



This work was originally published as: Robert A. Mikos, Marijuana Localism - 65 Case Western Reserve Law Review 719 (2015).

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Citation: 65 Case W. Res. L. Rev. 719 2014-2015



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# MARIJUANA LOCALISM

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## CONTENTS

INTRODUCTION .....	719
I. LOCALISM THEORY .....	727
II. MARIJUANA LOCALISM.....	731
A. <i>The Case For</i> .....	731
B. <i>The Case Against</i> .....	737
1. Marijuana Smuggling .....	737
2. Marijuana Tourism.....	745
III. THE LESSONS FROM ALCOHOL LOCALISM .....	750
IV. RECOMMENDATIONS .....	761
A. <i>What States Could Do</i> .....	761
B. <i>What States Have Done</i> .....	764
C. <i>What States Should Do</i> .....	766
CONCLUSION .....	767

## INTRODUCTION

The states have largely prevailed in their struggle against the federal government for control over marijuana policy. More than twenty states have already legalized marijuana for some purposes under state law, and the number is sure to grow.<sup>1</sup> Though the federal government has not yet formally repealed its own marijuana prohibition,<sup>2</sup> it has largely ceded control of the issue to the states.<sup>3</sup>

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1. *State Medical Marijuana Laws*, NCSL (Mar. 16, 2015) [hereinafter *NCSL Marijuana*], <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

2. Controlled Substances Act, 21 U.S.C. §§ 841(a), 844(a) (2012).

3. See STAFF OF H. RULES COMMITTEE, 113TH CONG., TEXT OF HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 213 14 (2014) (instructing that “[n]one of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana”); DEP’T OF THE

But the states 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.<sup>4</sup> Communities in at least twelve marijuana legalization states have already passed local bans on marijuana dispensaries.<sup>5</sup> 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.<sup>6</sup> And 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.<sup>7</sup>

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TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) (signaling that FinCEN will allow banks to provide financial services to some marijuana dealers, notwithstanding the stringent federal ban on the drug); Memorandum from James M. Cole, Att'y General, to U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (signaling that the DOJ will not prosecute marijuana dealers who comply with state law and do not implicate other federal enforcement priorities).

4. See e.g., Eric M. Johnson, *Local Bans Try to Put Lid on Washington State Pot Shop Investors*, REUTERS (May 13, 2014), <http://www.reuters.com/article/2014/05/13/usa-marijuana-washington-idUSL2N0NS04W20140513> (reporting that “nearly 50 municipalities [in Washington] have enacted bans, moratoria and restrictive zoning ordinances, largely citing fears of a federal crackdown, their children getting high, and costly enforcement”); Jacob Sullum, *Will Local Bans Undermine Marijuana Legalization in Washington?*, FORBES (Jan. 24, 2014), <http://www.forbes.com/sites/jacobsullum/2014/01/24/will-local-bans-undermine-marijuana-legalization-in-washington/> (reporting that several cities in Washington “have banned marijuana businesses, while more than 20 others have imposed moratoriums”).
5. The states include Arizona, California, Colorado, Connecticut, Maine, Massachusetts, Montana, Nevada, New Jersey, Oregon, Vermont, and Washington. See *infra* Part IV.B for a discussion of how the states have responded to local bans.
6. Jon Murray & John Aguilar, *Colorado Cities and Towns Take Diverging Paths on Recreational Marijuana*, THE DENVER POST (Dec. 27, 2014); COLORADO MUNICIPAL LEAGUE, SUMMARY OF LOCAL RETAIL MARIJUANA ACTIONS: THRU FALL 2014, <http://www.cml.org/Issues/Elections/Election-Results/Election-Results-Retail-Marijuana/>.
7. For very helpful surveys of the regulations now being imposed by local governments, see Jeremy Nemeth & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, J. AM. PLAN. ASSOC. 6 (Aug. 2014) and Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning*:

These local ordinances raise one of the most important and unresolved questions surrounding marijuana law reforms: What power, if any, should states give *local governments* to regulate marijuana? How the states choose to answer this question will not only influence the content and pace of reforms, but could also have a dramatic impact on the overall level of popular satisfaction with marijuana policy. Proponents of localism suggest that local communities can do a better job of tailoring marijuana policies to suit the preferences of local majorities<sup>8</sup>—the same argument that states have employed to wrest control from the national government.<sup>9</sup> In other words, locals are simply saying that what’s good for the goose is good for the gosling.

But there is one important difference between localism and federalism: States have far greater influence over localities than the federal government has over the states. The states have a degree of constitutionally guaranteed autonomy from federal interference. This is why they have been able to legalize marijuana, notwithstanding the federal government’s strict ban on the drug<sup>10</sup> and claims that state legalization has imposed negative externalities on neighboring states.<sup>11</sup> In other words, the federal government could not stop the states from

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*Can You Grow, Sell, and Smoke That Here?*, 62 PLANNING & ENVIR. L. 3 (Aug. 2010).

8. *E.g.*, *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 300 P.3d 494, 508 (Cal. 2013) (suggesting that “while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens”).
9. *See* Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) [hereinafter Briffault, *Normative and Formal Concerns*] (“[T]he values said to be advanced by federalism are not distinctively associated with the states. Many of these values increasing opportunities for political participation, keeping government close to the people, inter-governmental competition, the representation of diverse interests may be served better by local governments than by states.”). *See also* Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (urging scholars to consider the potential benefits of devolving authority onto a multitude of government actors, including localities).
10. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419 (2009) [hereinafter Mikos, *On the Limits of Supremacy*] for an in-depth explanation of how the states won the war for control over marijuana policy.
11. *See infra* Part II.B.1 for a discussion regarding claims that Colorado-sourced marijuana is flooding neighboring states.

legalizing marijuana even if it sorely wanted to.<sup>12</sup> In contrast, local governments have no similar constitutional protection against state interference, at least as a matter of federal constitutional law. This means states could conceivably prevent local governments from meddling with state marijuana policy, if they deemed local control normatively undesirable.<sup>13</sup> The only real question then is what *should* the states do?

Despite the importance and very live nature of the local authority question, there has been surprisingly little attention paid to it. Most marijuana legalization states have simply failed to address local authority when crafting their marijuana laws, including recent reforms.<sup>14</sup> This means the issue is being resolved through costly and lengthy litigation.<sup>15</sup> Indeed, in many states, the issue of local control remains unsettled.<sup>16</sup> And while many scholars have weighed in on the federalism issues surrounding marijuana law reforms (including yours

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12. See Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1423-24 (“States may continue to legalize marijuana because Congress has not preempted and more importantly, *may not* preempt state laws that merely permit (i.e., refuse to punish) private conduct the federal government deems objectionable.”).

