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Incumbent Landscapes, Disruptive Uses: Perspectives on Marijuana-Related Land Use Control

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I. INTRODUCTION

As some political jurisdictions move toward marijuana legalization, decriminalization, or some other mixed form of tolerance for marijuana-related activities,¹ the properties associated with these activities will encounter myriad legal issues. Although some of these issues might be unique to pot-related properties,² most of the issues are both predictable and often old, tested problems simply applied to new, yet disruptive circumstances. Hence, this Article will often evoke the tune that “everything old is new again.”³

Regulatory responses, neighborhood disputes, permit battles, and opposition coalitions are all predictable both as a matter of logical analysis in light of legal standards but also, very importantly, due to

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1. See Gina K. Grimes & Morris C. Massey, *Medical Marijuana: Differences Among States’ Regulatory Frameworks and Land Use and Zoning Regulations*, PROB. & PROP., Nov./Dec. 2015, at 45 (describing the differences between the 23 states and the District of Columbia with some form of legalized marijuana use (including two with recreational use legalized) over types of regulation and how much regulation is state-based versus how much is done by localities).

2. “Pot” is a common term used for “marijuana of any sort.” *Pot*, URBAN DICTIONARY (June, 16, 2002), <http://www.urbandictionary.com/define.php?term=pot>.

3. Peter Allen & Carole Bayer Sager, *Everything Old Is New Again*, on Continental American (A & M Records 1974).

the lessons of history.⁴ It is useful then to borrow yet another phrase—for pot and property, “what’s past is prologue.”⁵ In that light, this Article will use history as a means of identifying some of the precursors to pot-related property law conflicts. One thing is for sure, we must know and evaluate how property law has dealt with similar disruptive forces in the past if we are to understand how it will deal with pot as the new disruptor and as one of land use law’s newest objects of analysis.⁶

This Article is entirely agnostic with respect to the issue of whether we should or should not decriminalize, legalize, or otherwise increase legal tolerance for marijuana or any other drugs. One need not discuss these merits to process what property problems and possibilities might emerge when any of those law-relaxation efforts are enacted. But, as society seems to increasingly tolerate marijuana, we undoubtedly will encounter more pot-related property uses in need of analysis.⁷ We will be faced with both legal and political regulatory choices as we attempt to integrate the uses of properties associated with marijuana—for use, growing, cultivation, processing, distribution, dispensing, sale, kitchens (for the preparation of edible products), and business offices—with other competing and coordinating uses of the places where such pot-related properties exist.⁸

4. Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLAN. & ENVTL. L. NO. 8, 3, 4–6 (Aug. 2010) (surveying licensing and permitting requirements for marijuana land uses); Grimes & Massey, *supra* note 1, at 46 (explaining the variety of state and local land use regulations in place for marijuana-related properties, including bans, limits on the number of dispensaries, restrictions on ownership, and location restrictions). One author draws the same line between temporally distant regulatory frameworks, but focuses his comparative efforts on the effectiveness of “localism” rather than comparative analysis of land use options. See Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 724 (2015) (“It is, of course, far too early to gauge the impact of local marijuana regulations. But we do have more than one century worth of experience with local alcohol regulations.”). Mikos is primarily focused on alcohol as a case study on whether localities should have the authority to regulate the distribution of the good rather than on the types of land use controls that can be used to so regulate. See *id.* at 725 (focus of the article is on “who should decide” how to regulate marijuana).

5. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sec. 1; see also ALDOUS HUXLEY, *THE DEVILS OF LOUDUN* 259 (Harper ed. 1952) (“The charm of history and its enigmatic lesson consist in the fact that, from age to age, nothing changes and yet everything is completely different.”).

6. GEORGE SANTAYANA, *THE LIFE OF REASON, OR THE PHASES OF HUMAN PROGRESS: REASON IN COMMON SENSE* 284 (Scribner’s 2d ed. 1922) (“Those who cannot remember the past are condemned to repeat it.”); cf. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 1 (1964) (“although history never quite repeats itself, and just because no development is inevitable, we can in a measure learn from the past to avoid a repetition of the same process.”).

7. Grimes & Massey, *supra* note 1, at 47 (counseling that real estate practitioners need to become knowledgeable about the marijuana regulatory framework).

8. Michael Polson, *Land and Law in Marijuana Country: Clean Capital, Dirty Money, and the Drug War’s Rentier Nexus*, 36 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 215, 220 (Nov. 2013) (exploring ways in which “marijuana as a land use

This Article will examine the tensions from a number of levels, including: in Part II, pot-related property usage as a vehicle of disruption; in Part III, the regulation of pot-related properties through judicial land-use controls such as nuisance; through private land-use controls and consensual agreements; and through public land-use controls and coercive enforcement, including the distinctive characteristics of zoning, permitting, and licensing regimes; in Part IV, the lessons from interest group theory about the coalitions that will be formed and the political dynamics that will surround property law developments spurred specifically by pot-related issues regarding property uses; and finally in Part V, how pot changes a “place,” “space,” or the community as a whole.

One potentially deep wrinkle for even successful state marijuana reforms emerges from the Controlled Substances Act,⁹ which still considers marijuana a Schedule 1 drug, and, therefore, federal law still prohibits the possession, importation, distribution, and sale of marijuana.¹⁰ Yet, more than twenty-three states and the District of Columbia have some form of relaxed marijuana laws moving away from criminalization.¹¹ The fact that current U.S. Department of Justice policy favors exercising discretionary power against federal enforcement of federal law in states that have relaxed marijuana laws¹² does not change the statutory determination of federal “illegality.”

Thus, any study of the law’s reaction to new marijuana-related land uses necessarily involves complications associated with the manner in which we define “legal” or “lawful” (or, if you prefer, how we define “illegal” or “unlawful”). At their core, such determinations can have dramatic property-related effects. Many leases, covenants, defeasible fees, zoning ordinances, and nuisance elements—to name a few—often include such terms or depend on findings related to such terms for their application or enforceability. For instance, it is often said that one cannot lease property for an illegal purpose. Lease terms often prohibit lessees from conducting illegal activities. Illegality may be the

competes with other potential land uses”); see also Seth M. Low & Denise Lawrence-Zúñiga, *Locating Culture, in THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE* 19 (Seth M. Low & Denise Lawrence-Zúñiga eds., 2003) (“Urban environments provide frequent opportunities for spatial contests because of their complex structures and differentiated social entities that collude and compete for control over material and symbolic resources.”).

9. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801–971, § 812(c), Sched. I(c)(10) (2012).

10. § 812(c), Sched. I(c)(10).

11. Grimes & Massey, *supra* note 1, at 45; see also Mikos, *supra* note 4, at 719 (“More than 20 states have already legalized marijuana for some purposes under state law, and the number is sure to grow.”).

12. See, e.g., Memorandum for Selected U.S. Attorneys from Deputy Attorney Gen. David Ogden to U.S. Attorneys (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> (“provid[ing] clarification and guidance to federal prosecutors in states that have enacted laws authorizing the medical use of marijuana”).

very express reason that a real covenant is broken or a defeasible fee undone. Illegal activities may immediately violate zoning laws as written. Illegal activities may be nuisances per se in some jurisdictions.¹³ And, in many of these property forms, terms must be interpreted and enforced according to the original intentions of the parties or drafters. But, did such persons expect to fix the universe of “illegality” in a set time period as well or allow that term to be fluid? Even if the application of the “illegality” term in such property forms is fluid, there is still the problem that the federal government’s statutory mandate (imbued with the Supremacy Clause) has not changed. So, to complicate matters even further, if a state says marijuana is legal for state purposes, is it “legal” for all of these other property form purposes, especially when engaging with marijuana in a variety of ways on one’s land or in one’s business affairs is still illegal under federal law? While the substance of the term “illegal” is an interesting one to ponder, this Article will not address it further. Issues regarding the duty to enforce federal law, federalism, the Supremacy Clause, federal-state preemption, and similar concerns are also beyond the scope of this Article.¹⁴ Furthermore, this Article will not discuss intersections with criminal law, state preemption of local law, or the details of constitutional barriers to local land-use regulatory options to control marijuana-related uses.

II. INCUMBENT LANDSCAPES, LEGALITY INNOVATION, AND DISRUPTIVE USES

We can learn quite a bit about shifting land use policy—necessitated by the relatively radical introduction of previously unacceptable, indeed illegal, activities into the land use mix—through the lens of the emerging scholarship on theories of disruption and disruptive innovation.¹⁵

13. Salkin & Kansler, *supra* note 4, at 3 (explaining stance of one city (San Jose, California) that cultivation, sale and use of marijuana is a nuisance because it violates federal law). While Saxer recognizes that properly licensed retail liquor stores cannot generally be held as a nuisance per se, the same may not hold true for marijuana stores which, at least under federal law, are illegal. See Shelley Ross Saxer, “*Down With Demon Drink!™: Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*,” 35 SANTA CLARA L. REV. 123, 173 (1994) [hereinafter Saxer, *Strategies*] (“the lawful operation of a properly licensed retail liquor outlet cannot be considered a nuisance per se, ‘since that which the law authorizes to be done, if done as the law authorizes, is not such a nuisance.’ Therefore, in the typical land use nuisance case, the nuisance alleged is per accidents.”).

14. See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015) (analyzing the important and complex federal-state conflicts and federalism concerns associated with changes in marijuana laws).

15. Neil Katyal, *Disruptive Technologies and the Law*, 102 GEO. L.J. 1685, 1685 (2014) (“Disruption: In the past two decades, the concept has gone from theory, to buzz word, to the captivation of the popular imagination.”).

