v. Cambridge City Council*, 779 N.E.2d 141, 149-50 (Mass. App. Ct. 2002). Separating uses from each other is seen to be sound public policy because it reduces the likelihood of incompatible uses locating near each other and creating nuisances.

<sup>10</sup> *Euclid*, 272 U.S. at 395. The police power grants municipalities broad authority to craft policies that are designed to address issues of local concern. Presumably any zoning decision that does not implicate fundamental rights and suspect-classes, does not exceed the grant of authority given to the municipality by the state, and is tailored to address the health, safety, and public welfare of the

This is especially true with zoning policies enacted in response to state-level marijuana legalization policies; cities often cite the public health, safety, and welfare when regulating marijuana uses.<sup>11</sup>

### B. Zoning Medical Marijuana

Marijuana, even when used for medical purposes, is often zoned and regulated in a similar manner to establishments selling alcohol.<sup>12</sup> San Francisco allows the cultivation and sale of medical marijuana within its jurisdiction, but stringently regulates the operation and placement of marijuana businesses.<sup>13</sup> Medical marijuana dispensaries are only permitted in the Residential Commercial (RC) medium and high-density zones in San Francisco and must meet a set of permitting criteria in order to comply with the zoning code.<sup>14</sup> Los Angeles County, by contrast, completely prohibits the commercial cultivation and sale of recreational and medical marijuana in each of its zoning classifications.<sup>15</sup> The ability of local governments in California to completely prohibit medical marijuana facilities from all zoning classifications was upheld in 2013 on statutory grounds.<sup>16</sup> The

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municipality is an acceptable exercise of the municipal police power.

<sup>11</sup> See, e.g., DENVER, CO, CODE OF ORDINANCES ch. 6, art. V, § 6-200 (2017); L.A. COUNTY, CA, ZONING ORDINANCE, tit. 22, div. 1, ch. 22.04.040. Often, cities simply recite that the zoning code is enacted pursuant to the city's power to promote the public health, safety, and general welfare under state law.

<sup>12</sup> See, e.g., DENVER, CO, CODE OF ORDINANCES ch. 6 ("Alcoholic Beverages and Retail Marijuana Code") (2017). Denver places retail marijuana under the same regulatory body as alcoholic beverages and many of the substantive regulations are identical between marijuana and alcohol.

<sup>13</sup> S.F., CAL., HEALTH CODE art. 33, § 3303 (2005). It is unlawful for a medical marijuana dispensary to operate within the city without obtaining a permit from the San Francisco Health Department. The requirements to obtain such a permit include criminal background checks for all owners and employees of the dispensary, security measures provided for the proposed dispensary, and representations whether food or medical cannabis will be consumed on the premises.

<sup>14</sup> S.F., CAL., PLANNING CODE art. 2, § 209.3 (2017). A "high-density" zone permits one residential unit per 200 sq. feet of a given lot's area. "Medium-density" zones allow one residential unit per 400 sq. feet of a lot's area. In order for a medical cannabis dispensary to receive approval to operate within a residential commercial zone, the proprietor must apply for a medical cannabis dispensary permit from the city and the parcel on which the dispensary is to be located cannot be located within 1000 feet from any school or public facility. Additionally, the dispensary must allow for adequate ventilation to prevent marijuana odors escaping the building, must not be located near a substance abuse treatment facility, must not allow alcohol to be sold or consumed near the building, and must inform all owners and occupants of property within 300 feet of the parcel that a dispensary is applying for a permit. Finally, the completed permit application will be held for 30 days to allow for review by residents, occupants, owners of property, and neighborhood groups in the area. Once the conditions are met, the San Francisco Planning Commission may hold a discretionary hearing to decide whether to grant the application. It is important to note that the above requirements must be met **in addition** to the requirements under the Health Code at note 13, *supra*.

<sup>15</sup> L.A. COUNTY, CAL., CODE OF ORDINANCES 22.66.020 (2017).

<sup>16</sup> *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729 (2013) (holding that the California Medical Marijuana Program (MMP) does not preempt municipalities

difference between two cities in the same state highlights the fact that local policies can vary from jurisdiction to jurisdiction, even in the presence of a general statewide policy with respect to a given issue. San Francisco allows the cultivation of medical marijuana in the city limits, but Los Angeles County completely prohibits all commercial marijuana cultivation.<sup>17</sup> The variance in the policies is made even starker by the presence of the uniform state policy of legalized medical marijuana. Below, in Parts III and IV, I will expand upon the reasons that lie behind local policy variances. Inter-local non-uniformity in recreational marijuana policy is even more pronounced.

### C. Zoning Recreational Marijuana

Local zoning policies with respect to recreational marijuana are even less uniform than with medical marijuana. For example, Monument, Colorado restricts the cultivation of recreational marijuana to accessory uses of residences.<sup>18</sup> Monument also imposes further restrictions on the visibility and number of plants that can be grown by a property owner.<sup>19</sup> Monument's zoning code only allows the commercial sale of marijuana in the context of medical marijuana dispensaries, which are permitted in the Commercial zoning designation as a conditional use only.<sup>20</sup> By contrast, Denver currently permits marijuana dispensaries within certain zoning districts, though it places significant restrictions on building specifications, location within the municipality, and mandatory spacing requirements through its zoning ordinance.<sup>21</sup> The Denver Zoning Code does not permit growing marijuana plants as an accessory use in a residential zone where marijuana

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from enacting ordinances that prohibit medical marijuana dispensaries within their borders because the MMP does not confer rights to convenient access of medical marijuana).

<sup>17</sup> L.A. COUNTY, CAL., CODE OF ORDINANCES 22.66.020 (2017). At the time of writing, Los Angeles County is expected to adopt a more comprehensive regulatory framework to govern commercial cultivation and sale of marijuana, but continued its pre-legalization ban on marijuana enterprises in its zoning code in the meantime. *Id.*

<sup>18</sup> MONUMENT, COLO., ZONING CODE § 17.05.010 (2016). An accessory use is defined as a use that is "naturally and normally incidental to, subordinate to and devoted exclusively to the main use of the premises." Common examples of accessory uses are large gardens and greenhouses.

<sup>19</sup> *Id.* A property owner may have no more than six flowering adult marijuana plants, and they must not be visible from the exterior of the property.

<sup>20</sup> MONUMENT, COLO., ZONING CODE §§ 17.36.030(A), (C) (2018). Conditional uses are subject to discretionary approval by the municipal zoning commission, which means that the municipality may deny a conditional use application, notwithstanding its sufficiency, on the basis that medical marijuana dispensaries do not comport with the public health, safety, or welfare for the community in which the conditional use is sought.

<sup>21</sup> DENVER, COLO., CODE OF ORDINANCES ch. 59 § 59-2 (2018). In addition to being excluded from 97 zoning designations, retail marijuana stores may not be located within 1000 feet of any school, drug or alcohol treatment facility, child care center, or other marijuana store. Such regulations severely limit potential sites for retail marijuana stores and cultivation facilities.

is sold at a licensed marijuana dispensary.<sup>22</sup>

#### D. Relationship Between State and Local Policy

The policy differences between San Francisco, Los Angeles County, Monument, and Denver shows that municipalities make unique zoning decisions with respect to medical and recreational marijuana, despite the presence of statewide policy that permits its cultivation, sale, and use. The variance of intrastate municipal zoning policies is due, in part, to the intrastate balance of power between states and local governments.