13. See *infra* Part IV.A.

14. See *infra* Part IV.B for a discussion of how states have addressed the marijuana localism question.

15. There have been dozens of lawsuits filed challenging local bans on marijuana, and state courts have reached starkly different conclusions regarding the propriety of those bans. Compare *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 300 P.3d 494 (Cal. 2013) (upholding a local ban on retail medical marijuana shops, notwithstanding California’s Compassionate Use Act) with *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014) (striking a local ban on marijuana cultivation as preempted by the Michigan Medical Marijuana Act).

16. For example, the attorney general of Washington recently issued an opinion declaring that state Initiative-502, which legalized recreational marijuana in 2012, does not preempt local bans on marijuana shops. See Letter from Robert W. Ferguson, Att’y General of Washington, to the Hon. Sharon Foster, Chair, Washington State Liquor Control Board, *Whether Statewide Initiative Establishing System for Licensing Marijuana Producers, Processors, and Retailers Preempts Local Ordinances 2* (Jan. 16, 2014), available at <http://www.atg.wa.gov/uploadedFiles/FosterAGO2014No02.pdf> (concluding that “[l]ocal governments have broad authority to regulate within their jurisdictions, and nothing in [the state initiative] limits that authority with respect to licensed marijuana businesses”). But state license applicants have sued to block local bans, and it is unclear whether the courts will agree with the state attorney general’s conclusion. See *State Attorney General Seeks to Join Marijuana Lawsuits in Fife, Wenatchee to Defend I-502*, KENT REPORTER (July 31, 2014), <http://www.kentreporter.com/news/269420451.html> (noting the Washington attorney general’s intervention in three lawsuits challenging city ordinances that ban marijuana shops).

truly),<sup>17</sup> they have all but ignored the important power battles now flaring up within the states.<sup>18</sup>

This Article begins to fill the gap. It aims to provide lawmakers, jurists, scholars, and other interested parties insights into the desirability of enabling local communities to regulate the sale of marijuana. I focus on local power over marijuana sales because it is the most salient localism battleground today. Notably, no state has yet allowed a local government to ban the simple possession of the drug where state law permits such possession.<sup>19</sup> Even local bans on personal cultivation of the drug appear suspect under state law.<sup>20</sup> Nonetheless,

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17. *See generally, e.g.*, William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513 (2015); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. REV. 74 (2015); Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279 (2014); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507 (2006); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v Raich*, 2005 SUP. CT. REV. 1. For my own work analyzing federalism issues surrounding marijuana law reforms, see Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5 (2013) [hereinafter Mikos, *Preemption Under the Controlled Substances Act*]; Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, CATO POL’Y ANALYSIS, Dec. 2012, at 1, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf>; Robert A. Mikos, *Can States Keep Secrets from the Federal Government?* 161 U. PA. L. REV. 103 (2012); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997 (2012); Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011); Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL. F. 223 (2010) [hereinafter Mikos, *State Taxation of Marijuana Distribution*]; Mikos, *On the Limits of Supremacy*, *supra* note 10.
18. There are at least two notable exceptions. *See* Nemeth & Ross, *Planning for Marijuana*, *supra* note 7; Salkin & Kansler, *Medical Marijuana Meets Zoning*, *supra* note 7.
19. For example, Amendment 64 expressly declares that it “shall not be an offense under Colorado law or the law of any locality within Colorado” for anyone twenty-one years of age or older to possess one ounce or less of marijuana. COLO. CONST. art. XVIII, § 16(3)(a) (emphasis added).
20. *Id.* § 16(3)(b) (stating that there will be no penalty under the law of any locality for “[p]ossessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes

this Article could be used to gauge the desirability of local power over these and other issues as well, should the need arise.

The Article approaches its task in three steps. First, it discusses the economic theory of localism, focusing on the primary economic rationale behind localism decisions: the desire to maximize satisfaction with government policy. Under this theory, localism's net impact on preference satisfaction hinges on the relative strength of two competing considerations: (1) the degree to which local communities disagree about how to regulate a given activity; and (2) the degree to which local communities absorb the full costs and benefits of the regulated activity—or, to put it another way, the degree to which people are likely to care about how the activity is being regulated elsewhere.

Second, the Article attempts to gauge the strength of these competing considerations when it comes to regulating marijuana sales. The Article suggests that local communities do indeed disagree about how to regulate marijuana sales, as evidenced by the divergent policies they are now pursuing and the local votes in recent elections. At the same time, however, the Article suggests that local communities do not absorb the full costs and benefits of local marijuana sales. The reason is that residents of one community can easily purchase marijuana in other communities and consume it there or back home. Easy access to marijuana in neighboring communities threatens to undermine the efficacy of many local marijuana regulations and thus the ability of local governments to satisfy the policy preferences of large constituencies.

Third, the Article develops a case study of local alcohol control and mines this case study for lessons about local marijuana control. 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. I argue that this experience holds some valuable lessons for debates over marijuana localism. In particular, I suggest our experience with local alcohol control should temper enthusiasm for giving local government similar control over marijuana. The research on local alcohol control suggests that local alcohol regulations often have effects outside of the communities that adopt them.<sup>21</sup> For example, one community's decision to go "wet" could thwart a neighboring dry community's efforts to curb alcohol consumption and the harms that go along with it. Likewise, one community's decision to go "dry" might simply shift more alcohol consumption and its attendant harms into a neighboring wet community. The sobering experience with local alcohol control suggests that the state or even the national government might be better suited to control alcohol and, by extension, perhaps marijuana as well.

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place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale").

21. See *infra* Part III.



Importantly, the Article remains deliberately neutral regarding whether marijuana distribution should be legal or illegal. It focuses instead on *who* should decide. I contend that the answer to that question ought to be the same regardless of its impact on the reach and pace of legalization. The state should allocate policymaking authority to whichever level of government is likely to please the largest number of people. To be sure, presently, localism would appear to favor one side—it enables prohibitionists to preserve islands of prohibition in states where the tide has clearly turned against them. But it is important to recognize that local power could just as easily be used to *legalize* as to prohibit marijuana. Indeed, citing frustration with the pace of state-level reforms, local communities in several states are now attempting to legalize marijuana, notwithstanding state prohibitions on the drug.<sup>22</sup> Localism thus arguably holds some appeal for both sides in marijuana policy debates. For this reason, if no other, it might be possible for decisionmakers to allocate authority between state and local governments without necessarily being influenced by expectations of how that authority will be exercised at the present moment.