The theory of disruption, broadly understood, provides lessons for, and is applicable to, the introduction of new products, uses, entrants, or the like into an existing industry or environment where such introduction potentially threatens the continued viability or construction of existing industries or environments.¹⁶ Cortez for example, posits that “[d]isruption theory tells us that certain innovations can undermine existing products, firms, or even entire industries.”¹⁷

Joseph Bower and Clayton Christensen are credited with first introducing the idea of “disruptive technologies” into our business and economic discourse, explaining how new technologies that are dramatically different from existing ones can fundamentally alter the marketplace.¹⁸ Christensen, in particular, has refined the theory over the years by broadening its application to what he called “disruptive innovation,” a more expansive term acknowledging that business models and other market breakthroughs (in addition to technology) could also act as disruptive forces with similar effects and concerns.¹⁹ That moniker has been extended even more broadly to label these particular insights more simply as “disruption theory,” which, as Cortez explains, provides “explanatory power [that] extends to many [] products and industries [and] has inspired prolific writing in the business academy and now creeps into other disciplines.”²⁰

The story behind the move toward marijuana’s legality is a story of disruptive forces—to incumbent markets, to incumbent places, to the incumbent regulatory structure, and to the legal system in general which must mediate the battles between the push for relaxation of illegality and adaptation to a new normal and the push toward entrenchment, resilience for the status quo, and resistance to that disruption.

Although marijuana legalization and the introduction of marijuana-based land uses into a community is not the type of change that en-

16. See Jon M. Garon, *Mortgaging the Meme: Financing and Managing Disruptive Innovation*, 10 NW. J. TECH. & INTELL. PROP. 441, 442 (2012) (the term “disruptive innovation” has “grown considerably to encompass virtually any incumbent market threat”).

17. Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 175 (2014) (focusing especially on how agencies must be agile and capable of handling “regulatory disruption”).

18. Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV., Jan.–Feb. 1995, at 43, 45 (1995).

19. See CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* xiii (Michael L. Tushman & Andrew H. Van de Ven eds., 1997); see also, e.g., CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, *THE INNOVATOR’S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH* (2003); CLAYTON M. CHRISTENSEN, SCOTT D. ANTHONY & ERIC A. ROTH, *SEEING WHAT’S NEXT: USING THE THEORIES OF INNOVATION TO PREDICT INDUSTRY CHANGE*, at xv–xvii (2004); CLAYTON M. CHRISTENSEN, JEROME H. GROSSMAN & JASON HWANG, *THE INNOVATOR’S PRESCRIPTION: A DISRUPTIVE SOLUTION FOR HEALTH CARE* (2009).

20. Cortez, *supra* note 17, at 177.

tirely displaces or crowds out incumbent land uses, it does change the incumbent landscape of allowable land uses, altering what we might call “the land use industry,” if you will, that exists within any particular community. Moreover, it at least also separately serves a disruptive role because marijuana cultivation and sales in a community threaten displacement of other incumbent, already-legal drug companies (pharmaceutical, alcohol, tobacco, etc.) that face new competition for their products and rival for supplying the effects offered by their products.

Furthermore, with marijuana legalization or other relaxation of pot laws, perhaps the disruption could be termed “legality innovation.” Consider “relational innovation”—which has been defined as beginning with “a firm’s development of relevance for its [new] product or service,” and “measured by the consumer’s desire for the firm’s product or service.”²¹ We might borrow from that arrangement of ideas regarding “relational innovation” and define “legality innovation” as that which begins with the change in law that leads to the development of the lawful relevance of, lawful business regarding, and legal use for a newly legal product, the successful deployment of which depends on the relative acceptance of the general public which must provide a venue for its operations along with the relative change in the consuming public’s attitudes as a result of the introduction of legality.

Focusing just on the consumer angle for a moment, applying Campbell’s analysis of disruption,²² this analogy to what this Article is calling “legality innovation” fits. Campbell posits that the very definition of “disruptive innovation” applies “[o]nly when the innovation allows the targeting of new consumers or the targeting of existing consumers in ways not of interest to the incumbents.”²³ Indeed, one of the ways disruptive innovation works is by creating “new markets, allowing those who previously were not consumers to become consumers,” where “[e]xisting customers do not, at least at first, shift to the new product. Rather, thanks to the disruptive innovation, those without the option to be consumers at all have a chance to become consumers for the first time.”²⁴ At other times, or even just with the passage of time, the disruptive innovation will be of the type that also takes customers away from incumbents.²⁵ Marijuana legalization seems to do both—it offers through “legality innovation” a product previously unavailable to law-abiding consumers, and it threatens over time to act as a replacement product for those that might otherwise consume alcohol, tobacco, or pharmaceutical products.

21. Garon, *supra* note 16, at 448.

22. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & Bus. 1 (2012) (examining how innovation can change market structures).

23. *Id.* at 11.

24. *Id.*

25. *Id.* at 11–15.

One somewhat similar area where disruptive innovation is being studied relates to the impact of new land uses from the sharing economy. New sharing economy business structures and models have been studied describing incumbent opposition to new community entrants and new lands uses, exhibited through zoning and other means, and the relatively limited opportunities for new disruptors to make their claim in the process.²⁶

The literature appears to be sparse, if not empty of, the application of disruption theory to land use. It appears equally thin on identifying marijuana's market impact as one with the characteristics shared in other studies of disruptive innovation. And the concept of "legality innovation" is similarly absent from current discussions. If we start to consider the application of each to land use generally and through a marijuana legalization case study, we can find even more interesting ways to examine this unique type of disruption. For this Article's purposes, the disruption theme will run throughout, helping to explain the regulatory responses and community demands likely to surface when addressing existing and upcoming land-use questions related to marijuana-based property uses and assisting with understanding the interest-group dynamics that are at play.

Whether one supports the preservation of place or alteration of place, the incumbent occupants of the place will have tremendous influence on the level of acceptance given to the new disruptive use of the place. Incumbent members of a place protect their space against newcomers.²⁷ As Ellickson explains regarding zoning, for example, "friends of the house come out winners while others are losers" and "[g]iven the huge amounts at stake, it is not surprising that special influence problems have plagued zoning from its inception."²⁸ There are very special and extensive protections that existing uses and users get within our property system, including across a variety of land use doctrines, and such protection makes it difficult to make regulatory

26. Michael N. Widener, *Shared Spatial Regulating in Sharing-Economy Districts*, 46 SETON HALL L. REV. 111, 175–85 (2015) (positing that when a new sharing producer business model requires a change in zoning, outsiders have less voice and incumbent residents will mobilize against it and have more privileged access to the power to exclude the new use).

27. Cf. Franz von Benda-Beckmann et al., *Space and Legal Pluralism: An Introduction*, in SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 1, 13–14 (Franz von Benda-Beckmann et al. eds., 2009) [hereinafter Benda-Beckmann et al., *Space and Legal Pluralism*] (discussing examples of historical tendencies for some laws to "distinguish between original settlers and newcomers who are assigned a lower status with less political and economic rights").

28. Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 701 (1973) ("Zoning is not a perfectly balanced roulette wheel, randomly bestowing its wins and losses" but instead favors incumbents and those in current control of the power structures where "[i]n most communities the wheel is warped").

changes and set altered land use priorities.²⁹ In light of that fact, the land-use disruptor has some serious hurdles to overcome the forces that favor incumbent land uses and prevailing limits on the universe of acceptable uses.

The next Part examines the legal mechanisms capable of being deployed to regulate and manage (in either a controlling or encouraging manner) the disruptive effects of marijuana-related land uses—along with the historical, antecedent legal mechanisms employed in other areas of law that are likely to serve as models for marijuana-related land-use regulation.

III. THE LAND USE REGULATORY SYSTEM AND LESSONS FROM THE PAST

A community will employ land use controls as a means to control or transform its space and to manage disruptions to it.³⁰ Land-use controls provide mechanisms for satisfying individual or community preferences regarding the use of property. These controls help shape the landscape and motivate how individuals and the community interact with property by identifying permissible land uses, acceptable behavior, and the scope of property rights. Oftentimes, limitations will be imposed on how others use property so as to satisfy those preferences.³¹ As such, it is important that anyone involved with pot-related properties—whether to encourage or oppose them—develops a basic understanding and capability to navigate the land-use controls and limitations that will be used to manage the disruption, and that are acknowledged and enforced by society and the legal system.

29. See generally Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222 (2009) Several others characterize these hurdles not just as process-based but also due to the controlling “elites” within the land use and planning system. See, e.g., Franz von Benda-Beckmann et al., *The Properties of Property*, in CHANGING PROPERTIES OF PROPERTY 2 (Franz von Benda-Beckmann et al. eds. 2006) [hereinafter Benda-Beckmann et al., *Properties of Property*] (discussing the role of “ruling elites” putting energy into “regulating and changing property regimes” to advance and protect their interests); see also Low & Lawrence-Zúñiga, *supra* note 8, at 19–20 (contending that urban planning “[t]ypically serve[s] the interests of political elites and monied interests”).

30. See Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 9 (“Legal constructions of space are used as an instrument to control people and resources. Especially state governments use constructions of space in order to effectively transform their imagined community into a well controlled and bounded space.”).

31. NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 111 (Michael Dear et al. eds., Guilford Press 1994) (“Social relations are frequently understood by human agents with reference to specific places, the boundaries of which are usually collectively defined.”); see Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 496 (2007) (“the land use regulatory system is not a self-contained legal system that shapes land use, but is instead a medium of various forces in society”).

We can begin by identifying a few broad categories of such land-use controls.³² These include: (1) common law limitations on how one can use her property, principally by recognizing the initial assignments of rights or sometimes the “foundational” or “inherent” limits that serve at the base of property law; (2) means of voluntary adjustment to initial assignments of rights through private consensual agreements; and (3) public (i.e., “legislative” or “regulatory”) land-use controls which involve government-imposed rules upon individuals about what they can and cannot do with their land. These types of public land use controls typically involve involuntary, mandatory rules. The zoning, planning, permitting, and licensing systems we expect to see employed in the control of pot-related properties fall in this category.³³ Prohibitions on types of use and other mandates or restrictions, of course, also serve as public land-use control mechanisms.

Public land-use controls are powerful tools to minimize the disruptive influences of unwanted land uses or to privilege welcomed ones. They are also effective mechanisms for protecting the position of incumbent land uses or to preserve the incumbent community values reflected in the existing authorized uses of property within a jurisdiction.