Local governments have no independent basis for their existence in the United States Constitution. Instead, cities derive their existence and authority from a grant of power by a state government, powers of which originate in the reservation of power to states under the Constitution.<sup>23</sup> When defining the contours of municipal power, States generally take one of two approaches: one that subordinates local governments to state law and one that grants local governments broader authority of self-government. Arising out of the subordination of local governments to state authority is Dillon's Rule, which is used to determine the contours of a local government's authority as delegated to it by the state.<sup>24</sup> In states that apply Dillon's Rule, local governments generally have only those powers specifically and expressly granted by the state government and those powers that are implied in or incident to the powers expressly granted.<sup>25</sup>

Many states reject Dillon's Rule and give broader authority to local governments through home rule.<sup>26</sup> Home rule comes in two forms, one form that conceptualizes local governments as sovereigns within a sovereign, and another form that grants plenary power to a local government that is not specifically reserved by the state government.<sup>27</sup> Home rule cities have far greater discretion to make zoning decisions than local governments in states

<sup>22</sup> *Id.*

<sup>23</sup> Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7-8 (1990) [hereinafter "Our Localism"]. The legal status of localities are conceptualized in three ways: "creature, delegate, and agent." A locality as creature of the state owes its existence to an act of the state, which has "plenary power to alter, expand, contract, or abolish at will any or all local units." As a delegate of the state, the locality possesses only such power as the state confers upon it, which may be altered at any time and for any reason by the state. A locality, as agent for the state, exercises its delegated powers within its jurisdiction on behalf of the state. Dillon's Rule is a reflection of the tri-partite legal status of cities mentioned above and cabins the authority that a city or local government can assert to those powers explicitly granted to it by state governments.

<sup>24</sup> *Id.* at 8 (quoting D. Mandelker, D. Netsch & P. Salsich, *State and Local Government in a Federal System: Cases and Materials* 83 (2d ed. 1983)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.* at 9-10.

following Dillon's Rule.<sup>28</sup> The discretion provided by home rule allows local governments like San Francisco, Los Angeles County, Denver, and Monument to enact zoning policies that comport with local values, needs, and desires, instead of being forced to comply with a single statewide policy as they would in a state that follows Dillon's Rule. The choice between policies based on individual and community values is best explained by John Dewey's Social Value Theory. This theory aids in the explanation of why concepts such as Dillon's Rule and home rule govern the relationship between state and local laws.

## Part II: Dewey's Social Value Theory

### A. Overview of Social Value Theory

John Dewey's Social Value Theory can be reduced to the following: "...[A]ll deliberate, all planned human conduct, personal and collective, seems to be influenced, if not controlled, by estimates of value or worth of ends to be attained."<sup>29</sup> Human behavior that is taken with forethought is, at the very least, influenced by perceptions of values. Such values are formed by a manner of valuation that Dewey describes: "...[V]aluation in its connection with desire is linked to existential situations and that it differs with differences in its existential context."<sup>30</sup> The "desire" that Dewey discusses is an end, a goal to be attained through deliberate conduct. The "existential situations" with which Dewey is concerned is a state of objective facts as they exist at a given time that a value judgment is made. Any given valuation depends on the "existential situations;" as the objective facts surrounding a situation change, so too does the valuation itself change.

Dewey's method of valuation states that a value judgment is a judgment regarding the state of objective facts as they exist in a given situation at any given time.<sup>31</sup> Actors who evaluate alternative courses of action do so with an end in view, or a goal to be attained by undertaking the potential courses of action.<sup>32</sup> According to Dewey, the method by which alternative courses of action are evaluated is by comparing the potential course of action in light of the end in view and determined by facts existing at the time the evaluation is done.<sup>33</sup>

Dewey's valuation method is interpreted by some to state that humans derive normative values from a descriptive set of facts based on objective

<sup>28</sup> As of the writing of this Note, there are currently 41 home rule states, including California, Colorado, and Michigan.

<sup>29</sup> John Dewey, *THEORY OF VALUATION 2* (1939) [hereinafter "THEORY OF VALUATION"].

<sup>30</sup> *Id.* at 16-17.

<sup>31</sup> *Id.* at 22.

<sup>32</sup> *Id.* at 23.

<sup>33</sup> *Id.*

criteria that are specific to the situation in which they present themselves to the one deriving the value.<sup>34</sup> The normative value-proposition that is to be derived can be stated as “If situation, Y, is to be resolved, then I *ought* to pursue course of action, X.” Any given situation is comprised of objective facts that are perceived by an evaluator. Once an evaluator perceives the situation, they conceive of a resolution to the situation. The evaluator then considers alternative courses of action that will carry into effect the resolution of the situation. If the evaluator believes that the situation should be resolved, then the evaluator will choose the course of action that is most likely to resolve the situation. The criteria that the evaluator considers when deciding whether a course of action is superior to another course of action is dependent on the particular facts of the situation. Thus, the evaluator’s prescriptive belief about an objective fact (that a situation should be resolved) transfers to the objective fact that a course of action is the most conducive to resolving the situation and generates the value-proposition stated above. Generally speaking, the means that is objectively the most conducive to resolving the situation is described as “good” and means less conducive to resolving the situation are described as “less good” or “bad.”<sup>35</sup>

An example of this is found in a game of chess, wherein the two players each seek to capture or corner the opposing player’s king piece. There are an immense number of moves that each player can make to simply move pieces according to the game’s rules that would play the game, yet fewer that would objectively accomplish the game’s objective of capturing the opposing player’s king piece. Applying the normative-value proposition derived above from the perspective of one of the chess players, the “situation” in this example is capturing the opposing player’s king piece. The situation is couched in a set of objective facts as they exist at a particular time, namely the configuration of the chess pieces on the chessboard at any given time. Given each player’s ultimate goal (to win by capturing the

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<sup>34</sup> See JOHN DEWEY, *THEORY OF THE MORAL LIFE* 112 (1960); see also Gail Kennedy, *The Hidden Link in Dewey’s Theory of Evaluation*, 52 J. PHIL. 85, 91 (1955).

<sup>35</sup> *THEORY OF VALUATION*, *supra* note 29 at 34. “[V]aluation takes place only when there is something the matter; when there is some trouble to be done away with, some need, lack, or privation to be made good, some conflict of tendencies to be resolved by means of changing existing condition...the end-in-view is formed and projected as that which, if acted upon, will supply the existing need or lack and resolve the existing conflict.” Dewey further develops “goodness” as having two aspects, the immediate aspect and the contributory aspect. The immediate good is an “intrinsic” good, or that which one determines to be good in itself. By contrast, a contributory good is something that is “good” for something else, for example a hammer is “good” for driving nails, but is not “good” for other, non-nail related, tasks. See John Dewey, *Valuation and Experimental Knowledge*, 31 PHIL. REV. n. 4 325, 326 (1922). For purposes of this Note, normative discussions of what is “good” are references to “good” in its contributory sense.



opposing king) and the configuration of the chess pieces on the chessboard, there is a finite set of moves that a player could make that conform with the rules of the game. Of these permissible moves, there is a smaller set of moves that, directly or indirectly, advance or accomplish the ultimate objective of capturing the opposing king. There is an even smaller subcategory of these moves that have objectively distinguishable features, such as permissible moves that capture the opposing king in the least amount of turns, or moves that are designed to delay the inevitable end of the game so as to prolong each player's enjoyment of the match.