The Article could also generate important insights for marijuana federalism. Since states too have porous borders, marijuana smuggling

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22. In Michigan, for example, eight cities recently voted to legalize possession and distribution of recreational marijuana under city law; the state, so far, has only legalized medical marijuana. See *City of Berkley Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Berkley\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Berkley_Marijuana_Decriminalization_Proposal_(November_2014)); *City of Hazel Park Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Hazel\\_Park\\_Marijuana\\_Decriminalization\\_Proposal\\_\(August\\_2014\)](http://ballotpedia.org/City_of_Hazel_Park_Marijuana_Decriminalization_Proposal_(August_2014)); *City of Huntington Woods Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Huntington\\_Woods\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Huntington_Woods_Marijuana_Decriminalization_Proposal_(November_2014)); *City of Mount Pleasant Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Mount\\_Pleasant\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Mount_Pleasant_Marijuana_Decriminalization_Proposal_(November_2014)); *City of Oak Park Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Oak\\_Park\\_Marijuana\\_Decriminalization\\_Proposal\\_\(August\\_2014\)](http://ballotpedia.org/City_of_Oak_Park_Marijuana_Decriminalization_Proposal_(August_2014)); *City of Pleasant Ridge Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Pleasant\\_Ridge\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Pleasant_Ridge_Marijuana_Decriminalization_Proposal_(November_2014)); *City of Port Huron Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Port\\_Huron\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Port_Huron_Marijuana_Decriminalization_Proposal_(November_2014)); *City of Saginaw Marijuana Decriminalization Proposal (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Saginaw\\_Marijuana\\_Decriminalization\\_Proposal\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Saginaw_Marijuana_Decriminalization_Proposal_(November_2014)).

In similar fashion, many local governments sought to legalize sales of alcohol before the repeal of state and national prohibitions. See DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 54 (2d ed. 2000).

and marijuana tourism threaten to undermine satisfaction with *their* policies as well. Indeed, Nebraska and Oklahoma have filed a lawsuit against Colorado claiming the Rocky Mountain State has imposed various costs upon its neighbors:

The diversion of marijuana from Colorado contradicts the clear Congressional intent, frustrates the federal interest in eliminating commercial transactions in the interstate controlled-substances market, and is particularly burdensome for neighboring states like Plaintiff States where law enforcement agencies and the citizens have endured the substantial expansion of Colorado marijuana.<sup>23</sup>

For reasons I've explained elsewhere, marijuana federalism may pose more of an academic question for now<sup>24</sup>—but it could resurface if support for marijuana legalization continues to grow.<sup>25</sup>

In addition to contributing to the debate over marijuana law and policy, this Article also adds to the body of localism scholarship. Following in the footsteps of recent works analyzing local control of domains as diverse as firearms and hydraulic fracturing,<sup>26</sup> this Article provides a case study to apply and refine the more abstract principles of localism theory. Perhaps one of the most important takeaways from these works is that the case for or against localism is rarely as clear cut as in the highly stylized hypotheticals commonly employed in the classroom.

The Article proceeds as follows. Part I discusses the theoretical framework for evaluating the desirability of local control. Part II discusses the strength of the two competing considerations surrounding the decision whether or not to grant local governments power to regulate marijuana sales: (1) the distinctiveness of local marijuana policy preferences; and (2) the impact of local marijuana sales on outsiders. Part III then discusses the lessons of local alcohol control.

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23. *Nebraska & Oklahoma v. Colorado*, No. 22O144 ORG, 6 (U.S. docketed Dec. 18, 2014) [hereinafter *Complaint*].

24. *See Mikos, On the Limits of Supremacy*, *supra* note 10, at 1445 50 (explaining that the anticommandeering rule prevents Congress from preempting state marijuana legalization).

25. If it had the political support to pass new legislation, for example, Congress could preempt state marijuana bans and force states to legalize marijuana. *See Mikos, Preemption Under the Controlled Substances Act*, *supra* note 17, at 15 17 (explaining that the anticommandeering rule does not prevent Congress from preempting state interference with the private market).

26. *See, e.g., Joseph Blocher, Firearm Localism*, 123 *YALE L.J.* 82 (2013) (making a case for local control over firearm regulation and providing the inspiration for the title of this piece!); David B. Spence, *The Political Economy of Local Vetoes*, 93 *TEX. L. REV.* 351, 377 78 (2014) (making an equivocal case for local control over fracking).

Part IV makes some tentative recommendations concerning whether states should devolve control of marijuana policy onto local governments.

### I. LOCALISM THEORY

This Part provides a quick primer on localism theory. For purposes of this Article, I focus on the economic theory of localism. This theory strives to maximize total satisfaction with government policy.<sup>27</sup> To that end, it asks which level of government, state or local, would maximize the combined utility of all residents of the state.<sup>28</sup> Maximizing preference satisfaction is not, of course, the only—or, indeed, even necessarily a *good*—rationale for localism,<sup>29</sup> but it is one of the most commonly invoked rationales for local control. So for now, I will focus exclusively on localism’s impact on satisfaction with government policy, leaving other considerations for another day.

Localism’s net impact on preference satisfaction depends on the strength of two competing considerations.<sup>30</sup> On the one hand, localism

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27. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (arguing that “local[ism] . . . reflects the preferences of the population more adequately than they can be reflected at the national level”); WALLACE E. OATES, FISCAL FEDERALISM 11 13 (1972) (arguing that decentralization achieves a higher degree of preference satisfaction); ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 152 54 (2013) (examining the informational benefits of “foot voting”).
28. I recognize this is not the only method of aggregating preferences. See WULF GAERTNER, A PRIMER ON SOCIAL CHOICE THEORY 9 12 (2006) (discussing competing approaches).
29. See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) (arguing that local governments are more than “insular forums for registering the private preferences of the persons who inhabit them” and can serve as “important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society’”); Richard Briffault, *Our Localism: Part II Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393 99 (1990) [hereinafter Briffault, *Our Localism: Part II*] (discussing claims that localism enhances political participation); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1861 (1994) (arguing that “contemporary local government law perpetuates the historically imposed segregation of the races”); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067 68 (1980) (arguing that the case for localism “does not rest on the view that local autonomy is the only, or even the most efficient, way to solve local problems” and suggesting instead that localism is desirable because it enables individuals “to participate actively in the basic societal decisions that affect one’s life”).
30. These two considerations are implicit in the theory’s conclusion that regulatory authority should be allocated to the smallest unit of government that can capture the full costs and benefits of regulated activity. See

could potentially boost preference satisfaction if local communities in the same state disagree about policy. Each state is comprised of a large number of local communities.<sup>31</sup> When some of those communities disagree with the way the state would handle an issue, localism enables them to pursue the policy their own majorities would prefer.<sup>32</sup> By giving communities the opportunity to opt out of a state policy that some find disagreeable, localism should satisfy a larger number of state residents overall.<sup>33</sup>