It should be obvious that this public controls category is steeped deeply in authority and can cast a very extensive net to alter the legal land-use landscape. The potential for such breadth is firmly planted in the legal authority the courts grant such regulators, especially regarding the “police power.” State and local governments operate with a general police power that is extraordinarily wide, giving them broad authority to regulate for the public health, safety, morals, and public welfare.³⁴ The U.S. Supreme Court has given this “public welfare” standard a very broad interpretation. Consider, for example, the Court’s statement in *Berman v. Parker* (recently quoted with approval in the case of *Kelo v. City of New London*):³⁵

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present

32. Arnold, *supra* note 31, at 472–73 (describing various types of land-use controls, particularly detailing examples of a wide spectrum of public land-use control mechanisms).

33. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 40–55 (3d ed. 2013) (discussing history of zoning controls, planning, and related rules); see also Arnold, *supra* note 31, at 464–65 (discussing land-use planning as a type of public land-use control mechanism).

34. See, e.g., *Chi., Burlington, & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906).

35. 545 U.S. 469, 481 (2005).

case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.³⁶

Justifications for governmental intervention into land uses through legislative and other regulatory powers, therefore, abound.

Extensions and adaptations to combat or accommodate the emergence of pot-related properties are present in the common law (such as nuisance); private land-use controls (such as servitudes) and other private-ordering mechanisms (including contracts or even simply social adjustments); and public lands-use controls (including zoning and permitting).³⁷ Neighbors and permitting regimes each exercise power in the land-use system and lend to the regulatory control dynamics that emerge.³⁸

Most of the conflicts and coordination problems that we see emerging (or can predict emerging) with marijuana legalization are not unique to pot-related properties.³⁹ We can learn from the past regulation of similar conflicts associated with precursor industries and other new property-use introductions into the land use atmosphere—particularly regulations and neighborhood responses to other “vice”-related, “sinful,” or otherwise purportedly unseemly land uses. Those hoping to constrain pot-related property uses can use these past regulatory occurrences as a blueprint for imposing costs on pot-related entities and dampening the impact of pot-related properties on the public space. Examples of uses or business types that have contended with community opposition and the imposition of stringent land-use limitations include: liquor stores;⁴⁰ bars (and concomitant liquor li-

36. 348 U.S. 26, 33 (1954) (emphasis added).

37. An exploration of how these categories of regulatory response are interconnected and play off of each other in a dynamic way is explored elsewhere in my work. See Donald J. Kochan, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 4 MICH. J. ENV'T'L & ADMIN. L. 303 (2015).

38. See Arnold, *supra* note 31, at 473 (“The land use regulatory system coordinates the exercise of power and development of public policy among various communities and identities that are formed in relationship to land.”); see, e.g., Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC'Y REV. 567, 569 (1998) (“socially produced space is saturated with power relations.”).

39. See Arnold, *supra* note 31, at 471–72 (“Decisions about which uses are incompatible with one another under various circumstances, as well as choices about how to segregate these incompatible uses, are [regularly] made within the land use regulatory system.”).

40. Mikos, *supra* note 4, at 751 (comparing marijuana land-use regulations to the history where “[l]ocal communities have long regulated the sale and even possession of alcoholic beverages . . . [with] a patchwork of dry, damp, and wet communities in local option states.”); Saxer, *Strategies*, *supra* note 13, at 147–51, 156 (discussing the “broad and deep” zoning authority to restrict the sale of alcohol in buildings and on certain lands).

cense supply controls);⁴¹ adult entertainment; adult bookstores; porn shops;⁴² massage parlors; strip clubs; and other similar “vice-laden” or “sinful” lifestyle activities.⁴³ Relatedly then, nightclubs, assisted living homes,⁴⁴ abortion clinics,⁴⁵ video arcades,⁴⁶ and other “disfavored” activities have also faced obstacles that provide experiences upon which those wishing to engage in marijuana-related uses or activities can draw to anticipate opposition and develop strategies. Society has a long history of using local land use laws to keep out uses that it does not like.

Undoubtedly, many pot-related properties will face “Not-in-My-Backyard” (“NIMBY”)-like opposition.⁴⁷ The secondary effects from adult entertainment establishments demonstrate the possibilities. Those effects have long been considered by the courts a legitimate reason to target restrictive land use regulations at such businesses.⁴⁸ In fact, the U.S. Supreme Court rejected certain First Amendment challenges to some regulations on such adult entertainment businesses because it found the localities’ purpose in regulating to be the control of secondary adverse impacts on the neighborhoods.⁴⁹

In an important survey of marijuana laws across the United States, particularly as they relate to medical marijuana, Nemeth and Ross articulated this strong connectedness between emerging marijuana land-use restrictions and restrictions adopted in the past to deal with seemingly similar industries—demonstrating that all that is old is new again:

41. Saxer, *Strategies*, *supra* note 13, at 145–47 (discussing local government requirements for liquor licenses, often in addition to licensing obtained from the state).

42. Salkin & Kansler, *supra* note 4, at 3 (describing use in marijuana land use decisions of “distance requirements, similar to those used in the regulation of adult business uses”).

43. Thomas B. Griffen, Note, *Zoning Away the Evils of Alcohol*, 61 S. CAL. L. REV. 1373, 1395–96 (1988) (discussing cases on use of zoning to exclude adult entertainment businesses including porno shops and massage parlors).

44. See, e.g., Michael Kling, Note, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187 (2002) (explaining the ways that zoning can work to keep out or shrink the location options for siting assisted living facilities in light of neighborhood opposition).

45. Griffen, *supra* note 43, at 1395 (discussing cases on use of zoning to exclude abortion clinics).

46. *Id.* at 1396–97 (discussing cases on use of zoning to exclude video arcades which “[c]ourts generally have upheld” on the basis that “[v]ideo arcades have the capability of producing nuisance-like adverse impacts on surrounding neighborhoods such as litter, noise, pedestrian traffic, depreciation of neighboring property values, and crime[.]” and because “video games are said to be addictive, psychologically harmful, conducive to gang activity and other anti-social behavior, and are said to produce adverse effects on morality and frugality.”).

47. Jeremy Nemeth & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, J. AM. PLAN. ASS’N, Aug. 2014, at 7 (identifying NIMBY-based opposition to marijuana land uses).

48. Griffen, *supra* note 43, at 1396.

49. *Id.* at 1395–96 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68–71 (1976)).

[I]n practice [medical marijuana dispensaries (MMDs)] are regulated most closely to liquor stores and other nuisance/vice uses. To allocate suitable land for MMDs, communities around the country are adopting the same zoning restrictions that prohibit any businesses selling alcohol, pornography, firearms, and fast food from locating in residential or even mixed-use neighborhoods. For example, local jurisdictions are applying the same proximity buffers used to separate sex-oriented businesses from residential areas and sensitive uses such as schools, parks, and playgrounds. They are also employing density controls commonly used to control bar and liquor store density, most often the spacing between such facilities.⁵⁰

Furthermore, the past is filled with examples in which people sued under private and public nuisance laws, for example, to attempt to shut down or drive out several of these types of unwanted businesses that had arrived earlier in the public space.⁵¹ Most of the successful cases involved the secondary adverse effects or secondary nuisances traceable to the liquor store operation, for example.⁵² Pot-related properties should expect to see the same types of efforts.⁵³

50. Nemeth & Ross, *supra* note 47, at 6 (surveying local government marijuana-related land-use regulations); *see also, e.g.*, Salkin & Kansler, *supra* note 4, at 4–5 (describing Colorado 1,000-foot distance regulations from previously denied permit locations or a “school; alcohol or drug abuse treatment facility; principal campus of a seminary, college, or university; or a child care facility” and more generally surveying local government distance regulations related to proximity to “churches, drug and alcohol rehabilitation facilities, group homes, halfway houses, recreational property, and in some instances, any publicly owned or maintained property” as well as some requiring dispensaries be “a certain distance from smoke shops, marijuana paraphernalia shops, and other dispensing facilities.”).

51. Saxer, *Strategies*, *supra* note 13, at 172–74 (describing ways to characterize establishments selling liquor as nuisances per se or nuisance accidents and cases that did so); Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 474 (1995) [hereinafter Saxer, *License to Sell*] (“The sale of intoxicating liquor has been deemed a common law nuisance by some courts, although many of the decisions involved liquor operations that were illegal.”) (collecting cases).

52. Saxer, *License to Sell*, *supra* note 51, at 475 (“The mere location of a lawful retail liquor store may constitute a nuisance—not because of illegality, but because of the associated crime problems accompanying such a land use.”); Saxer, *Strategies*, *supra* note 13, at 124 (“Many neighborhood nuisance problems such as graffiti, loitering, and prostitution, are linked to the sale of alcohol.”).

53. Salkin & Kansler, *supra* note 4, at 7 (explaining that some jurisdictions consider outdoor growing of marijuana a nuisance because of observability as well as “excess odor, heat, glare, noxious gases, traffic, crime, and other impacts” as well as “repeat responses . . . by law enforcement personnel to the site, excessive noise, or any distributive impact created by the cultivation.”); *see also* Mikos, *supra* note 4, at 764 (surveying the state laws either authorizing localities to ban retail marijuana sales, denying local governments that authority, or not yet resolving that issue of authority; but concluding that “[n]otwithstanding their firm rejection of local authority to ban marijuana shops, all of these states do allow local authorities to enact some reasonable regulations to govern them”).