A player's values come into play in the objectively distinguishable features of the permissible moves that advance the game. A player could conceivably want to win the chess game in the fewest turns as possible, and such a desire would be accomplished by making those moves that actually do conduce to winning the game in as few turns as possible. Therefore, the normative-value proposition that emerges from this example is "If Player *P* desires to win the chess game in the fewest number of turns, then *P* ought to make move *M*<sub>1</sub>, *M*<sub>2</sub>, *M*<sub>3</sub>..." It can thus be said that a move that is conducive to winning the game in as few turns as possible, *in this context*, is a "good" move, and the evaluation of what "good" means is determined by objectively verifiable facts unique to the situation.<sup>36</sup> A normative value statement was drawn from an objective set of facts.

#### B. Valuation in Collective Decision-Making

When expanded from one person to a group of persons, namely a decision-making body, it is logical that the same evaluative process discussed above results in the formation of values that guide the decisions adopted by that body.<sup>37</sup> A decision-making body is comprised of individuals, who each undertake the evaluative process on an individual level, and who are asked to derive values and create policy as a group. Problems of policy present themselves to such collectives, and such

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<sup>36</sup> THEORY OF VALUATION, *supra* note 29 at 24. "These propositions in their generalized form may rest upon scientifically warranted empirical propositions and are themselves capable of being tested by observation of results actually attained as compared with those intended." *Id.* This evaluation of good reflects Dewey's idea of contributory good, or that which is good "for something else." Here, a "good" chess move is one that accomplishes the objective of the game, which is the "something else." In further support of this, Dewey characterizes the value derivation process ("judgments of value") as the connection of objects or acts in relation to certain contemplated ends and consequences. THEORY OF THE MORAL LIFE, *supra* note 34 at 122.

<sup>37</sup> THEORY OF VALUATION, *supra* note 29 at 60. "If, on the other hand, investigation shows that a given set of existing valuations, including the rules for their enforcement, be such as to release individual potentialities of desire and interest, and does so in a way that contributes to mutual reinforcement of the desires and interests of all members of a group, it is impossible for this knowledge not to serve as a bulwark of the particular set of valuations in question, and to induce intensified effort to sustain them in existence."

problems can be addressed by policy decisions. The policy decisions that a legislature adopts are the courses of action (or inaction) that the members of the legislature perceive, given the particular circumstances of the policy problem, will be best suited to addressing the problem. As noted above, the prescriptive belief that a problem should be solved transforms into a prescriptive belief that a given course of action is most conducive to solving the problem. It is important to note that in the context of multiple evaluators, as in a decision-making body, the possibility that different courses of action are seen to be the most conducive to resolving the situation becomes problematic.<sup>38</sup> Differences of opinions as to the superior course of action may arise from evaluators using different sets of facts to evaluate the possible courses of action, evaluators perceiving the situation itself differently, or even objective mistakes of fact made by the evaluators.<sup>39</sup>

For example, recall the example of the chess game. Instead of two players, there are ten players, five on each team. In order to make a move, the majority of players on one team must first agree on the move to make. Each member of each team must first assess the state of the game board in a similar fashion to each of the players in the previous chess example. Then the team members must communicate their understanding of the state of the game board with each other and come to a consensus regarding the same.<sup>40</sup> Once this is done, the members of the team will assess the goal that the team is going to pursue, in light of the configuration of the chess board and pieces. For purposes of this example, it is assumed that the team members agree that the goal for the team is to win the chess game in as few turns as possible. Once the goal is set, the team members will evaluate different possible moves, in the same manner as the individual players in the previous example. Eventually, the team members will arrive at a set of moves that are conducive to winning the game in as few moves as possible. The team members must then choose from among these moves. As stated, a majority

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<sup>38</sup> John Dewey, *PUBLIC AND ITS PROBLEMS* 203 (1927) [hereinafter *PUBLIC AND ITS PROBLEMS*]. Dewey argues that differences of opinion with respect to the adoption of a given course of action are difficult, if not impossible to eliminate. What is important, Dewey argues, is that the differences of opinion will be based on observable and verifiable fact evidence, rather than on unsubstantiated beliefs.

<sup>39</sup> *Id.* at 207. The act of public deliberation, of social evaluation, causes the public to come to terms with the fact that there are shared ends and interests to be sought by the public. Dewey notes here that the public rarely comes to a consensus on exactly what the shared interests are, but it is important that the public recognizes that shared interests are revealed through the deliberative method. This recognition can, and often does, result in social action and legislation based upon shared interests revealed through deliberation.

<sup>40</sup> Coming to a consensus about the facts of a situation is often where disagreement arises in deliberative bodies. In such cases, one perspective must prevail if a decision is to be made, especially in a democratic body.

of the team members must agree on the most appropriate move to make in order to make a move. By way of discussion, debate, and persuasion, a majority of the team would make their decision as to the move to make, and such move would be made. The process would start anew as the opposing team decides which move to make in response.

The assessment of the state of the board by each of the team members is identical to the assessment of the board by the individual chess players discussed above. This assessment allows each team member to observe and gather information about the factual situation at hand. When the team members communicate with each other about what each of them perceives the factual situation at hand to be, they come to a consensus regarding the objectively verifiable facts as they exist on the board at that time. When the team members get together to decide which move to make, they do so with the factual situation in mind and with the goal of winning the game in as few turns as possible. Thus the team members derive a normative-value proposition as a group: “If we want to win the chess game in as few moves as possible, and given the current configuration of the board, we ought to make move  $M_1, M_2, M_3$ , etc...”<sup>41</sup>

As illustrated above, the problem of diverging views regarding the optimal course of action is significantly mitigated by the fact that decision-making bodies often agree on a certain set of objectively verifiable facts and come to a unified decision regarding action, often in accordance with majoritarian principles. Plurality rule in such bodies allows groups to debate and attempt to persuade others in order to form a consensus that will agree to the shared set of facts and a derived normative-value proposition. The shared set of facts allows a legislative body to act in a similar fashion as an individual with respect to its method of evaluating potential courses of action.

In cases where it is not possible for a body to agree on a shared set of facts, or where the set of facts decided upon is not clear, then it is unlikely that a unified value will be derived. Instead, more than one value is likely to be created, if any are created at all, based upon facts that are agreed upon and objectively verifiable.<sup>42</sup> In the rare instance of two or more courses of action being equally conducive to resolving the problem at hand, then criteria outside of the given set of facts is likely to control the final decision rendered by the body.<sup>43</sup>

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<sup>41</sup> See THEORY OF THE MORAL LIFE, *supra* note 34 at 122.

<sup>42</sup> See *id.* at 203.

<sup>43</sup> Timothy V. Kaufman-Osborn, *John Dewey and the Liberal Science of Community*, 46 J. POL. n. 4 1142, 1152. Dewey’s political theory regarding democracy makes explicit the function of democratic citizens to “transcend the self which they would otherwise bring to the political arena and which would otherwise hinder their individual participation in efforts of collective control[.]”