Professor Michael McConnell has developed a helpful hypothetical to illustrate the preference-satisfaction benefits of decentralization.<sup>34</sup> Although McConnell originally used this hypothetical to make the case for federalism, it is arguably even better suited to make the case for localism.<sup>35</sup> Adapted for that purpose, the hypothetical asks the reader to

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Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 137 (2010) (arguing that power in a federal system should be assigned to “the smallest unit of government that internalizes the effects of its exercise”). See also Spence, *supra* note 26, at 377 (“There is a long tradition in economics, positive theory, and other quasi-utilitarian traditions of examining jurisdictional conflicts . . . using the matching principle, which would house regulatory authority at the lowest level of government that encompasses (geographically) the costs and benefits of the regulated activity.”).

31. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (noting that there are more than 3,000 counties and 15,000 municipalities dispersed across the fifty states).
32. The assumption, of course, is that state government must apply the same policy throughout the state. If this assumption does not hold—in other words, if the state could adjust its own policy to suit local preferences—the preference satisfaction benefits of localism would disappear. Cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that the federal government could achieve the same preference-satisfaction benefits commonly attributed to federalism by simply adjusting federal policy to suit state conditions).
33. See Briffault, *Our Localism: Part II*, *supra* note 29, at 375–78 (discussing the posited comparative advantage of localism over federalism). See also sources cited *supra* note 27.

Localism does not, of course, benefit *everyone* in a state and for that reason is not Pareto efficient; instead, the idea is that the number of people who gain from localism outnumber the number who lose, making it Kaldor-Hicks efficient if we ignore the nettlesome problem of interpersonal utility comparisons.

34. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).
35. See Briffault, *Normative and Formal Concerns in Contemporary Federalism*, *supra* note 9, at 1305 (arguing that “many . . . of [the] values

assume that there are only two [cities], with equal populations of 100 each. Assume further that 70 percent of [City] A, and only 40 percent of [City] B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a [state] basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each [city], 130 will be pleased, and only 70 displeased.<sup>36</sup>

Mobility could further enhance preference satisfaction under localism. After all, residents who are unhappy with one locality's policy could potentially move to another locality that espouses a different, more agreeable policy.<sup>37</sup> McConnell notes in his example that "[t]he level of satisfaction will be still greater if some smokers in [City] A decide to move to [City] B, and some anti-smokers in [City] B decide to move to [City] A."<sup>38</sup> To be sure, residents could also relocate to other *states* as well as localities. But the relatively large number of localities increases the odds that residents will find one with a more agreeable policy and also reduces the costs associated with relocation across state lines.<sup>39</sup>

On the other hand, localism could potentially diminish satisfaction with government policy if some residents care about what happens outside their home communities. For a variety of reasons, people commonly do care about what is going on in other communities. For example, those happenings might harm them physically—think of lung disease caused by pollution emanating from a neighboring town's factory—as well as psychologically—think of the disgust felt upon hearing of ISIS beheadings halfway across the globe. Judge David Barron has aptly remarked that "no city or state is an island jurisdiction. The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states . . . ."<sup>40</sup>

When people care about what happens elsewhere, localism will not necessarily increase total satisfaction in the state and could even diminish it. This is because localism requires surrendering a degree of control over activities occurring elsewhere. In McConnell's hypothetical, for example, the people of City A could not ban smoking

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said to be advanced by federalism . . . may be served better by local governments than by states").

36. McConnell, *supra* note 34, at 1494.

37. See, e.g., SOMIN, *supra* note 27, at 152–54 (noting the benefits of "foot voting").

38. McConnell, *supra* note 34, at 1494.

39. Briffault, *Our Localism: Part II*, *supra* note 29, at 400–35.

40. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378–79 (2001).

in City B, nor could City B legalize smoking in City A. McConnell's case for decentralization thus rests on the assumption that the residents of City A do not care about City B's policy and vice versa. This might be a fair assumption to make for an issue like smoking policy. But the same assumption does not hold for policies governing other activities. Imagine, for example, that City B decided to allow a local factory to dump toxic pollutants into a river, contaminating the water supply of downstream City A. Notwithstanding their apathy toward City B's smoking policy, the residents of City A *would* care about City B's *pollution* policy.<sup>41</sup>

Ultimately, the problem is that local communities have no incentive to consider the costs and benefits of local activity that are borne by outsiders.<sup>42</sup> This means that the interests of local communities and the interests of the entire state do not necessarily coincide, and we cannot trust local communities to regulate activities in a way that will maximize the total satisfaction of the entire state. In particular, when local activity imposes costs on outsiders, local authorities will allow or produce too much of it. (The example of the factory in City B polluting City A's water supply fits the bill). And when local activity instead confers benefits on outsiders, local authorities will allow or produce too little of it.

\* \* \*

To summarize, localism enables each community to pursue the policy that maximizes its own well-being. And as long as local activity does not affect outsiders to the community, regulation motivated by local interests will also maximize the well-being of the state. But when local activity imposes costs or benefits on those outsiders, local communities will not necessarily adopt the policies that maximize the state's well-being. The normative case for localism thus hinges on the strength of two competing considerations: (1) the degree to which local communities disagree about how to regulate a given activity, and (2) the degree to which local communities absorb the full costs and benefits of the regulated activity. *Ceteris parabis*, the stronger is the former consideration, the stronger will be the case for local control. Conversely, the stronger is the latter consideration, the stronger will be the case for state control. I argue that states should consider these criteria when deciding whether to grant local communities authority over marijuana.

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41. Economists label these concerns externalities, which, for present purposes, are costs or benefits associated with a local activity or policy that are borne by nonconsenting outsiders.

42. See Briffault, *Our Localism: Part II*, *supra* note 29, at 434 ("Local governments will not, as long as they need not, take extralocal effects into account, give a voice to nonresidents affected by local actions, internalize externalities, make compensatory payments for negative spillovers or transfer local wealth to other communities in the region to ameliorate fiscal disparities.").

The next Part thus explores the strength of these two considerations when it comes to marijuana sales.

## II. MARIJUANA LOCALISM

This Part evaluates the case for and against local control of marijuana sales policy using the two economic criteria discussed above. Namely, I examine the extent to which majority preferences toward marijuana sales policy differ across local jurisdictions and the extent to which local marijuana sales have effects outside the point-of-sale community. As noted above, this is not meant to be an exhaustive list of the criteria needed to evaluate marijuana localism. But these economic considerations offer a good place to start our assessment of the normative desirability of marijuana localism.