In fact, “hard prohibition” efforts by local governments are already surfacing in some communities, even in states that have gone so far as to legalize marijuana for recreational use. Mikos explains:

[S]tates are now facing growing opposition from within their own borders. Citing concerns over marijuana’s perceived harms, many local communities in marijuana legalization states are seeking to reinstate marijuana prohibitions at the local level. Communities in at least twelve marijuana legalization states have already passed local bans on marijuana dispensaries. Even in Colorado, arguably the state with the most liberal marijuana policies, more than 150 municipalities have passed ordinances banning the commercial sale of marijuana.⁵⁴

A number of localities have also enacted moratoria to get their arms around their regulatory options.⁵⁵ Some states allow localities broad discretion to regulate marijuana distribution, including allowing complete bans on opening dispensaries in a locality.⁵⁶

Moreover, short of prohibition, lawmakers can curtail the accessibility of even legal and recently legalized products, if they so desire, through zoning or licensing regimes.⁵⁷ Again, liquor control provides strong precedent. Zoning and other means of control have been generally upheld, against legal challenges, to control a variety of aspects of liquor stores—from location limitations to operational restrictions.⁵⁸ As with liquor, there are a variety of what may be called “soft prohibition” efforts to limit the effectiveness of marijuana legality in these states through general regulatory powers. Mikos explains that “countless other communities that otherwise welcome or at least tolerate the marijuana industry are nonetheless attempting to regulate it, imposing their own idiosyncratic rules concerning the location, size, hours, signage, security, and goods sold and taxes paid by local vendors.”⁵⁹ Salkin and Kansler, for example, identify laws in Colorado, New Mexico, Maine, and Rhode Island as examples where localities have imposed distance and visibility regulations for grow sites and dispensing facilities as well as additional licensing conditions that require

54. Mikos, *supra* note 4, at 720.

55. Salkin & Kansler, *supra* note 4, at 3 (describing the number of municipalities that have enacted moratoria on medical marijuana establishments, explaining that “[w]hen new and seemingly controversial land uses arrive on the scene, it is not uncommon for planners and municipal officials to enact moratoria to buy some time to study and develop appropriate regulations”).

56. Grimes & Massey, *supra* note 1, at 46.

57. James G. Hodge, Jr. & Megan Scanlon, *The Legal Anatomy of Product Bans to Protect the Public’s Health*, 23 ANNALS HEALTH L. (SPECIAL ISSUE) 161, 174–75 (2014) (“Although licensing or zoning may not be used to ban products entirely, they effectively outlaw them from certain zones to curtail the prevalence.”).

58. Griffen, *supra* note 43, at 1387–88 (discussing cases finding wide authority to use zoning to control liquor stores).

59. Mikos, *supra* note 4, at 720.

extra security measures be taken by such businesses.⁶⁰ Florida provides another example of a state-based limit on the total number of marijuana dispensaries statewide to just five facilities.⁶¹ Public land-use controls to combat or accommodate the emergence of pot-related properties can certainly include what some call “muscular” zoning,⁶² (particularly its exclusionary characteristics) where zoning is used to control for aesthetics or other values rather than just against nuisances or traditionally defined externalities.⁶³ Zoning is, after all, one of the main vehicles used as an exclusionary mechanism to shield certain places (or parts of communities) from certain types of activities.⁶⁴ Zoning is an influential way that the law works to create “spatial order.”⁶⁵

Additional public land-use controls include permitting (conditional use and special-use permits especially) and licensing regimes.⁶⁶ Licensing (state and local) and other regulation that increases costs, i.e., that hampers the effectiveness and profitability of the effort, work to make the incidence of a particular land use less likely. After all, liquor store and liquor license control has often been accomplished by conditional use or special-use permitting as a means to provide particularized determinations whether a use will have an adverse impact.⁶⁷ Other ways to limit the activity (or its success) include signage restrictions⁶⁸ or requirements to have security guards.⁶⁹ The regulators might impose limits on hours,⁷⁰ location, size, adequate lighting, graf-

60. Salkin & Kansler, *supra* note 4, at 4.

61. Grimes & Massey, *supra* note 1, at 47.

62. See DUKEMINIER, ET AL., PROPERTY 1010–11 (8th ed. 2014) (discussing the expanding aims of zoning to more “muscular” methods beyond nuisance control).

63. Griffen, *supra* note 43, at 1392–93 (“Freed from the confines of nuisance theory, the courts rapidly expanded the legitimate objectives of zoning by construing many novel ordinances While some judges have objected to this expansion, a municipality’s power to enact an ordinance in the name of general welfare seems well settled.”); Salkin & Kansler, *supra* note 4, at 3–4 (explaining zoning options—and the importance of clearly defining terms—for controlling marijuana-related land uses).

64. See Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 5 (discussing zoning as a way that “[l]aw is also used for creating spaces for more specific purposes with special legal regimes that are superimposed on this general geographical political and administrative grid”).

65. Paul Babie, *The Spatial: A Forgotten Dimension of Property*, 50 SAN DIEGO L. REV. 323, 330–31 (2013) (“[S]ocial life—society—has a definite spatial form . . . it arranges space itself by means of buildings, boundaries, paths, markers, zones, and so on, so that the physical milieu of that society also takes on a definite pattern. In both senses a society acquires a definite and recognizable [sic] spatial order.”).

66. Salkin & Kansler, *supra* note 4, at 3 (describing use of special use permits for marijuana facilities).

67. Saxer, *Strategies*, *supra* note 13, at 158.

68. Salkin & Kansler, *supra* note 4, at 6 (surveying marijuana advertising and signage restrictions and the corresponding free speech concerns).

69. *Id.* (explaining security requirements associated with marijuana land-use permits that resemble the same requirements attached to liquor store permits).

70. *Id.* at 7 (giving examples of opening and closing hour restrictions for marijuana facilities); Saxer, *Strategies*, *supra* note 13, at 160 (describing some of the conditions

fiti, or litter removal, among other things.⁷¹ Hour and day restrictions on the sale of alcohol are common, for example, and are often justified by noise, disorderly conduct, religious concerns, or the amount of traffic on a specific day and the corresponding heightened need to control against impaired driving.⁷² Various licensing and permitting regimes work to marginalize otherwise legal but unwanted businesses—such as by setting caps on the number of liquor licenses within a certain radius (thereby both keeping out unwanted activities and also serving to protect the competitive share of existing businesses). We can certainly expect (and already see in some cases) that methods used in liquor store permitting will be applied to marijuana properties, including: the concentration limits mentioned above where caps are set on the overall number of liquor licenses within a certain area⁷³ based on the belief that such limits help to control crime and blight that is believed will more readily obtain when too many establishments like liquor stores are in the same vicinity;⁷⁴ limiting the manner and location of sale generally;⁷⁵ and distance or proximity restrictions—such as in relation to schools, child care and youth facili-

for liquor store licenses as including agreements to “remove graffiti promptly, provide adequate lighting, remove trash, provide a security guard, and in some instances, limit hours of operation,” along with things like advertising limits and spatial proximity restrictions between stores and between a store and sensitive areas like schools, parks, churches, and the like).

71. Salkin & Kansler, *supra* note 4, at 7 (Very much like with liquor-based or adult establishments, in several municipalities “[z]oning ordinances have also imposed a duty on dispensing facilities to ensure the cleanliness of the neighborhood. Some localities require dispensing facilities to frequently retrieve litter from around the building and the surrounding sidewalks. Other ordinances require that graffiti on dispensary facility walls be removed promptly.”); *see also* Griffen, *supra* note 43, at 1375–76 (describing a Los Angeles ordinance as an example that dramatically decreased applications to sell liquor by implementing a comprehensive permitting scheme to combat blight with concentration restrictions, lighting and security requirements, hours of operation limits, neighbor notification with public hearings before permit issuance, proximity limitations (to protect schools, churches, and hospitals), special planning approvals, and other mechanisms).

72. Saxer, *Strategies*, *supra* note 13, at 170–71.

73. Salkin & Kansler, *supra* note 4, at 5 (discussing limits on the number of marijuana dispensing facilities in an area); Saxer, *License to Sell*, *supra* note 51, at 443 (discussing regulatory strategies “that may help combat liquor store overconcentration” and liquor store density controls through “limits on the number of outlets that are allowed”); *id.* (discussing over-concentration of liquor stores and liquor licensing).

74. Saxer, *Strategies*, *supra* note 13, at 123 (“Recent studies indicate that there is a ‘high correlation between the number of liquor stores and a neighborhood’s crime rate.’”); Saxer, *License to Sell*, *supra* note 51, at 473 (discussing legitimacy of state interests as measured by loitering, graffiti, and other crime control necessitated by “having a liquor store in the neighborhood”).

75. Griffen, *supra* note 43, at 1374 (“Municipalities have taken aim at the vendors of alcoholic beverages by passing zoning ordinances that limit the number and type of establishments permitted to sell liquor.”).

ties, parks and playgrounds, seminaries, colleges and universities, treatment facilities and jails, and residential areas.⁷⁶

This Article will not deal with the constitutional limits on what zoning or other regulations can be imposed on marijuana-related land uses, but it is important to remember that they exist and constrain the scope of acceptable regulation (especially with restrictions like exclusionary zoning or outright bans) and put limits on societal choices to preserve or protect a “place.”⁷⁷ Broadly stated, these limits include: equal protection (where rational basis review is likely to apply);⁷⁸ substantive due process;⁷⁹ property rights and takings law protections;⁸⁰ First Amendment, state preemption of local laws, and other similar constraints. Most often the broad regulatory authority, including under the police power and through zoning, will not run afoul of constitutional limits.⁸¹ Nonetheless, some “[l]egislation has been invalidated on the basis that the regulations created arbitrary classifications that were not rationally related to a legitimate state purpose.”⁸²

Lastly, we cannot forget that even apart from public and judicial land-use controls, private land-use controls—such as restrictive covenants and other servitudes—represent separate, non-governmental options that were often used to control liquor and other uses on properties⁸³ and could play an important role in the land-use landscape for pot-related properties. Covenants can be attached to leases

76. Saxer, *Strategies*, *supra* note 13, at 169–70 (examining regulations that control against “undue concentration” including placing distance limitations on liquor sales). Borrowing from liquor store regulations, similar distance regulations are emerging for marijuana-related uses of property. Salkin & Kansler, *supra* note 4, at 7 (describing zoning measures being used to control growing and cultivation of marijuana, including location, size, distance, visibility, and security restrictions); *see also*, e.g., Mikos, *supra* note 4, at 731–32 (“[T]o varying degrees communities in Colorado and elsewhere restrict the number, location, size, and hours of operation of locally permitted marijuana stores.”).