Diverging views with respect to a proposed course of action are unavoidable in democratic institutions. When a decision-making body acts only with the approval of a majority of its members, the deliberative process in which the body engages becomes enormously significant. Every individual member of the body engages in Deweyan valuation on an individual level insofar that they each make value judgments about what issues are important to take up and which political stances they ought to adopt.<sup>44</sup> Each separate member of the body understands that they are part of a decision-making process, and thus they understand that if decisions are to be made, then they must engage with the other members of the body in forming a majority to vote in favor of such decision. To this end, the engagement between members with the common goal of coming to a decision for a body is deliberation. This deliberation, even when it is merely a recognition of the fact that a decision is to be made, is Dewey's method of valuation at work. Thus, legislators engage in Deweyan valuation individually and collectively when they develop policy.

Collective actions, such as actions by a state, are also influenced and controlled by values derived according to the aforementioned valuation method. Thus legislatures *qua* states that undertake deliberative legislative action are influenced by the same values that have been described. Dewey's conception of the state illustrates this point insofar that he believed that public bodies direct human action according to two ends or consequences.<sup>45</sup> The first consequence is that which applies to those directly involved in the action, namely the legislators or policy makers themselves.<sup>46</sup> The second consequence considered by the public body is that which affects constituencies besides those who are immediately involved in the proposed course of action, namely the constituencies of the legislators or the public-at-large.<sup>47</sup> Dewey's formulation of the second consequence taken into account by public bodies is illustrative of a form of quasi-agency, whereby legislators act for, or on behalf of, others. Thus, legislation is a reflection and codification of the individual and collective values of the legislators and the legislature.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> TERRY HOY, THE POLITICAL PHILOSOPHY OF JOHN DEWEY: TOWARD A CONSTRUCTIVE RENEWAL 98 (1998) [hereinafter "HOY"].

<sup>46</sup> PUBLIC AND ITS PROBLEMS, *supra* note 38 at 12; *see also id.*

<sup>47</sup> HOY, *supra* note 45 at 98.

<sup>48</sup> William R. Caspary, DEWEY ON DEMOCRACY 141 (2000). According to Caspary, Dewey's theory of valuation predicts that individual citizens receive and digest information disseminated to the public and eventually arrive at a "responsible" public judgment that possesses the same character of a well-conducted individual deliberation and decision. Caspary argues that Dewey himself did not develop

### Part III: Values, State Law, and Marijuana

#### A. Medical Marijuana Policy

Medical marijuana is legal in twenty-nine states.<sup>49</sup> The statutes that authorize the cultivation, distribution, and use of medical marijuana differ in each state, indicating they reflect different social values. California and Michigan took different approaches with respect to their medical marijuana legalization programs and the interpretation of the laws legalizing medical marijuana by their respective state supreme courts.<sup>50</sup> These different approaches reflect different legislative and policy values.

Strictly speaking, California's Compassionate Use Act and Medical Marijuana Program is not a direct *authorization* of medical marijuana. California's Compassionate Use Act<sup>51</sup> imparts negative rights, or freedom from criminal liability, on medical marijuana patients insofar that card-carrying medical marijuana patients possess affirmative defenses in any criminal prosecution arising from or relating to their possession and use of medical marijuana obtained from a licensed medical marijuana facility.<sup>52</sup> The CUA and its implementing legislation also immunizes licensed physicians in California from prosecution for prescribing medical marijuana to patients, provided that the prescription given to the patient is for the treatment of enumerated illnesses and conditions.<sup>53</sup>

The CUA is the result of a referendum action by the people of California and was further implemented in 2003 in specificity by the California legislature.<sup>54</sup> If Dewey is correct, the CUA reflects the values of the voters of California and the legislature.

Subsection (b)(1)(A) of the CUA sets forth one of its main purposes, which is to preserve the *right* of seriously ill Californians to procure and use marijuana to assist in the treatment of their ailments as recommended by a licensed physician.<sup>55</sup> The values that Subsection (b)(1)(A) evinces are

a specific application of his social-value theory to legislators and policy-makers, but instead focused his attention on making sense of the essence of public life and democracy as a community.

<sup>49</sup> *State Policy*, MARIJUANA POLICY PROJECT (Mar. 12, 2018, 9:01 AM), <https://www.mpp.org/states/>.

<sup>50</sup> *See, e.g.*, *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 760-61 (2013) ("The sole effect of the statute's substantive terms is to exempt specified medical marijuana activities from enumerated state criminal and nuisance statutes."); *see also* *Beek v. City of Wyoming*, 495 Mich. Appt. Ct. 1 (2014).

<sup>51</sup> Cal. Health & Safety Code § 11362.5 (2016).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 2003 Cal. Stat. Ch. 875.

<sup>55</sup> Cal. Health & Safety Code § 11362.5(b)(1)(A) (West 2016); *see also* [Bill Analysis Report of

illustrative of the values reflected by the entire CUA. It is easy to conceive of a possible situation that the California voters and legislature deemed best addressed by placing health care decisions in the hands of the people most affected by such decisions: the patients themselves.<sup>56</sup> Popular sentiment in the months leading up to the vote on the CUA reflected an attitude favoring protecting the rights of individuals to make their own medical decisions.<sup>57</sup> The protection of one's personal freedom to make significant healthcare decisions with the advice and recommendation of one's doctor indicates that individual liberty is a value that the people of California and the California legislature took into consideration when they voted in favor of the CUA. Related to this point is a rejection of paternalism to the extent that Subsection (b)(1)(A) acknowledges that the decision to use medical marijuana to treat a patient's illness is a decision should be reserved to that patient and their doctor, rather than to the public.

In this context, the problem perceived by the California voters in approving Proposition 215 was the foreclosure of a valid health care option by the federal government. The facts surrounding the situation were such that California citizens suffering from cancer and other serious illnesses were being prevented from utilizing a safe and effective drug to treat their condition by the federal government.<sup>58</sup> California voters determined that the most conducive manner of resolving the problem they perceived was to allow California patients to exercise their health care options by undergoing a course of action that decriminalizes the possession and use of medical marijuana for patients suffering from qualifying conditions. The initiative process allowed California voters to instruct their lawmakers to listen to their values and make policy accordingly.

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SB 420 by CA Senate Health and Human Services Committee, <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml>] and David Ferrell & Dan Weikel, *High Emotions: Measure's Passage Stirs Strong Support and Harsh Criticism*, L.A. TIMES, Nov. 7, 1996. The main proponents of Proposition 215 were seriously ill patients who relied on marijuana to directly treat the symptoms of their ailments or used it to mitigate the harsh side effects of their prescribed medications. The nature of the popular initiative process in California left the CUA in need of legal clarification, which was accomplished by the California legislature in 2003 with SB 420 (Medical Marijuana Program Act). SB 420 sought to provide a more detailed legal framework for medical marijuana to proceed under in California than was provided by Proposition 215.

<sup>56</sup> Eric Bailey, *6 Wealthy Donors Aid Measure on Marijuana*, L.A. TIMES, Nov. 2, 1996, at 18. Arguments in favor of voting for Proposition 215 were seen very poignantly in T.V. commercials aired in California prior to the 1996 election. Such commercials featured depictions of seriously ill cancer patients and survivors who purposed to use marijuana to treat their illnesses.