### A. *The Case For*

This Section demonstrates that local communities do indeed prefer different policies toward marijuana sales. But it also suggests that the gains associated with marijuana localism could prove to be small and temporary.

It seems safe to posit that communities disagree about how to regulate marijuana sales. The best evidence stems from the fact that local communities have adopted starkly different policies toward marijuana stores. In Colorado, for example, 165 municipalities have voted to ban retail marijuana stores, but another fifty-three municipalities have voted to permit them.<sup>43</sup> Marijuana stores garnered as little as 21 percent support and as much as 65 percent support in the most recent round of local referenda.<sup>44</sup> Even among Colorado

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43. See Murray & Aguilar, *supra* note 6 for a detailed breakdown of Colorado.

44. In 2014, voters in eight Colorado cities considered local initiatives to legalize marijuana stores as permitted by Amendment 64. *Local Marijuana on the Ballot*, BALLOTPEdia, [http://ballotpedia.org/Local\\_marijuana\\_on\\_the\\_ballot](http://ballotpedia.org/Local_marijuana_on_the_ballot). Majorities in two of those cities voted to approve marijuana stores, while majorities in the other six cities voted to prohibit them. *Id.* The cities and vote shares (prohibit-allow) are Cañon City (61-39), *Canon City Marijuana Legalization, Measure 2C (November 2014)*, BALLOTPEdia, [http://ballotpedia.org/Ca%C3%B1on\\_City\\_Marijuana\\_Retail\\_Legalization\\_Measure\\_2C\\_\(November\\_2014\)](http://ballotpedia.org/Ca%C3%B1on_City_Marijuana_Retail_Legalization_Measure_2C_(November_2014)); Lakewood (54-46), *Town of Lakewood Marijuana Retail Ban, Measure 2A (November 2014)*, BALLOTPEdia, [http://ballotpedia.org/Town\\_of\\_Lakewood\\_Marijuana\\_Retail\\_Ban\\_Measure\\_2A\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Lakewood_Marijuana_Retail_Ban_Measure_2A_(November_2014)); Manitou Springs (35-65), *City of Manitou Spring Retail Marijuana Ban, Measure 2G (November 2014)*, BALLOTPEdia, [http://ballotpedia.org/City\\_of\\_Manitou\\_Springs\\_Retail\\_Marijuana\\_Ban\\_Measure\\_2G\\_\(November\\_2014\)](http://ballotpedia.org/City_of_Manitou_Springs_Retail_Marijuana_Ban_Measure_2G_(November_2014)); Palisade (50.3-49.7), *Town of Palisade Retail Marijuana Legalization, Measure 2A (November 2014)*, BALLOTPEdia, [http://ballotpedia.org/Town\\_of\\_Palisade\\_Retail\\_Marijuana\\_Legalization\\_Measure\\_2A\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Palisade_Retail_Marijuana_Legalization_Measure_2A_(November_2014)); Palmer Lake (53-47), *Town of Palmer Lake Recreational Marijuana Retail Ban, Measure 301*

communities that allow marijuana stores, there is some differentiation in policy. For example, only half of the fifty-three municipalities that permit retail marijuana shops have chosen to levy special local taxes on marijuana sales.<sup>45</sup> And to varying degrees communities in Colorado and elsewhere restrict the number, location, size, and hours of operation of locally permitted marijuana stores.<sup>46</sup>

The passage of different policies arguably reflects the distinctive beliefs, priorities, and conditions of local communities. To simplify somewhat, communities that have banned marijuana dispensaries fear the stores fuel marijuana consumption<sup>47</sup> and all the harms they attribute to it, and that they also attract “crime, congestion, blight, and drug abuse”<sup>48</sup> to surrounding neighborhoods. Communities that allow dispensaries might share some of these concerns, but they prefer less-draconian means to address them, for example, keeping stores away from areas frequented by children.<sup>49</sup> Communities that allow marijuana stores also see an upside to them. The stores provide medicine for

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(November 2014), BALLOTPEDIA, [http://ballotpedia.org/Town\\_of\\_Palmer\\_Lake\\_Recreational\\_Marijuana\\_Retail\\_Ban\\_Measure\\_301\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Palmer_Lake_Recreational_Marijuana_Retail_Ban_Measure_301_(November_2014)); Paonia (53 47), *Town of Paonia Marijuana Retail Legalization Referendum, Measure 2B (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/Town\\_of\\_Paonia\\_Marijuana\\_Retail\\_Legalization\\_Referendum\\_Measure\\_2B\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Paonia_Marijuana_Retail_Legalization_Referendum_Measure_2B_(November_2014)); Ramah (79 21) *Town of Ramah Marijuana Retail Legalization, Measure 2B (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/Town\\_of\\_Ramah\\_Marijuana\\_Retail\\_Legalization\\_Measure\\_2B\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Ramah_Marijuana_Retail_Legalization_Measure_2B_(November_2014)); and Red Cliff (36 64), *Town of Red Cliff Marijuana Retail Ban, Question 2G (November 2014)*, BALLOTPEDIA, [http://ballotpedia.org/Town\\_of\\_Red\\_Cliff\\_Marijuana\\_Retail\\_Ban\\_Question\\_2G\\_\(November\\_2014\)](http://ballotpedia.org/Town_of_Red_Cliff_Marijuana_Retail_Ban_Question_2G_(November_2014)).

45. Murray & Aguilar, *supra* note 6.
46. Nemeth & Ross, *supra* note 7, at 8 11 (cataloging the regulations imposed on medical marijuana dispensaries by several communities across the country).
47. See Hunter Stuart, *One-Quarter of Washington’s Towns Still Ban Marijuana*, THE HUFFINGTON POST, Jul. 8, 2014 (“Having a retail recreation store sends the wrong message to kids.”) (quoting Dale Brown).
48. *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 300 P.3d 494, 508 (Cal. 2013) (adopting argument made by amici curiae to support a local ban on medical marijuana dispensaries). See also Nemeth & Ross, *supra* note 7, at 7 (noting strong NIMBY opposition to marijuana stores).
49. See Nemeth & Ross, *supra* note 7, at 8 (noting that the “main intent” of restrictions on the day to day operations of medical marijuana dispensaries is “to limit feared secondary impacts” of the stores, “especially crime, underage use, or diversion to the ‘black market’”).



seriously-ill patients, recreation for consenting adults, tax revenues for cash-strapped local governments, or jobs for local workers.<sup>50</sup>