77. Griffen, *supra* note 43, at 1377–83 (discussing the typical constitutional challenges to zoning ordinances).

78. Saxer, *License to Sell*, *supra* note 51, at 483 (“Suspect classifications and fundamental interests are generally not at issue when regulating liquor licenses and, therefore, strict scrutiny of regulatory action is not applied. As a result, most regulations are upheld under the rational basis test.”).

79. *Id.* at 489 (“State or local governing authorities may regulate liquor licensing actions without violating a licensee’s substantive due process rights provided the government’s action is rationally related to a legitimate state purpose.”).

80. *Id.* (Liquor store regulations are not usually a taking because “[m]ost liquor regulation will likely be deemed to substantially advance legitimate state interests and the court will probably find that the owner will not be denied economically viable use of his land.”).

81. *Id.* at 484.

82. *Id.*

83. Saxer, *Strategies*, *supra* note 13, at 176–78 (describing private land use controls, including defeasible estate and restrictive covenants, as mechanisms for controlling even otherwise legal alcohol sales establishments).

or conveyances in fee.⁸⁴ Some private covenants in leases and fees, or defeasible fee limitations, might even be enforceable as written to preclude marijuana-based property uses because they use the term “legal,” “lawful use,” or “illegal” and, as discussed earlier, the continuing illegality under federal law may make those clauses enforceable and operational. It is important to note that, if one wishes to allow or encourage marijuana-related land uses on lands subject to such a clause, legal instruments may need amending to make the permissibility of pot-related uses clear.

Individuals wishing to use private land-use restrictions as a control mechanism could prevent property from being used for pot-related purposes, which was the case with liquor stores or other such disfavored land uses.⁸⁵ Furthermore, old restrictions could be renegotiated to make terms more specific and certain (like defining “unlawful” according to federal law). Contracts and adjustments to non-legal social institutions could also have a role in determining the level of acceptability of marijuana into the land-use landscape (no smoking policies in restaurants or in the workplace properties, for example).

There are also many ways that community activism efforts have been successful at pressuring liquor stores to change their practices or voluntarily work to limit the secondary nuisances that occur as a result of their operations.⁸⁶ Similarly, some efforts have successfully delayed the opening of, or “boycott-out-of existence,” liquor store operations.⁸⁷ Undoubtedly, pot-related properties will face social and political pressure that will exist both inside and as a complement to the creation of the legal landscape to determine the level of acceptability or exclusion of marijuana from society and the lands it uses and controls.

Put simply, even entirely legal enterprises can sometimes face private protests and lawsuits, regulatory hurdles, and public land-use controls that can severely hamper the effectiveness and profitability of the effort. Certainly, legality innovations (i.e., newly legal products and businesses) become fertile ground for disputes over differences between formal legality and soft prohibition. In the face of opposition and despite sometimes substantial legal hurdles, some of the older activities once (and perhaps still) deemed less desirable have nonetheless worked around the property law-related obstacles to maintain their businesses. Even if legally disabled through these types of property-related regulatory blows, pot might similarly adapt. At the same

84. *Id.* at 177–78 (“Restrictive covenants have also been used historically to prevent liquor sales on particular parcels of property. These covenants have been found in the forms of both leasehold conveyances and conveyances in fee simple.”).

85. *Id.* at 190 (discussing that “the use of restrictive covenants, either in the conveyance of a fee or of a leasehold, may be somewhat more effective in restricting liquor sales on certain property.”).

86. *Id.* at 180–81, 190.

87. *Id.* at 181–82.

time, opposition forces have learned how to marginalize some unwanted uses and will no doubt borrow from the past, too.

The analogies presented in this Part to similarly-situated or similarly-opposed property uses are helpful to study if one wishes to anticipate and navigate the conflicts, questions, and solutions that will surface in response to pot-related property uses. These uses are introduced as a disruptive force into the existing legal landscape and as legality innovation threatens incumbent land policy. While the focus of this Part has been on property law implications of new pot-related entrants into property ownership and usage, also instructive are a series of interest-group realities that should help one understand and cautiously approach an evaluation of regulatory battles surrounding pot-related properties.

IV. PERMITS AND POWER, BAPTISTS AND BOOTLEGGERS

The structure of the land-use regulatory system ultimately forms after juggling the concerns of a variety of interest groups, and thereafter mediating the conflict between incumbent users and disruptive new users of the legal and physical landscapes. As Arnold counsels, the task of “[m]ediating the relationships between these communities and types of power is one of the core functions of the land use regulatory system,” and a prototypical example of when such a mediating function becomes necessary is seen when addressing “a conflict between developers who seek to create value for themselves from new development, and neighbors who seek to stop or constrain new development in order to protect their existing quality of life and property values.”⁸⁸ Most of the mechanisms used in liquor-store regulations and similar controls discussed in the previous Part—and already emerging in the marijuana-control landscape as well—are examples of the battle over the imposition of controls to minimize the footprint of the emergent land uses and their concurrent landscape disruption.

Thus, predictions can be made regarding the likely areas where interest group battles will be salient in a post-decriminalization or post-legalization era, such as zoning, city planning, competition for the scarce resource of liquor or pot licenses attached to properties when fighting within a common but fixed pool, and the like. Interest groups on every side are in the market for marijuana-related legislation and other legal outcomes (including most specifically property-related laws) to constrain or to propel the new industry and its new legality. The move toward acceptance of pot-related properties within communities (and marijuana decriminalization or legalization itself) is also an interest group-laden enterprise within the competitive marketplace for legal favor.

88. Arnold, *supra* note 31, at 474–75.

The role of competing interests—and their impact on the possible or probable—is often under-recognized in land-use planning debates.⁸⁹ As one planner describes, “land use and environmental issues can be contentious to the extreme . . . we often witness multiple local networks, representing divergent political and ideological perspectives and working at cross-purposes.”⁹⁰ One must recognize the presence of interest groups and their relative positions in the system⁹¹ in order to understand how land-use regulations emerge and determine whether they serve the public or are simply the product of interest-group manipulation.

This Part focuses on one manifestation of the political reality exposed by interest-group theory—Baptist and bootlegger “coalitions.” Accordingly, the following begins with an explanation of the theory and some representative empirical examples of the lobbying it reveals and concludes with evidence that such couplings are already present and at play in the debates on the formulation of legal rules surrounding the relaxation of our marijuana laws.

Drawing substantially on the well-developed general interest-group theory literature,⁹² one can identify some of the odd interest-group coalitions that will remain prevalent in marijuana decriminalization or legalization generally, and in pot-related land-use regulation specifically. The “bootleggers and Baptists” understanding of interest-group coalition building was conceived in a 1983 article by Bruce Yandle where he explained the forces behind the generation of “Blue laws” that required the Sunday closure of liquor stores in Southern states.⁹³ The Baptists supported these closing laws as a way of combatting sinful behavior and promoting moral and religious values.⁹⁴ The bootleggers had profit rather than the pulpit in mind, supporting the very

89. ROBERT J. MASON, COLLABORATIVE LAND USE MANAGEMENT: THE QUIETER REVOLUTION IN PLACE-BASED PLANNING 48 (2008) (“Conflict does not go unrecognized by place-based planning’s proponents, but it is frequently under-recognized.”).

90. *Id.*

91. Arnold, *supra* note 31, at 484 (discussing “the complex and varied array of forces and influences that the land use regulatory system must mediate as society makes choices”).

92. See, e.g., Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 222 (2005) (“‘Bootleggers and Baptists’ regulation theory explains how successful lobbying efforts often result when one supporting group, the ‘Baptists,’ takes the moral high ground while the other group, the ‘bootleggers,’ seeking to gain competitive advantage, provide political resources.”); see also Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583, 608–09 (2008) (discussing generally the Baptist and bootlegger theory in relation to environmental law); see also Todd J. Zywicki, *Baptists?: The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. L. REV. 315, 316–17 (2002) (explaining the Baptist and bootleggers phenomenon).

93. For the original work describing the Baptist and bootlegger phenomenon, see Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REG. 12 (May/June 1983).

94. See *id.*

same laws because consumers of alcohol would have to seek out the illegal source if the legal sources were closed for the day.⁹⁵ These groups joined forces in support of full alcohol prohibition for the same divergent reasons. Bootleggers sought a monopoly in the black market for liquor while the Baptists seemingly thought the ban on alcohol sales and consumption altogether would raise the character and virtue of the citizenry.⁹⁶ Yandle posits that these groups needed each other to succeed in obtaining the Sunday-closing laws and Prohibition. Neither could have obtained those outcomes alone, but their combined efforts were enough regardless of the deviations in their motives for obtaining these anti-liquor laws.⁹⁷ The presence of the Baptists in the legislative fights provided the requisite cover for the bootleggers' rent-seeking efforts in the legislature to obtain a competitive advantage over legal suppliers.

After the original Yandle article, many have applied the collective terms, "Baptists" and "bootleggers," to a slew of other seemingly unlikely coalitions (a.k.a., "unholy alliances" or "strange bedfellows"), with the "Baptist" label attaching to the group with the purportedly public-spirited and morally defensible position, and the "bootlegger" label attaching to the interest group concurrently seeking self-interested financial gain and a wealth transfer from the same legislation.⁹⁸

The public is more likely to be persuaded that legislation—or the resistance to a legislative change—is acceptable and worth supporting if such action is supported by a group that appears externally to have the public interest in mind ("the Baptists").⁹⁹ Or, the presence of such a group at least sufficiently masks the true nature of the legislative position.¹⁰⁰ This masking effect makes it too expensive for others to obtain enough information and discover the special interest beneficiaries of the legislation. Thus, the masking effect of the one group partially immunizes the special interest beneficiaries from scrutiny due to rational ignorance.¹⁰¹ The Baptists will look the other way as to

95. *See id.*

96. *See id.* at 13–14.