<sup>57</sup> See note 55 *infra*.

<sup>58</sup> David Ferrell & Dan Weikel, *High Emotions: Measure's Passage Stirs Strong Support and Harsh Criticism*, L.A. TIMES, Nov. 7, 1996, [http://articles.latimes.com/1996-11-07/news/mn-62202\\_1\\_high-emotions](http://articles.latimes.com/1996-11-07/news/mn-62202_1_high-emotions).

California legislators explicitly considered and reinforced the values demanded by the public in the original initiative when drafting a fix to the law in 2003, which would eventually be known as the Medical Marijuana Program Act (MMPA)<sup>59</sup>. In the years following the 1996 referendum, law enforcement officials had difficulty distinguishing between citizens who were treating legitimate and serious health conditions with medical marijuana and those citizens who were falsely claiming they had serious medical problems as a pretext to obtain and use marijuana without fear of criminal prosecution under state law.<sup>60</sup>

The California state senators who drafted the MMPA and a majority of the rest of the legislators through their affirmative votes agreed that the problem was one that needed to be fixed.<sup>61</sup> The majority of the California legislators agreed on the text of Senate Bill 420<sup>62</sup> and included a statement of purpose for the bill, which is equivalent to a set of agreed upon facts discussed in Part II, above.<sup>63</sup> The California legislature found that the means most conducive to addressing the problem that they perceived would be to adopt an identification card program in order to better identify qualified medical marijuana patients and ensure they would not be unnecessarily subjected to criminal prosecution. The value that thus emerges from the California legislature's actions is that the CUA, as a matter of state policy, was worth obeying and expanding upon through legislative action. The legislature enshrined the will of the California voters who supported the CUA by undertaking the deliberative policy-making process and overlaying their own policy values on top those of the voters of California. This is shown by the legislative history surrounding Senate Bill 420.<sup>64</sup>

Michigan's medical marijuana program followed a similar trajectory as in California, though the legislature guided the legalization process in Michigan. Michigan's medical marijuana legalization measure was intended to protect medical marijuana users from criminal prosecution and civil penalty and to create an administrative system that regulates the cultivation, sale, distribution, and use of medical marijuana by qualifying

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<sup>59</sup> Cal. Health & Safety Code § 11362.7 *et seq.* (West/Deering 2018).

<sup>60</sup> Bill Analysis of Senate Bill 420, CALIFORNIA SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, April 9, 2003. "Proposition 215 made a clear policy statement regarding access to medical marijuana, but left to the Legislature and courts responsibility for many key legal definitions, design of a medical marijuana distribution system, guidance to law enforcement officers, and protection of physicians, caregivers, and patients."

<sup>61</sup> Legislative History at 289, California Senate 2003-04 Session. SB 420 gathered 24 "Aye" votes compared to 14 "No" votes.

<sup>62</sup> 2003 Cal. Stat. c. 875, §1.

<sup>63</sup> *See supra* note 34.

<sup>64</sup> Bill Analysis of Senate Bill 420, CALIFORNIA SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, April 9, 2003.

patients.<sup>65</sup> The wording of the measure is similar to California's Proposition 215 insofar that it does not, on its face, create a *right* to access medical marijuana, but rather a defense against adverse legal action predicated on the basis of a marijuana patient or caregiver's cultivation, possession, and use of medical marijuana.<sup>66</sup> In this way, the Michigan Medical Marijuana Program is a system of negative rights and resembles Proposition 215.

Giving patients access to medical marijuana, and thus the creation of negative rights, was seen by Michigan voters as the means most conducive to accomplishing a perceived end-in-view: granting seriously ill Michigan citizens, with the advice of their physicians, the discretion to choose medical marijuana as an option to treat their ailments.<sup>67</sup> [Re work this last sentence to reflect that the focus was more on access, rather than negative rights.] The value that arises from the adoption of the Michigan Medical Marijuana Program is similar to the value that motivated California voters to adopt Proposition 215: If seriously ill patients in Michigan are to have the freedom to choose effective medication for the treatment of their illnesses, then the state of Michigan ought to immunize medical marijuana patients from criminal liability under state law. The declaration of purpose for the Michigan Medical Marijuana Program reflects this view.<sup>68</sup>

As stated above, state medical marijuana policy in California and Michigan was crafted by the people of each respective states.<sup>69</sup> The citizens of each state decided that seriously ill patients with ailments that are treatable with marijuana ought not to be prosecuted and they acted upon their decision by conferring negative rights upon medical marijuana patients. The stated declarations of purpose of the Compassionate Use Act and the Michigan Medical Marijuana Programs each reflects what Dewey terms a "negative end-in-view," which is the employment of means that "inhibit the operation of conditions producing the obnoxious result" and that "enable positive conditions to operate as resources and thereby to effect a result which is, in the highest possible sense, positive in content."<sup>70</sup> A Deweyan characterization of the Compassionate Use Act and the Michigan

<sup>65</sup> MICH. COMP. LAWS ANN. § 333.26424(a) (West 2008).

<sup>66</sup> *Id.*

<sup>67</sup> MICH. COMP. LAWS ANN. § 333.26422 (West 2008). "The people of the State of Michigan find and declare that...changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marijuana."

<sup>68</sup> *Id.*

<sup>69</sup> The people directly expressed their values in California, and the California legislature adopted and expanded upon those values. Michigan citizens expressed their values indirectly through their state legislators.

<sup>70</sup> THEORY OF VALUATION, *supra* note 29, at 48.



Medical Marijuana Program is that the prosecution of seriously ill medical marijuana patients for possession of marijuana that treats their illnesses (“obnoxious result”) is “inhibited” by affording a freedom from prosecution for qualifying medical marijuana patients in order to effect greater access for medical marijuana patients to treatment of their illnesses (“positive condition.”) Simply put, the voters of California, Michigan, and every other state with similarly worded medical marijuana voter referendums statutes valued the negative freedom of medical marijuana patients in those states, just as the chess team valued playing the game to win.

### B. Recreational Marijuana laws

Colorado voters approved Amendment 64 on November 6th, 2012.<sup>71</sup> This measure amends the Colorado constitution and is a mandate to the Colorado legislature to formulate and implement a regulatory system to permit and regulate recreational marijuana cultivation, distribution, and use in Colorado.<sup>72</sup> Colorado’s legislature passed implementation legislation soon after the voters approved Amendment 64.<sup>73</sup>

Under Colorado’s legalization measure, a person over the age of twenty-one may possess up to one ounce of marijuana, and may grow up to six marijuana plants, only three of which may be flowering at one time.<sup>74</sup> Possession of more than the statutorily permitted amount is still illegal under state law, and it is a felony to remove marijuana from Colorado outside of its borders.<sup>75</sup> Marijuana use is not permitted in public areas, and property owners are free to prohibit marijuana from their premises.<sup>76</sup> The legalization measure also leaves unaffected the ability of employers to decline to hire or terminate employees who consume marijuana.<sup>77</sup>

The proponents of legalization of marijuana for recreational use implicitly argued that a statewide system that taxes and regulates the recreational use of marijuana has more social utility than a system that criminalizes the cultivation, possession, distribution, and use of marijuana.<sup>78</sup>

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<sup>71</sup> Sadie Gurman, *Coloradans Say Yes to Recreational Use of Marijuana*, DENVER POST (Nov. 6, 2012, 10:07 AM), <http://www.denverpost.com/2012/11/06/coloradans-say-yes-to-recreational-use-of-marijuana/>.