The results of statewide elections further demonstrate the existence of divergent local policy preferences in this domain. In statewide elections, local communities have commonly staked out opposing positions on marijuana ballot initiatives. Consider the vote on Colorado's Amendment 64. In total, more than one-half (55.3%) of Colorado voters favored Amendment 64.<sup>51</sup> But a majority of voters in thirty out of Colorado's sixty-four counties actually *opposed* Amendment 64.<sup>52</sup> Marijuana ballot initiatives in other states have proven similarly divisive at the local level.<sup>53</sup>

Given these disagreements, localism theory suggests that more people might be satisfied if their local government rather than the state (or national) government controlled marijuana sales policy. The results of those aforementioned statewide elections could even help estimate the magnitude of the preference-satisfaction gains to be had from marijuana localism. To that end, I compared the number of people in the local majority on state marijuana measures to the number of people in the statewide majority on the same measures. The differences provide a very rough approximation of the number of voters who might gain from marijuana localism in the states. While this methodology has obvious shortcomings, like ignoring the intensity of voter preferences and ignoring policy alternatives not considered on state ballots, it should generate some insight into the strength of the case for marijuana localism.

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50. *See id.* at 7 (discussing perceived job and tax revenue rationale animating local ordinances allowing marijuana dispensaries).

51. *Amendments and Proposition Results*, COLORADO SECRETARY OF STATE [hereinafter *Colorado Amendments and Proposition Results*], <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html> (receiving 1,383,140 out of 2,500,034 votes).

52. *Id.*

53. For example, in California, twelve of fifty-eight counties supported Proposition 19 in 2010. *State Ballot Measures by County*, CALIFORNIA SECRETARY OF STATE (2010), <http://elections.cdn.sos.ca.gov/sov/2010-general/88-state-ballot-measures.pdf>. In Washington, 20 of 39 counties supported Initiative 502 in 2012. *November 06, 2012 General Election Results*, WASHINGTON SECRETARY OF STATE, (Nov. 27, 2012), [http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana\\_ByCounty.html](http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html) [hereinafter *Washington Voting Results on Initiative 502*]. Finally, in Oregon, 14 of 36 counties supported Measure 91 in 2014. *General Election, Official Abstract of Votes: Measure 91*, OREGON SECRETARY OF STATE (2014) [hereinafter *Oregon Abstract of Votes: Measure 91*], <http://www.oregonvotes.gov/doc/history/nov42014/91.pdf>.

Consider, first, the county-by-county vote on Colorado's Amendment 64.<sup>54</sup> In the 2012 election, 1,383,140 Coloradoans voted for Amendment 64 and were presumably satisfied with the outcome; another 1,116,894 Coloradoans voted against Amendment 64 and were presumably dissatisfied with the outcome.<sup>55</sup> In total, a net 266,246 more Coloradoans preferred the new state policy (legalization) over the old one (prohibition). But the county-by-county vote suggests that even more people would have been satisfied by localism. Majorities in thirty of Colorado's sixty-four counties actually *opposed* Amendment 64. In these counties, the total number of "no" votes (215,973) exceeded the total number of "yes" votes (181,369) by 34,604. This suggests that a net of 34,604 Coloradoans might have been happier under localism.<sup>56</sup>

While the results on Amendment 64 might be indicative only of Colorado circa 2012, the county-by-county votes on marijuana ballot measures in other states tell a very similar story. Table 1 displays data from four of the most recent statewide marijuana ballot initiatives in which county level votes were readily available.<sup>57</sup>

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54. All of the Colorado election figures are pulled from STATE OF COLO., OFFICE OF THE SEC'Y OF STATE, 2012 ABSTRACT OF VOTES CAST 145 (2012) [hereinafter *Colorado Voting Results on Amendment 64*], <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/booklet.pdf>.

55. *Id.*

56. To put it another way, 34,604 is the difference between the sum of the countywide majority vote on Amendment 64 (1,417,744) and the total statewide majority vote on the Amendment 64 (1,383,140). *Colorado Voting Results on Amendment 64*, *supra* note 54, at 145.

57. All data in the table are pulled from CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2, 2010, GENERAL ELECTION 88 90 (2011) [hereinafter *California Voting Results on Proposition 19*], <http://elections.cdn.sos.ca.gov/sov/2010-general/complete-sov.pdf>; *Colorado Amendments and Proposition Results*, *supra* note 51; *Oregon Abstract of Votes: Measure 91*, *supra* note 53; *Washington Voting Results on Initiative 502*, *supra* note 53.

TABLE 1

State	Majority voters at state level	Majority voters at county level	Difference
<b>California Prop 19 (2010)</b>	5,333,230	5,558,225	224,995
	53.5%	55.7%	2.3%
<b>Colorado Amendment 64 (2012)</b>	1,383,140	1,417,744	34,604
	55.3%	56.7%	1.4%
<b>Oregon Measure 91 (2014)</b>	847,865	880,527	32,662
	56.1%	58.3%	2.2%
<b>Washington I-502 (2012)</b>	1,724,209	1,770,284	46,075
	55.7%	57.2%	1.5%

The second column shows the number and percentage of state voters who were in the majority at the state level; the third column shows the number and percentage of voters in the majority at the county level; and the final column shows the difference between the first two figures, which provides a rough approximation of the net increase in satisfied voters under localism. As the table shows, to date, the number of potential beneficiaries of marijuana localism expressed as a percentage of state voters has been *remarkably* consistent across the states, amounting to roughly *2 percent* of a state’s voting population. This is not a trivial gain, but it is far less than the 10 percent net gain posited by McConnell’s hypothetical above.<sup>58</sup> The gains from marijuana localism appear to be somewhat small because opposition to state legalization measures has been concentrated in more thinly populated counties. In Colorado, for example, five of the seven *smallest* counties but not one of the seven *largest* counties opposed Amendment 64.<sup>59</sup>

In theory, of course, the number of people who benefit from localism would be even larger and the case for localism correspondingly stronger if some dissatisfied residents relocated to communities espousing more like-minded preferences toward marijuana regulation. After all, estimating the number of people who benefit from localism using only the votes they cast in an election fails to count anyone who benefits from localism by voting with their feet instead.<sup>60</sup> Nonetheless, I suspect

58. In the hypothetical, twenty more voters out of 200 total were more satisfied by local versus state control. See McConnell, *supra* note 34, at 1494.

59. The ten smallest counties comprised only .23% of voters while the ten largest counties comprised 66.9% of voters. *Colorado Voting Results on Amendment 64*, *supra* note 54, at 145.