97. *See id.*

98. Andrew P. Morriss et al., *Green Jobs Myth*, 16 MO. ENVTL. L. & POL'Y REV. 326, 345 n.58 (2009).

99. *Id.*; *see also* Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 188 (2002) ("[T]he push for any given regulation will not be successful if at least two quite different interest groups are working in the same direction—'bootleggers' and 'Baptists.'").

100. Morriss, Yandle, & Dorchak, *Choosing How to Regulate*, *supra* note 92, at 222 ("The 'Bootleggers and Baptists' theory . . . explains how some people might perceive the public interest model of regulation as still valid.").

101. Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 ENVTL. L. 309, 356 (2009) (discussing how the Baptists provide "'theological' cover for what would otherwise be naked rent-seeking"); Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 242–43 (2005) ("The 'Bootleggers' need a public interest face to make their reforms seem more popular, and the 'Baptists' need a group with a significant personal stake in the outcome to relentlessly

the bootleggers' motives and remain willfully blind to the possible immoral acts that the bootleggers might perpetrate, because they know that without bootlegger funding in the legislative effort, the effort is less likely to succeed.¹⁰² These coalitions allow for the "exploitation of moral- or social-cost arguments for private economic (or political) gains."¹⁰³ Political observers have identified numerous examples of such coalitions, including: environmental groups with green agendas that provide cover stories masking their myriad private financial interests;¹⁰⁴ coordination between energy security and environmental advocates for ethanol subsidies;¹⁰⁵ labor leaders protecting their job pool by teaming with rights activists against child labor laws;¹⁰⁶ plaintiffs' attorneys seeking fee opportunities coupled with health care agencies and social welfare advocates in promoting tobacco regulation;¹⁰⁷ and environmentalists seeking to combat the effects of climate change paired with "companies, industries, and countries" that stand to gain from a tax imposed on their competitors through climate change regulation.¹⁰⁸

So too do we see "Baptist-and-bootlegger" scenarios emerging in pot-related legislative battles. When opposing something like marijuana legalization, for example, the "Baptists" in the equation fear a disruption to their incumbent-dominant value position while the "bootleggers" fear a disruption to their incumbent market position.

One Baptist-bootlegger alliance exists between those with moral or virtue-based opposition to pot-related properties (the "Baptists") teaming up with those who benefit from selling *illegal or criminal* marijuana (the "bootleggers") to oppose legalization or permissions for the use of legally-recognized and acceptable pot-related properties. Similarly, they would want to impose stronger "soft prohibition"-like regulations on property uses to marginalize their competitors. That

finance or otherwise help to push through the legislation."); *see also* Yandle & Buck, *supra* note 99, at 190 (discussing the "cover story" the Baptist interest can provide).

102. Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 *YALE L.J.* 2593, 2620–21 (1994) (book review) ("Although there is no necessary reason why legislators may not take principles into account when fashioning legislation, experience supported by public choice theory suggests that they will often give them short shrift.").

103. M. Todd Henderson, *The Nanny Corporation*, 76 *U. CHI. L. REV.* 1517, 1533 (2009).

104. *See generally, e.g.,* Zywicki, *supra* note 92.

105. Robert W. Hahn, *Ethanol: Law, Economics, and Politics*, 19 *STAN. L. & POL'Y REV.* 434, 463 (2008); Morriss & Cramer, *supra* note 101, at 356–57 ("[E]thanol's self-interested proponents have successfully hijacked the rhetoric of Environmentalism in their pursuit of government support, as have myriad other 'green energy' interests.").

106. Henderson, *supra* note 103, at 1533 (providing child labor laws in England and tobacco legislation in the United States as examples with Baptist and bootlegger coalitions).

107. Bruce Yandle et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 *U. ILL. L. REV.* 1225 (2008).

108. Yandle & Buck, *supra* note 99, at 190.

coalition has direct lines of analogy to the original use of the Baptist-bootlegger framing by Yandle to describe the forces favoring prohibition of alcohol.

There is another alliance that shares characteristics with Baptist-bootlegger coalition. This second alliance (also under-covered as a phenomenon in the law review literature on marijuana) involves those with moral or virtue-based opposition (again, the “Baptists”) teaming up with the industries that supply legal alternatives to marijuana, particularly alcohol-related businesses, pharmaceutical companies, and to some extent tobacco-related operations. They see marijuana as a potential product consumers will substitute for the products the incumbents provide. Each of these legal incumbent industries, just like bootleggers or illegal drug dealers, does not want to lose business to the new startup, disruptive industries associated with legal or decriminalized marijuana. These alternative, legal merchants of vice often see themselves as competing with marijuana operations for the same revenue pool from the same consumer base seeking somewhat fungible products.

Others also recognize this second alliance phenomenon’s presence in pot-related issues (although I have not yet seen it discussed in any detail from an academic standpoint and no analysis has focused specifically on how marijuana-related land-use law will be implicated by such coalitions). In a July 2014 story in *The Nation*, journalist Lee Fang reported on his investigation of the money flowing into the lobbying efforts against legalized marijuana for medicinal and recreational purposes.¹⁰⁹ His reporting reveals what the “Baptists-and-bootleggers” theory would predict. For example, he found that the Community Anti-Drug Coalition of America (“CADCA”) “and the other groups leading the fight against relaxing marijuana laws, including the Partnership for Drug-Free Kids (formerly the Partnership for a Drug-Free America), derive a significant portion of their budget [sic] from opioid manufacturers and other pharmaceutical companies.”¹¹⁰ Fang explained that, in addition to money contributions to campaigns against marijuana legalization, lobbyists backed by pharmaceutical companies have a record of attacking medical marijuana and claiming risks of abuse while refusing to lobby for pill reform and legislative efforts to attack painkiller addictions.¹¹¹ In addition to the influx of a

109. Lee Fang, *The Real Reason Pot is Still Illegal*, NATION (July 2, 2014), <http://www.thenation.com/article/anti-pot-lobbys-big-bankroll/> (“A close look at the broader political coalition lobbying against marijuana-law reform reveals many such conflicts of interest.”).

110. *Id.*; see also Bob Goethe, Opinion, *Yes on 2, and Here’s Why*, CITRUS COUNTY CHRON., (Fla.), Oct. 5, 2014, 2014 WLNR 27695800 (op-ed by doctor claiming that “[p]harmaceutical companies don’t want any competition from a nonpatentable drug” like marijuana and “[p]hysicians are not fond of losing the power of the prescription pad to a natural remedy and are also influenced by the pharmaceutical companies”).

111. Fang, *supra* note 109.

new disruptive legal-competitor product, pharmaceutical companies also worry that physicians will be less fearful of prescribing marijuana—to the detriment of substitute pharmaceuticals—if the stigma and ethical cloud over marijuana-related treatments are lifted.

In addition to pharmaceutical companies, Fang also identified a number of other groups that directly lobbied, or funded lobbying campaigns, against marijuana legalization to protect their own incumbent, privileged positions and wealth-based interests against competition or loss of revenue.¹¹² These groups included: liquor and beer companies who fear competition; drug treatment centers that rely on court-ordered rehabilitation; companies that conduct and benefit from workplace drug testing that might not be required if marijuana were legalized; and police who benefit from seized property and cash from drug busts and also receive large federal grants for drug enforcement that supplement their budgets.¹¹³

The third “bootlegger-and-Baptist” story that one can tell in the marijuana political debate pits advocates for full legalization of marijuana (including for recreational use) against those who have secured or are seeking to secure a quasi-monopoly on the legal sale of marijuana by limiting such sale to medical use—the consequence of defeating more broad legalization. Whether to maintain their monopoly or to protect their more sympathetic story and the gains achieved by limited approval of pot uses, the medical-marijuana lobby has reasons to oppose outright legalization of marijuana as well.¹¹⁴ For example, Matthew Yglesias’ report in 2012, described money donations used to fight the Washington marijuana legalization.¹¹⁵ His sources revealed that the funding and efforts against legalization were dominated by

112. *Id.*

113. *Id.* (quoting several state and federal legislators and police officials who verify the financial interests the police have in maintaining budget sources that flow from illegal marijuana); see also Philip Ross, *Marijuana Legalization: Pharmaceuticals, Alcohol Industry Among Biggest Opponents of Legal Weed*, INT’L BUS. TIMES (Aug. 6, 2014, 5:54 PM), <http://www.ibtimes.com/marijuana-legalization-pharmaceuticals-alcohol-industry-among-biggest-opponents-legal-weed-1651166>; see also Ben Cohen, *Who’s Really Fighting Legal Weed*, U.S. NEWS & WORLD REP. (Dec. 8, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/12/08/pot-legalization-opponents-aim-to-protect-their-bottom-line> (“Crusaders against weed constitute a long list of suspiciously self-interested folks” like police departments interested in maintaining sources of revenue from forfeiture, alcohol and beer interests who “fear the competition,” and pharmaceutical companies who want pain customers to prefer their products to marijuana).

114. See, e.g., Phillip Matier & Andrew Ross, *Newsom Losing Appetite for Healthy-Food Laws*, S.F. GATE (Sept. 26, 2010), <http://www.sfgate.com/bayarea/matier-ross/article/Newsom-losing-appetite-for-healthy-food-laws-3173210.php> (“[T]he California Cannabis Association – which represents a group of Sacramento medical marijuana dispensaries – came out against legalization as well, fearing it may allow conservative towns to ban medicinal pot.”).

115. Matthew Yglesias, *Baptists and Bootleggers: Medical Marijuana Versus Legal Marijuana*, SLATE: MONEYBOX (Nov. 27, 2012, 3:50 PM), http://www.slate.com/blogs/moneybox/2012/11/27/marijuana_baptists_and_bootleggers.html.

the existing medical marijuana industry, a “brand-new interest group to join the alcohol lobby in opposing legal pot.”¹¹⁶

These “Baptist-and-bootlegger” stories should at least make us cautious about whether new regulations emerging to control legal marijuana and associated land uses are actually public-spirited and advance public welfare. Regardless of whether one wishes to constrain or promote the new legality innovation represented in marijuana land uses, the substance of the law can be better shaped if exposure of self-serving interests opens one’s eyes to a fresh and more objective approach to such regulations. Who has influence and how he or she influences the laws becomes particularly important because decisions on land-use regulation undoubtedly define the place and space within which we live. The last Part of this Article examines what we have learned about the meanings that attach to “place” and “space” across disciplines and the power those concepts have in shaping the law. It will use these concepts to illustrate the dynamics and interests in the background of any land use regulatory response to the disruptive innovation of marijuana-related land uses.