<sup>72</sup> COLO. CONST. ART. XVIII, § 16(2).

<sup>73</sup> 2013 COLO. SESS. LAWS 1826.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* See also COLO. CONST. ART. XVIII, § 16(6).

<sup>77</sup> *Id.*

<sup>78</sup> Barry Petersen & Phil Hirschhorn, *Colo. Bid to Legalize Marijuana Leads in Polls*, CBS NEWS (Oct. 14, 2012, 10:01 PM), <http://www.cbsnews.com/news/colo-bid-to-legalize-marijuana-leads-in-polls>. Proponents of recreational legalization in Colorado argued that legalization and regulation of marijuana would result in a substantial increase in tax revenue for the state and would ultimately reduce the influence of illegal drug cartels within the state.

This view ultimately prevailed, though because local governments have the discretion to adopt policies specific to their jurisdiction, the statewide policy of legalization of marijuana did not translate to a statewide policy of *access* to legalized marijuana. The statute features a specific provision that preserved the rights of local governments to restrict and ban the sale of recreational marijuana from their jurisdictions.<sup>79</sup> Retaining authority on the part of local governments in Colorado results in local governments having different policies with respect to the commercial sale and distribution of recreational marijuana. For example, the city of Denver allows the sale of recreational marijuana in accordance with Proposition 64<sup>80</sup>, but the city of Monument has banned all non-medical marijuana sales through excluding such uses from its zoning ordinance.<sup>81</sup> Allowing localities to determine whether they will prohibit marijuana dispensaries permits local authorities to guide local policy and puts local authorities in the best position to craft the policies that will most benefit these communities. If given the authority, local policymakers could conclude that the community is not benefited by the presence of a marijuana dispensary and that local goals are best served by prohibiting marijuana dispensaries from the community.

The fact that local governments in Colorado are permitted to set their own policy with respect to recreational marijuana evinces a value judgment to that effect by Colorado citizens when Proposition 64 was enacted. This value judgment is borne out through express reservations of authority for local governments to outright prohibit the operation of marijuana cultivation facilities, marijuana retail operations, and marijuana testing facilities. Essentially, Coloradan voters and lawmakers faced a situation in which a large portion of Coloradans did not favor the legalization of marijuana for recreational purposes, notwithstanding Proposition 64's popularity prior to its passage.

When considering whether to amend the state constitution to allow local governments to decide to prohibit recreational marijuana, Colorado voters implicitly expressed the normative-value statements, "If we want to respect the wishes of those Coloradans who are in favor of legalizing marijuana for recreational purposes, then we ought to vote in favor of legalization state-wide. If we want to respect the wishes of those Coloradans who are not in favor of legalizing marijuana for recreational purposes, then we ought to allow local governments to 'opt-out' of legalization by permitting such local governments to prohibit recreational marijuana sales

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<sup>79</sup> Colo. Const. art. XVIII, § 16(6).

<sup>80</sup> See *supra* note 11.

<sup>81</sup> See *supra* note 20.

and cultivation from their jurisdictions.”<sup>82</sup>

These dual normative-value statements explain the reservation of local authority contained in Proposition 64 and its implementation legislation. If residents of a locality feel strongly about their opposition to recreational marijuana in their jurisdiction, then such residents are empowered by the constitution of the state of Colorado to lobby for an ordinance that prohibits recreational marijuana sales and cultivation from that locality and otherwise comports with state law. Local marijuana policy is also guided by normative values.

#### Part IV: Values, Local Ordinances, and Marijuana

##### A. Medical Marijuana

In 2010, two years after the passage the Michigan Medical Marihuana Program by the Michigan legislature in 2008, the City of Wyoming, Michigan enacted an ordinance that purported to exclude the cultivation of marijuana as a permitted use in all zoning designations in the city.<sup>83</sup> This meant that any cultivation of medical marijuana within the city of Wyoming would be a zoning code violation that would subject the offender to civil penalties by the city.<sup>84</sup> As soon as it was passed the ordinance was challenged in court by a medical marijuana patient who objected to the assessment of civil penalties for growing medical marijuana for his personal use in his home.<sup>85</sup> The Michigan Supreme Court ultimately struck down the Wyoming ordinance, reasoning that the Michigan Medical Marihuana Program preempts any state or local laws that provide for penalties for the cultivation of medical marijuana in a manner inconsistent with the Michigan Medical Marijuana Program.<sup>86</sup>

The adoption of local land use controls that restricted the availability of medical marijuana by the city of Wyoming shows a value judgment made by the Wyoming City Council and its constituents that allowing medical marijuana access in Wyoming would have a detrimental effect on the city. This value judgment is derivable through Dewey’s method of valuation. The situation perceived by the Wyoming city council and the citizens of Wyoming was that medical marijuana would be distributed in the city

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<sup>82</sup> “If communities don’t want this [Proposition 64], then it shouldn’t be forced down their throats. At the same time, those who want it shouldn’t be stopped.” The Cannabist, *Colorado cities and towns take diverging paths on recreational pot*, DENVER POST (December 29th, 2014), <http://www.denverpost.com/2014/12/29/colorado-cities-and-towns-take-diverging-paths-on-recreational-pot/>.

<sup>83</sup> WYOMING, MICH. CODE OF ORDINANCES § 90-66 (2010); *see also* *Beek v. City of Wyoming*, 495 Mich. App. Ct. 1, 5-6 (2014).

<sup>84</sup> *See Beek*, 495 Mich. App. Ct. at 6.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 24-25.

pursuant to the Michigan Medical Marihuana Program. The facts surrounding the situation, as perceived by the city council, was that 1) medical marijuana is a threat to the health, safety, and public welfare of the residents and businesses of Wyoming, Michigan and 2) because the city council believed that the Michigan Medical Marihuana Program was contrary to federal law and invalid.<sup>87</sup> Given the situations and these perceived facts, the means most conducive to resolving the situation was to prohibit medical marijuana dispensaries from all Wyoming zoning classifications. This choice of means, if left unchallenged, would have the effect of removing commercial access to medical marijuana from Wyoming and forcing medical marijuana patients in Wyoming to travel to other municipalities that allow distribution of medical marijuana to obtain treatment for their symptoms.

The City of Riverside in California passed an ordinance that made operation of a medical marijuana dispensary or distribution center a prohibited use of land and a public nuisance within the city of Riverside.<sup>88</sup> Riverside, like Wyoming, Michigan, further declared as a nuisance any use that is prohibited by state or federal law.<sup>89</sup> Riverside's prohibition against the operation of medical marijuana dispensaries in its jurisdiction was justified by the city government on the grounds that medical marijuana dispensaries are illegal under federal law and are "indecent, offensive to the senses, and interfere with the use and enjoyment of property[.]"<sup>90</sup> By enacting this ordinance, the Riverside city government indicated a belief that medical marijuana dispensaries were public nuisances that needed to be kept out of the city.