60. See *supra* notes 37–39 and accompanying text.

few people actually change residences solely on account of local marijuana sales policy. For most people, marijuana is not an important enough issue to justify incurring the costs of permanent relocation,<sup>61</sup> especially when, as I suggest below, they can easily take advantage of neighboring community's laws without relocating there.

Likewise, the number of people who benefit from marijuana localism could prove even *smaller* than the vote tallies suggested. One reason is that preferences toward marijuana policy are rapidly changing. The disagreements that now divide local communities could resolve themselves over time, in which case localism would produce only temporary gains.<sup>62</sup> Consider, for example, how the controversy over medical marijuana has largely disappeared among the general public. More than *80 percent* of Americans now support legalization of marijuana for medical purposes.<sup>63</sup> Localism might have held some appeal for the medical marijuana issue twenty years ago when the public was somewhat more divided, but that appeal has waned along with opposition to medical use of the drug.<sup>64</sup> In a similar way, localism has arguably lost much of its appeal in the realm of alcohol policy. In 1935, nearly 1,000 counties voted to opt out of statewide legalization of

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61. GfK PUB. AFFAIRS & CORPORATE COMM'NS, THE AP-GfK SEPT. 2014 POLL: ALL QUESTIONS, 19 (2014), [http://surveys.ap.org/data/GfK/AP-GfK\\_Poll\\_September\\_2014\\_Topline\\_ALL.pdf](http://surveys.ap.org/data/GfK/AP-GfK_Poll_September_2014_Topline_ALL.pdf) (reporting that 12% of respondents consider laws regarding marijuana an "extremely important" personal issue; 14% consider it a "very important" personal issue; 24% consider it a "moderately important" personal issue; 21% consider it "slightly important"; and 28% consider it "not at all important").
  62. To be sure, the passage of local policies might play a role in facilitating such convergence of opinion. See Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1471-72 (discussing the possible impact state marijuana laws have had on public opinion toward the drug).
  63. See e.g., *Survey: General Public, Christian Young Adults Divided On Marijuana Legalization*, PUB. RELIGION RESEARCH INST., Apr. 25, 2013, <http://publicreligion.org/research/2013/04/april-2013-prri-rns-survey/> (80% favor legalization of medical marijuana).
  64. Polls from the mid-1990s reveal that the public was more divided over medical marijuana then than it is today. See, e.g., Wired/Merrill Lynch Forum Digital Citizen Survey, Sept. 1997. Retrieved Jan-19-2015 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, [http://www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (62% favor legalizing medical marijuana); ABC News Poll, May, 1997. Retrieved Jan-19-2015 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, [http://www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (70% favor legalizing medical marijuana); Americans Assess Medical Marijuana Survey, Mar, 1997. Retrieved Jan-19-2015 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. [http://www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (22% favor legalizing medical marijuana).

alcohol sales, but by 1970 that number had shrunk to around 600 counties,<sup>65</sup> and it has continued to drop ever since.<sup>66</sup>

In sum, at first glance, marijuana localism looks appealing. Local communities clearly disagree about how to regulate marijuana. It appears that more people would be happy living under locally tailored marijuana policies than would be happy living under a single state-crafted marijuana policy, though the difference appears somewhat small and may prove temporary. But the case for localism so far has rested on the assumption that local voters do not care about marijuana policies adopted outside their home jurisdictions. The next Part challenges this assumption and thus casts doubt upon the normative case for marijuana localism.

### *B. The Case Against*

Localism could potentially reduce overall satisfaction with government policy if people care about the marijuana policies adopted by other communities. This Section suggests there are at least two reasons people will mind what other communities do. Marijuana users can smuggle marijuana in from neighboring communities (marijuana smuggling), and marijuana users can travel out to neighboring communities to consume the drug (marijuana tourism). Both marijuana smuggling and marijuana tourism threaten to undermine the efficacy of many local controls and thus satisfaction with marijuana localism among a large segment of the population.

#### 1. Marijuana Smuggling

In a world of divergent local marijuana policies, marijuana smuggling could undermine all but the most lenient of them. All marijuana regulations impose costs on the drug. Marijuana prohibition imposes risk premiums on those who supply the drug; these risk premiums are passed along to consumers in the price of the drugs they buy. Marijuana taxes and other business regulations, such as licensing requirements, also raise the price of the drug, though perhaps to a lesser extent. The problem for governments is that marijuana consumers have strong incentives to avoid these costs, and the availability of cheaper marijuana in neighboring jurisdictions—especially nearby local jurisdictions—gives them an easy means by which to do so.

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65. Koleman S. Strumpf & Felix Oberholzer-Gee, *Endogenous Policy Decentralization: Testing the Central Tenet of Economic Federalism*, 110 J. POL. ECON. 1, 8-12 (2002) (providing data on a number of dry counties from 1935 to 1970).

66. See Reagan Baughman et al., *Slippery When Wet: The Effects of Local Alcohol Access Laws on Highway Safety*, 20 J. HEALTH & ECON. 1089, 1091-92 (2001) (reporting that from 1975 to 1996, thirty-three dry Texas counties voted to legalize alcohol sales).

For reasons both legal and practical, smuggling marijuana between local communities is easy. To begin, local residents have a constitutional “right to travel and to take advantage of the legal entitlements of neighboring jurisdictions.”<sup>67</sup> As Professor Seth Kreimer eloquently explains,

[T]he American Constitution as reformulated after the Civil War contemplates a national citizenship which gives to each of its members the right to travel to other states where, on a basis of equality with local residents, they can take advantage of the economic, cultural and moral options permitted there. The effort of any political subdivision of the nation to coerce its citizens into abjuring the opportunities offered by its neighbors is an affront not only to the federal system, but to the rights that the citizens hold as members of the nation itself.<sup>68</sup>

Thus, a community may not bar its residents from buying marijuana somewhere else, even if it chooses to ban marijuana inside its own borders. For example, if Aurora, Colorado, prohibits retail marijuana sales, it may not stop its residents from buying the drug next door in Denver, where sales are legal.<sup>69</sup>

The United States Constitution *would* allow local governments to bar the importation and possession of “noxious” goods in its borders, but it appears that no state has yet actually empowered a local community to ban the simple possession or even importation of marijuana bought legally elsewhere in the state.<sup>70</sup> In any event, even if a state did allow localities to ban possession and transportation of marijuana purchased in another community, residents would face little practical difficulty buying marijuana elsewhere and bringing it back home. The costs of making the trip to another community would be

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67. Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 462 (1992). See also I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (examining comprehensively the right to travel to circumvent domestic prohibitions on accessing certain medical services that are legal in the patient’s destination country but illegal in the patient’s home country).