V. LAND USE REGULATION AND THE CREATION, PRESERVATION, AND ALTERATION OF PLACE AND SPACE

As we contemplate the use of land-use controls and the interest-group dynamics—particularly the competitive value and competitive profit positions of certain segments of the population wishing to maintain their comparative advantage of incumbency—another body of literature on the importance of “place” and “space” is also instructive to appreciate the full texture of the incumbent societal and geo-legal landscape as it encounters disruptive forces. One should consider the legality innovation of marijuana-related land uses as a means of potentially disrupting place and space, i.e., effecting disruption of the incumbent legal and physical landscape of a community. While the previous Parts of this Article discussed land-use mechanisms for preserving, altering, or creating a place and some of the politics involved when marijuana legalization is introduced into the incumbent landscape, this closing Part focuses on just how consequential some of our choices may be. By place, we might mean the physical space, balances within the community, civic identity, moral communal identity, local culture, or a similar formulation. Saying that tolerance of pot-related activities can change a place is not a controversial claim. Any introduction of a newly legal product or business into the legal and community ecosystem necessarily effects change, for good or bad.¹¹⁷

116. *Id.*

117. For an examination of the land use control system as a “legal ecosystem,” see Kochan, *supra* note 37, at 314 (providing analogies to other work explaining how the law works like an ecosystem, citing, for example, J.B. Ruhl, *The Fitness of Law: Using*

To understand some of these consequences, we can draw on a substantial and growing body of literature that identifies the importance of understanding the “place-based” and spatial concerns associated with property problems.¹¹⁸ As one evaluates the introduction of marijuana-related uses as lawful land uses in the legal and physical landscape, one must situate pot-property concerns with place and space understandings. Blomley proposes that, “given the apparent significance of space to social relations, it is appropriate that sociolegal scholars interested in property consider its geographies. The concept of landscape offers one means of doing so, given that it alerts us to both the discursive and practical qualities of property.”¹¹⁹ Property law should engage with this diverse and interdisciplinary literature on “place-based” and spatial concerns associated with land-use questions,¹²⁰ including work developed and emerging in fields like geography, sociology, anthropology, ecology, economics, law, and other fields to position pot-related property issues and the communities within which they will surface inside this broader mode of analysis.¹²¹

The connections between land-use control and this literature are observed by Taylor, who explains that “the law engages with and articulates spatial concerns where governments establish, reinforce or impose conditions on the ownership of land” including by “defining rights of access to and provision for private and public domains.”¹²²

Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy, 49 VAND. L. REV. 1407 (1996)).

118. See, e.g., Blomley, *supra* note 38, at 569 (discussing “the saliency of the ‘spatial turn’ within much social theory”); see also Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 1 (“Since the spatial turn in the social sciences, impressive advances have been made in analyzing the interrelations between social organization and processes and space, place and boundaries.”); see also Low & Lawrence-Zúñiga, *supra* note 8, at 17 (describing the re-emergence of social science research focused on “space and place” in the 1990s).

119. Blomley, *supra* note 38, at 582; see also William Taylor, *Introduction: Landscape, Identity and Regulation*, in *THE GEOGRAPHY OF LAW: LANDSCAPE, IDENTITY AND REGULATION* 3 (William Taylor ed., 2006) (“geography and landscape . . . elucidate the fluidity of human identity—what is commonly called its ‘construction’ through various means . . . [that] situate, locate or position individuals, to cite further geographic terms, as subjects that use space in some way”).

120. Blomley, *supra* note 38, at 582.

121. Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 1 (“In recent years . . . the relationship between law and space has drawn broader interest.”); see also BLOMLEY, *supra* note 31, at 146 (spatiality has been under-analyzed in the past); As one scholar has explained, just as property is influenced by these other disciplines, so too does property influence those fields: “[P]roperty regimes and property rights . . . have also become central to many other disciplines including sociology, anthropology, political sciences, economics, geography and human ecology. Property figures as a prime mover in such diverse topics as social evolution, modernization, globalization, human rights, civil society, and sustainable resource management.” Benda-Beckmann et al., *Properties of Property*, *supra* note 29, at 2 (although within an analysis largely critical of Western property values).

122. Taylor, *supra* note 119, at 9; see also Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 3 (“All social and legal institutions, relations and practices

Above, Part III discusses some of the leading mechanisms available to governments to do so.

Blomley describes an important assumption in critical geography literature that “law itself is not simply imposed upon a local setting, but is instead interpreted in and through that setting.”¹²³ Therefore, he continues, “[l]aw is . . . produced in such spaces; those spaces, in turn, are partly constituted by legal norms. Either way, law cannot be detached from the particular places in which it acquires meaning and saliency.”¹²⁴ Land-use controls and other laws affect space and place as much as space and place affect law, making these reciprocal and interdependent spheres of influence.

To use marijuana-related properties as our example, there are two key categories in which to consider these insights—existing space and altered space.¹²⁵ The existing spaces and places where pot-related properties are proposed will affect the size of the universe of acceptable pot-related uses of property.¹²⁶ The capacity and willingness to accept disruption will affect the extent to which alteration of the space is also possible.

Choices society makes about which property uses, including pot-related ones, are acceptable—especially when they are disruptive in nature—will undoubtedly impact the nature of the place and space and require alteration and adaptation of existing laws and regulatory positions.¹²⁷ All of the choices explained in the previous Parts and the relative influence we allow certain groups to wield thus have real consequences on place-based understanding.¹²⁸ Arnold explains that “the

are located and distributed in space It involves taking account of the ways places are carved out, and people, relationships and objects are located and bounded in space.”).

123. BLOMLEY, *supra* note 31, at 46.

124. *Id.*; see also, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1858 (1994) (explaining that “[z]oning and covenanting prescribe who can occupy certain spaces” and that these create “the political geography of space” or a “spatial differentiation” that is “the product of collective action structured by law”).

125. See Arnold, *supra* note 31, at 471–72 (discussing the use of land-use laws for “both protecting existing uses and features of these areas and shaping future uses and features of these areas”).

126. BLOMLEY, *supra* note 31, at 54 (“Legal categories are used to construct and differentiate material spaces which, in turn, acquire a legal potency that has a direct bearing on those using and traversing such spaces.”).

127. See, e.g., Arnold, *supra* note 31, at 463–64 (Land-use “decisions . . . depend on the ethical choices or frameworks in the communities making those decisions. Land is a means of defining community, and therefore land becomes infused with community meanings.”); see also Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 2–3 (“The notion of space provides an important lens through which to view law. This is because it provides both a grounded, physical setting, as well as a more intangible universe, in which to locate the varying ways in which social relationships are created and regulated with differing effects.”).

128. Arnold, *supra* note 31, at 466 (“Many components and processes of the land use regulatory system aid local communities in defining, reshaping, and protecting

land use regulatory system aims to facilitate deliberations and decisions about what an ideal society looks like, situated geographically.”¹²⁹ Babie similarly counsels that “[p]roperty theorists might also tell us that the content of property [is] constituted by the social relations that exist between others and me and that may or may not be recognized and enforced by law.”¹³⁰ Constructing those social and spatial relations is one of the first tasks in adapting to the presence of new subjects of legality on the legal landscape and reacting to new forms of lawful behavior.

In this socio-legal and geo-legal understanding, the existing space and place where pot-related properties are proposed and the flexibility of the community to adapt away from the incumbent landscape will affect the size of the universe of permissible pot-related uses of property.¹³¹ Babie, for example, describes “two modes of linking spatiality and law” as involving making determinations on “how spatiality—the physical and the social space—shapes or influences law and legal development, such as property,”¹³² as well as determining “how law shapes social space, ‘legal understandings and knowledge of law are applied to help in understanding the social production of space, how social spatiality is constructed and organized and expressed.’”¹³³

Any and all land-use decisions—including adding an entirely new category of legal or acceptable land uses—will affect the character of a place and configuration of the spatial landscape.¹³⁴ Even without making any normative claims about whether such changes are good or bad, any positive analysis can be used to predict that the invasion of

places within those communities.”); see also Jeremy Waldron, *Homelessness and the Issue of Freedom*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 309, 310 (1993) (“One of the functions of property rules . . . is to provide a basis for determining who is allowed to be where The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place and who is not.”).

129. Arnold, *supra* note 31, at 462.

130. Babie, *supra* note 65, at 324–25.

131. See, e.g., Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 3 (“law is a crucial way of constructing, organizing and legitimating spaces, places, and boundaries”); see also Erika Fontanez Torres, *Law, Extralegality, and Space: Legal Pluralism and Landscape From Colombia to Puerto Rico*, 40 U. MIAMI INTER-AM. L. REV. 285, 287–88 (2009) (“Norms play a key role in our concept of material space because they are a means of determining property categories, urban planning laws, and zoning regulations. Property categories are probably the most direct way of configuring space. Property norms determine limits and borders of exclusion by creating categories such as owner and trespasser.”).

132. Babie, *supra* note 65, at 333.

133. *Id.* at 333–34; see also Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 3, 22 (“law represents an arena in which the politics of space is enacted and negotiated, one that requires an understanding of the extent to which legal spaces are embedded in broader social and political claims”).