Riverside, believing that medical marijuana dispensaries engaging in collective distribution of medical marijuana to patients is a public nuisance, found that the means most conducive to ensuring that medical marijuana dispensaries could not locate within Riverside would be an outright prohibition of dispensaries through the zoning ordinance. Riverside's end in view was to prevent the proliferation of medical marijuana dispensaries, which many of its citizens and lawmakers saw as a flagrant violation of

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<sup>87</sup> "[T]he City attempted to take into consideration how the provisions of this Act would affect the health, safety and welfare of its citizens in both residential neighborhoods and commercial and industrial zones." Def.'s Br. 1 on Appeal, WL 6847543.

<sup>88</sup> RIVERSIDE, CAL. MUNICIPAL CODE §§ 19.150.020-19.150.020(A). "Medical Marijuana Dispensary" is excluded from the permitted uses in every zoning classification set forth by the Riverside zoning code. This means that it is unlawful to build or operate a medical marijuana dispensary inside the city of Riverside.

<sup>89</sup> *Id.*

<sup>90</sup> Def.'s Mot. Prelim. Inj. 1, WL 9037950.

federal law, without displacing state policy. A method by which the city of Riverside could attain this end would be to utilize an avenue of traditionally local authority, zoning and land use ordinances, to enact a ban on the siting of medical marijuana dispensaries in the city of Riverside.

The cities of Wyoming and Riverside expressed strikingly similar values in response to medical marijuana legalization efforts in their respective states. They are examples of local values forming in response to expressed state values. The local values at play in Wyoming and Riverside are conceivably akin to the statement, “We, as a community, understand that medical marijuana has been legalized on a state level. We do not want medical marijuana being sold in our city because we believe that marijuana is illegal at the federal level and because it is a nuisance.” Such values were challenged and the validity of the land use regulations that express such values were litigated in state courts, as seen in *Beek v. City of Wyoming*<sup>91</sup> and *City of Riverside v. Inland Empire Patients Health and Wellness Center*.<sup>92</sup> These cases, and the extent to which they reflect the supremacy of state values over local values, will be expanded upon in Part V, below.

## B. Recreational Marijuana

At the time of writing, recreational marijuana legalization and regulation by states like Colorado and California continues to stir controversy over policy values. As with medical marijuana, despite general state policies in favor of legalization, value judgments about the effects of marijuana spur the adoption of local land use regulations for recreational marijuana uses. The distance requirements contained in the Denver Zoning Code and Retail Marijuana Code reflect a desire to separate marijuana from certain “vulnerable” uses. Marijuana dispensaries and cultivation facilities are prohibited from locating near schools, drug and alcohol rehabilitation centers, daycares, and other marijuana businesses.<sup>93</sup> Such regulations indicate a perception that marijuana poses a threat or is obnoxious to the above-mentioned uses.

Denver’s city council, in amending their zoning and recreational marijuana ordinance to account for the legalization of marijuana on a state level, considered the potential for “vulnerable” persons such as children and drug addicts and certain neighborhoods to be exposed to marijuana to be a problem.<sup>94</sup> The city council conceivably concluded that the course of action

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<sup>91</sup> *Beek*, 495 Mich. App. Ct. at 1.

<sup>92</sup> *Id.*

<sup>93</sup> *City of Riverside v. Inland Empire Patients Health and Wellness Center*, 56 Cal. 4th 729 (2013).

<sup>94</sup> Jeremy P. Meyer, *Denver City Council begins discussing big pot issues: taxes, zoning*, DENVER POST (Aug. 18th, 2013), <http://www.denverpost.com/2013/08/18/denver-city-council-begins-discussing-big-pot-issues-taxes-zoning/>. Some on the Denver city council specifically wanted zoning

most conducive to resolving this problem would be to impose the substantial spacing requirements discussed in Part I, *infra*. Applying Dewey's theory of valuation discussed in Part II to this set of facts results in the conclusion that Denver's city council regards marijuana as a detrimental land use.

Denver's city council, when formulating its policy that it was going to adopt with respect to regulating recreational marijuana dispensaries within its borders, engaged in deliberation pursuant to Dewey's theory of valuation. Every member of the Denver city council weighed the applicable facts as they existed at the time, and they weighed the consequences that their proposed courses of action would have on themselves and their constituents.<sup>95</sup> Having done so, the Denver city council determined that the means most conducive to ensuring that sensitive land uses are protected from marijuana-related land uses would be to insert a spacing requirement into the zoning code.<sup>96</sup> The city council could conceivably conclude that such a spacing requirement would be sufficient to preserve the ability of marijuana-related land uses to locate within Denver, but would also ensure that marijuana-related land uses would not threaten sensitive uses.

#### Part V: State Values are Superior to Local Values and Ought to Prevail

The tension between values reflected through legislation at state and local levels with respect to marijuana land use controls is well reflected in recent case law. As discussed in Part I, the cities of Riverside, California and Wyoming, Michigan each passed ordinances, through their respective zoning procedures, banning the siting of marijuana dispensaries within their borders.<sup>97</sup> Aggrieved citizens in each city brought suits or appeals challenging the validity of such zoning classifications based upon arguments that state policy in favor of decriminalization of medical marijuana precluded the cities from adopting ordinances that prohibited marijuana dispensaries.<sup>98</sup> The state supreme courts of California and Michigan issued divergent decisions: the California Supreme Court upheld

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buffer zones that would limit the placement of marijuana dispensaries to a select few sites in Denver, mostly near the edges of the city.

<sup>95</sup> An extremely important fact existing at the time that Denver's city council formulated its zoning policies with respect to regulating recreational marijuana was the fact that Colorado voters, a great number of whom living in Denver, had approved the legalization of recreational marijuana. This created a mandate in favor of permitting, while also regulating, the provision and consumption of recreational marijuana inside Denver's borders.

<sup>96</sup> *See id.*

<sup>97</sup> *Beek v. City of Wyoming*, 495 Mich. App. Ct. 1 (2014); *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729 (2013).

<sup>98</sup> *Beek*, 495 Mich. App. Ct. at 6; *Inland Empire*, 56 Cal. 4th at 738.

the city of Riverside's zoning classifications, while the Michigan Supreme Court invalidated the city of Wyoming's zoning classifications.<sup>99</sup>

The discrepancies between the California and Michigan Supreme Courts are ultimately describable in terms of meta-values. Meta-values are second-order values, meaning values about values. Since meta-values are second-order values, Dewey's method of valuation, discussed in Part II above, controls their derivation. A judgment that one set of derived values ought to be adopted or followed over another set of derived values is itself a meta-value. An example of a meta-value is Dillon's Rule, which constrains the powers of a local government in the absence of an express grant of power by a state. Dillon's Rule is a value judgment prioritizing the reserved power of a state under the United States Constitution over the autonomy of local governments. Essentially, Dillon's Rule places a premium on state power over municipal autonomy.