134. See, e.g., Torres, *supra* note 131, at 287–88 (2009).

new species of property uses will disrupt the overall usage landscape and the legal ecosystem surrounding our treatment of property.¹³⁵

Normative concerns are likely to be raised that will fuel those arguments generated by opposition forces that might be injected into the property and land-use law debates. Community exclusion can take many forms and affect many subjects of activity. For example, some communities have responded to political pressures to restrict certain types of occupancy in their space, as recently seen in relation to sex offender residency restrictions.¹³⁶ Many other examples were previously discussed, including the moral and virtue-based claims about disrupting local fabrics of the community,¹³⁷ the need to control the number of vice-related outlets to contain crime and abuse,¹³⁸ or the adverse secondary effects¹³⁹ from allowing the newest permutation of vice-related industry to enter into a community (the same as seen with past disputes over, for example, adult bookstores, strip clubs, and liquor stores).¹⁴⁰ We can anticipate substantial changes in light of these pre-existing “socially contingent boundaries” of the places where pot-related properties might wish to emerge.¹⁴¹

But this place-based analysis can also articulate what some of the normative claims are likely to be about the improvement of place and

135. Taylor, *supra* note 119, at 4 (“There is in the built environment . . . nothing that is changeless, only change itself” so studying the social context of it reveals much about “changing values.”).

136. See, e.g., Shelley Ross Saxe, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397 (2009); *In re Taylor*, 343 P.3d 867 (Cal. 2015).

137. Arnold, *supra* note 31, at 467 (“Zoning and regulatory permitting requirements and decisions also reflect and implement local community choices and values about desired and undesired places.”).

138. Saxe, *Strategies*, *supra* note 13, at 125–26 (“[O]verabundance of liquor stores and the attendant problems such as loitering, littering, graffiti, and prostitution, as well as the visual impact of alcohol abuse on inner city children, are valid land use issues . . .” because “it is the exercise of police power directed at those activities contributing to social blight in the area.”).

139. Nemeth & Ross, *supra* note 47, at 8 (identifying “feared secondary impacts” as a justification for many restrictions on marijuana land uses, “especially crime, underage use, or diversion to the ‘black market’”). Zoning is seen, for example, as one mechanism to control against crime rates and for preventing secondary impacts. James M. Anderson et al., *Reducing Crime by Shaping the Built Environment with Zoning: An Empirical Study of Los Angeles*, 161 U. PA. L. REV. 699, 752–53 (2013) (reporting statistical results showing that “zoning is substantially associated with crime rates,” meaning that choices in zoning can affect crime rates and those facts should be considered when making planning decisions).

140. See, e.g., Griffen, *supra* note 43, at 1391–93 (discussing the evolution of zoning laws across the years including as applied to controlling vice and advancing virtue).

141. Babie, *supra* note 65, at 348 (“[W]hat property actually is for a society and how it helps one make sense of the world depends upon an understanding of social context, which engenders a sense of community and the bringing together of various communities or subgroups in relation to scarce resources within a web of socially contingent boundaries.”); Benda-Beckmann et al., *Space and Legal Pluralism*, *supra* note 27, at 9 (discussing social anthropology’s quest to understand the “notion of community”).

space as a result of more pot-related properties. Arguments might be made from the side favoring greater inclusiveness of uses, including focusing on the benefits from new capital injection into the community, employment opportunities, the market and tax-based benefits that might come from allowing properties to be used and developed in pot-related ways, the benefits from moving activities “above-ground” and eliminating the negative effects of “underground” or street-based criminal activities, and so on.¹⁴²

This Article makes no hard judgments on which place-based arguments are normatively superior. Instead, the focus remains on underscoring that these types of place-based concerns are inevitable¹⁴³ and must be confronted whenever a jurisdiction makes a choice to move toward the legalization, decriminalization, or some other relaxation of its laws against marijuana.¹⁴⁴ Along the way, choices will necessarily be made within existing property law structures and through the invocation of property law vehicles for disputes.

In summary, the character and identity of the places one inhabits are in part defined by (or at least affected by) the property rules present and applicable to the place;¹⁴⁵ and decisions regarding property rules often are colored by the community’s idea of the places it wants

142. Mikos, *supra* note 4, at 732–33 (“Communities that allow marijuana stores also see an upside to them. The stores provide medicine for seriously-ill patients, recreation for consenting adults, tax revenues for cash-strapped local governments, or jobs for local workers.”); Saxer, *Strategies*, *supra* note 13, at 183 (discussing claimed benefits of liquor store presence in a community, including “efforts to expand business which provides jobs and revenues in areas that desperately need them” where “[l]iquor stores are operated in neighborhoods that other businesses have shunned, and such outlets contribute to the local community by hiring residents, sponsoring community events and contributing tax revenue”).

143. GENE BUNNELL, MAKING PLACES SPECIAL 31 (2002) (“It is impossible to engage in planning without making value judgments concerning the relative desirability or undesirability of possible future outcomes.”); *see also* Arnold, *supra* note 31, at 464 (“[L]and use planning—a significant component of the land use regulatory system—creates, enhances, and protects a ‘sense of place.’”).

144. Taylor, *supra* note 119, at 5 (discussing a prominent “assumption that space and law carry moral worth and elicit moral considerations, however variable their value might be”); Blomley, *supra* note 38, at 581–82 (“[R]ecent scholarship in geography would suggest that . . . [a] place is not inert but produced.”).

145. Babie explains:

Legal theorists tell us that property is constituted by a set of rights, use privileges and control powers, entitlements, or any one of dozens of ways of describing what property is. Property theorists might also tell us that those rights, or however they describe the content of property, are constituted by the social relations that exist between others and me and that may or may not be recognized and enforced by law.

Babie, *supra* note 65, at 324–25; *see also* David Delaney, Richard T. Ford, & Nicholas Blomley, *Preface: Where is Law?*, in *THE LEGAL GEOGRAPHIES READER* xvi (Nicholas Blomley et al. eds., 2001) (“What has been called the spatiality of social life is an aspect of social reality that is enormously complex and dynamic, fluid and shifting.”).

to preserve,¹⁴⁶ alter, or create (i.e., “actively produce”).¹⁴⁷ When discussing the pervasiveness of “the space in which property exists, operates, and has meaning in people’s lives,” Babie contends that “[a]t every moment of life, we are interacting with others and the world around us through some form of property—private, common, or public.”¹⁴⁸ How the law decides to treat pot-related properties will depend on where those activities are situated and the places they seek to infiltrate; and the extent to which we wish to alter property laws to accommodate pot-related properties will in part be tempered by our tolerance for changing the character and identity of certain places.¹⁴⁹ Babie explains this reciprocal relationship between space and law, and that “social space . . . influences and is influenced by property.”¹⁵⁰ Similarly, Blomley advises, “place, like space, is actively constructed through a constellation of material and discursive practices,” thus “we should think of places not as static entities but, like landscape, as in a constant process of becoming . . . [and] a site for political struggle.”¹⁵¹ There is no doubt that players and powers in these pot-affected places will permeate pot politics and associated pot-related property law debates; and that landscape will shift in some way during the contest between multiple competing interests.¹⁵²

Conflicts between land users, neighbors, permitting authorities, competitors, and others is inevitable—as it always has been with the introduction of uses that shake up the status quo balance in a place, requiring coordination of the shared spaces we call communities.¹⁵³

146. BUNNELL, *supra* note 143, at 52 (discussing land-use planning as “a means of achieving and preserving the qualities and features we value in our communities”).

147. Delaney et al., *supra* note 145, at xvi (“Many geographers and others have sought to grasp some of the dynamics of social space through reliance on the view that sees space not as simply being but as having been actively produced.”).

148. Babie, *supra* note 65, at 325–26 (Explaining we are also relating to “the space in which . . . the social relationships that constitute property exist; the space where rights and relationships structure our lives; and the space that we structure through those rights and relationships.”).

149. Richard Blythe, *The Idea of the Town: The Structuring of City Space in a Nineteenth Century Colonial Town*, in *THE GEOGRAPHY OF LAW: LANDSCAPE, IDENTITY AND REGULATION* 125 (William Taylor ed. 2006) (studying the development of the city of Launceston in Tasmania, Australia and concluding that “the way in which a town is conceived as idea . . . influences both the legal description and distribution of urban space and the distribution of events within it”).

150. Babie, *supra* note 65, at 352; *see also* Gordon Clark, *The Geography of Law*, in *1 NEW MODELS IN GEOGRAPHY: THE POLITICAL-ECONOMY PERSPECTIVE* 310 (Richard Peet & Nigel Thrift eds., 1989) (“The links between law and society, between law and geography, are indissoluble since as law is drawn from society it also reproduces society. And as law is structured by context, it structures context.”).

151. Blomley, *supra* note 38, at 581–82.

152. Low & Lawrence-Zúñiga, *supra* note 8, at 18 (“[C]ontested spaces” are defined “as geographic locations where conflicts in the form of opposition, confrontation, subversion, and/or resistance engage actors whose social positions are defined by differential control of resources and access to power.”).

153. *See, e.g., id.* at 20 (discussing the “contentiously produced” planning, design, and construction of the city and its encoded “intentions and aspirations”).

Such coordination in the face of disruption quite often necessitates a change in the legal landscape to fit the emerging social environment and physical landscape. Similarly, if we want to prevent or diminish prevalence of new uses, we must also consider how land-use controls can be used to accomplish such limits even if the activity changes from unlawful to technically “lawful.”

VI. CONCLUSION

This Article reminds us that old battles will often resurface with new products and different players. So too can we understand some of the power relationships and interest-group concerns involved in the new battles surrounding marijuana from reference to the past, including the self-interested preservation of incumbent positions. In that sense, much of the property-related concerns associated with decriminalization, legalization, or relaxation of marijuana laws are predictable. Nonetheless, it is useful and critical to carefully examine the past in order to understand the present, to seek to alter the path away from its predicted course if and when prudent, to plan for the future, and to evaluate along the way. In the end, the character of the spaces and places we inhabit and in which we conduct our business and social affairs are necessarily impacted whenever legality innovations work to disrupt the incumbent landscape. Understanding many of the dynamics involved, and the lessons available from similarly-situated past land-use legal developments, can help us shape how and whether we want to resist, impede, control, accept, or embrace the land-use disruption that marijuana-related uses will bring.