Applying Dewey's method of valuation to deriving the meta-value of Dillon's Rule, states have an end-in-view of creating local governments to assist the state government in governing its populace. Given that the existence of cities is not contemplated by the United States Constitution, and that states reserve power not explicitly and exclusively held by the federal government, states may logically conclude that the means most conducive to creating local governments is for states to create local governments by statute. At this point, states have a choice to either grant local governments expansive powers or to grant local governments circumscribed and limited powers.<sup>100</sup>

If states choose to adopt a set of values that confer broad, expansive authority to local governments, to the point where local governments enjoy all power that is not explicitly denied to them, then local governments have the potential to pursue interests that are antithetical to those of the state government. If, by contrast, state governments adopt values that grant local governments a narrowly defined and exclusive set of powers, then the local governments have much less license to buck state authority and pursue local interests at the expense of state interests. The latter choice of values is Dillon's Rule and is more conducive to achieving the end-in-view of creating local governments to assist the state government in governing its populace and is therefore the set of values that ought to be adopted. In the event one believes that local governments are better equipped to govern a state's population than the state government, then home rule, rather than

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<sup>99</sup> *Beek*, 495 Mich. App. Ct. at 19-20; *Inland Empire*, 56 Cal. 4th at 762.

<sup>100</sup> See Part I(D) and accompanying discussion above. When deciding the extent of autonomy they will allow local governments, states must inevitably choose between Dillon's Rule or home rule. Essentially, states are choosing the quality and quantity of values that local governments will be able to enact as policy for themselves.

Dillon's Rule, would be more conducive to achieving that end.

The California Supreme Court disagreed in its *Inland Empire* opinion with the notion that local authority ought to be circumscribed by broader state authority in 2015 when it upheld Riverside's zoning classifications that excluded marijuana dispensaries from uses permitted in Riverside.<sup>101</sup> The Court reasoned that California's Medical Marijuana Program did not confer positive rights to possess, cultivate, or sell medical marijuana.<sup>102</sup> Rather, according to the Court, California's Compassionate Use Act and its Medical Marijuana Program did not operate to displace local home rule discretion to completely prohibit the placement of a marijuana dispensary in their jurisdictions through land use regulations.<sup>103</sup> As discussed above in Part III, California is a home rule state, which means that local governments in California possess all powers not explicitly withheld from them by the Constitution and statutes of the state of California.

California's embrace of home rule evinces a meta-valuation in favor of granting local governments broader authority because they are better suited to governing their populations than the state government. Operating behind the scenes in the California Supreme Court's opinion is the very same meta-value. Home rule, like Dillon's Rule, is ultimately a meta-value held at the state level that defines local government authority, thus local values are given importance by and are subject to state meta-values, even when they do not conflict.

In contrast to the California Supreme Court, the Michigan Supreme Court invalidated the city of Wyoming's prohibition on marijuana dispensaries with its *Beek* decision.<sup>104</sup> The *Beek* Court reasoned that state policy in favor of decriminalizing medical marijuana and establishing a statewide Medical Marijuana Program to regulate medical marijuana displaced local policies that sought to restrict or prohibit access to medical marijuana.<sup>105</sup> As noted above, Michigan's Medical Marijuana Program closely resembles California's Medical Marijuana Program in many respects, including the fact that neither program grants affirmative rights to

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<sup>101</sup> "[T]he MMP's limited provisions neither expressly nor impliedly restrict or preempt the authority of individual local jurisdictions to...prohibit collective or cooperative medical marijuana activities within their own borders." *Inland Empire*, 56 Cal. 4th at 762.

<sup>102</sup> "[T]hey [the Compassionate Use Act and Medical Marijuana Program Act] do not establish a comprehensive state system of legalized medical marijuana; or grant a 'right' of convenient access to marijuana for medical use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries." *Id.* at 762-63.

<sup>103</sup> *Id.*

<sup>104</sup> *Beek*, 495 Mich. App. Ct. at 1.

<sup>105</sup> *Id.* at 24-25.



possess, cultivate, or sell medical marijuana to patients or caregivers, but rather afford protection from civil or criminal penalties.<sup>106</sup> The Michigan Supreme Court's invalidation of Wyoming's zoning ordinance purportedly turned on the construction of the provision of Michigan law that protects medical marijuana patients and caregivers from being subject to "penalty in any manner."<sup>107</sup> The Michigan Supreme Court construed "penalty in any manner" to include penalties for violation of zoning ordinances arising from siting medical marijuana dispensaries in municipalities that exclude medical marijuana dispensaries as permitted uses.<sup>108</sup> Thus, the Wyoming ordinance was invalid because it created local civil penalties for placing medical marijuana dispensaries that were otherwise valid under the Michigan Medical Marijuana Program.<sup>109</sup>

The *Beek* decision announced that the Michigan Supreme Court was willing to override local land use ordinances to effectuate access to medical marijuana that comports with the Michigan Medical Marijuana Program. Thus, the Michigan Supreme Court adopted meta-values that prioritize state policy over local policy, at least with respect to medical marijuana. In light of the discussion regarding California's meta-values above, the *Beek* court's value judgment makes sense and is in harmony with Dewey's valuation method.

*Inland Empire* and *Beek* illustrate the fact that meta-values explain the relationship between state and local governments. Both cases show that state meta-values, whether set by the state constitution or by statute, delineate the amount of power that local governments have. In this manner, meta-values also set the stage for the next showdown in the ongoing marijuana policy battle taking place in the United States. While states operate their medical and recreational marijuana programs, they do so in violation of federal law. The ongoing violation of federal law by such states leaves the medical and recreational marijuana businesses vulnerable to enforcement actions by the Drugs Enforcement Agency under federal law.

As legalization on the federal level becomes less likely with the presidency of Donald J. Trump as President of the United States and Republican leadership in the U.S. Congress, the states will continue to rise in prominence as the principal drivers of innovation with respect to developing public policy regarding marijuana. Attorney General Jeff Sessions, by rescinding a Justice Department policy that shielded marijuana enterprises from federal prosecution in states that legalized marijuana, re-ignited a marijuana policy battle between the federal government and states

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<sup>106</sup> *Id.* at 23-24.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

that legalized marijuana in any form.<sup>110</sup> Dewey's theory of valuation will be ever-present during every stage of the policy fight, providing justifications for all sides of the legalization issue.

#### Part VI: Conclusion

Every individual's values are unique to that person. The values held by a community, as a whole, are unique to that community because that community is comprised of individuals who themselves hold unique values. The differences between individual and community values are mediated by meta-values, which are values about values. Meta-values can take many different forms, from placing a premium on democratic processes (mediation of individual values) to placing a premium on federalism, home rule, and local autonomy (mediation of community values). Dewey's theory of valuation explains the process of deriving individual and community values, as well as deriving meta-values. This fact is illustrated by individual and community values with respect to the legalization of marijuana for medical and recreation purposes. As shown, different communities react differently, in accordance with their values, to the issue of marijuana legalization. Meta-values, as second-order values, should be accorded more weight than first-order values because they govern the creation and interaction of values.

As marijuana legalization efforts progress in the United States in the post-Obama era, there will likely be a renewed focus on state and local governments and the policies that they enact in response to legalization efforts nationwide. The values held by citizens at the state level and the values held at a local level will inevitably collide. Meta-values will be the mediating factor that decides whether local values will be preempted by state or federal values. A discussion of Dewey's theory of valuation, as applied to the creation of criminal statutes, would assist in clarifying the derivation of values and meta-values in the criminal aspect of the law.

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<sup>110</sup> This Note does not address the meta-value that is arguably present in Article VI of the United States Constitution. One could argue that the existence of the Supremacy Clause in the Constitution shows a meta-value held by the founders of the United States that federal policies should always supervene state policy.