68. Kreimer, *supra* note 67, at 519.

69. Aurora only recently decided to lift its ban on marijuana retail stores. See Carlos Illescas, *Aurora to Start Pot Sales, but Stores Not Ready*, THE DENVER POST, Sept. 28, 2014, at 5B (reporting that Aurora lifted its ban on October 1, 2014).

70. See *supra* note 19 and accompanying text.

negligible<sup>71</sup> as legal marijuana stores may sit just feet outside the resident's jurisdiction.<sup>72</sup> Moreover, the marijuana could be easily concealed for the trip home,<sup>73</sup> meaning the resident would face little risk of being caught by local police in possession of marijuana from another jurisdiction. The resident could further limit this risk and the size of the sanction she would face by limiting the quantities she smuggles, which is only a minimal inconvenience, considering that even

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71. As Jonathan Caulkins points out, “[d]rugs are enormously valuable per unit weight, so conventional transportation costs are negligible.” Jonathan P. Caulkins, *Domestic Geographic Variation in Illicit Drug Prices*, 37 J. URB. ECON. 38, 39 (1995).

72. For example, several of Denver's 100+ licensed marijuana shops are located just outside the city limits of Aurora. A map of Denver's licensed marijuana shops can be found at *Retail Marijuana Licenses*, DENVER BUS. LICENSING CTR., <http://www.denvergov.org/businesslicensing/DenverBusinessLicensingCenter/MarijuanaLicenses/RetailMarijuana/tabid/445028/Default.aspx> (last visited Feb. 7, 2015).

To be sure, not every community will be as closely situated to its doppelgänger as Denver and Aurora. And not surprisingly, smuggling poses less of a concern for more isolated communities. See, e.g., Matthew Berman et al., *Alcohol Control and Injury Death in Alaska Native Communities: Wet, Damp, and Dry under Alaska's Local Option Law*, 61 J. OF STUDIES ON ALCOHOL 311, 318 (2000) (concluding that “community-based alcohol control under the Alaska local option law has likely had some effect in moderating the elevated risk of injury death for Alaska Natives living in small remote communities”); Darryl S. Wood & Paul J. Gruenewald, *Local Alcohol Prohibition, Police Presence and Serious Injury in Isolated Alaska Native Villages*, 101 ADDICTION 393, 400 (2006) (confirming the findings of earlier studies that local alcohol prohibitions reduced violent crime among isolated Alaska Native American communities).

73. See, e.g., NAT'L DRUG INTELLIGENCE CTR., ARIZONA: DRUG THREAT ASSESSMENT 22 (2003), <http://www.justice.gov/archive/ndic/pubs6/6384/6384p.pdf> (noting that smugglers can conceal marijuana in “specially designed hidden compartments within . . . vehicles . . . includ[ing] bumpers, tires, gas tanks, quarter panels, seats, spare tires, and engine compartments [or] in duffel bags or luggage within the trunk or on the floor or seat of the vehicle[, or by] commingl[ing] marijuana with legitimate cargo such as fruits and vegetables”); *Experts Say Drug Mules Are Easy to Find, Hard to Catch*, NBC NEWS (May 30, 2013), [usnews.nbcnews.com/\\_news/2013/05/30/18589533-experts-say-drug-mules-are-easy-to-find-hard-to-catch?lite](http://usnews.nbcnews.com/_news/2013/05/30/18589533-experts-say-drug-mules-are-easy-to-find-hard-to-catch?lite) (“The stash spots can be incredibly difficult to detect. Entire gas tanks can be removed and replaced with a bundle of drugs, or a back bumper can be filled with packages. Customs and Border Protection regularly announces seizures of narcotics hidden in creative receptacles like statues of Jesus, shoe heels or hair-spray cans.”).

heavy users consume less than two grams daily.<sup>74</sup> And in the unlikely event she is caught with a small quantity of marijuana (say, twenty-eight grams or less), the resident would, at worst, likely face only simple possession charges.<sup>75</sup> For all of these reasons, the expected sanction for smuggling marijuana across local communities is likely to be extremely low.<sup>76</sup>

Indeed, marijuana is commonly smuggled through less porous borders and across longer distances than those separating communities in the same state. Much of the marijuana consumed in the United States is smuggled all the way from Mexico,<sup>77</sup> and states like Nebraska and Oklahoma claim they have “dealt with a significant influx of Colorado-source marijuana” since the state legalized commercial sales of the drug.<sup>78</sup> Though it is wise to take such claims with a grain of salt, the Colorado Department of Revenue itself estimates that out-of-state residents bought between eight and ten *tons* of marijuana legally in

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74. BEAU KILMER ET AL., RAND CORP., BEFORE THE GRAND OPENING: MEASURING WASHINGTON STATE’S MARIJUANA MARKET IN THE LAST YEAR BEFORE LEGALIZED COMMERCIAL SALES 11–12 (2013).

75. Even the federal government might treat this as a mere civil infraction, at least the first time around. *See* 21 U.S.C. § 844a (2012) (authorizing federal prosecutors to treat simple possession of one ounce or less of marijuana as a civil infraction).

76. Whether the expected sanction will be enough to deter such smuggling depends on the difference in the price of marijuana in different communities. It is possible that communities could deter smuggling from neighboring communities imposing only slightly more lenient regulations because the price differential will be small. But deterring smuggling from neighboring communities espousing significantly more lenient regulations will be considerably more difficult.

77. *See* BEAU KILMER ET AL., RAND CORP., REDUCING DRUG TRAFFICKING REVENUES AND VIOLENCE IN MEXICO: WOULD LEGALIZING MARIJUANA IN CALIFORNIA HELP? 7, 16 (2010) (noting that “at least 50 percent of the commercial-grade marijuana consumed in the United States comes from Mexico”).

78. Complaint, *supra* note 23, at 25; *see also* Brief in Support of Motion for Leave to File Complaint at 8, *Nebraska & Oklahoma v. Colorado*, No. 22O144 ORG (U.S. docketed Dec. 18, 2014) (“Since Amendment 64 took effect, Plaintiff States’ law enforcement have encountered Colorado marijuana on a routine basis, confirming that significant amounts of Colorado-sourced marijuana are being diverted to Plaintiff States.”); *id.* (“Amendment 64 . . . established Colorado as a marijuana source for the rest of the country.”). *See also* JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 136 (2015) (suggesting that legalizing marijuana in tiny *Vermont* could “alter availability [of marijuana] for at least *one-quarter* of the nation’s users”) (emphases added); *id.* at 137 (“Total marijuana spending by out-of-state users living within a radius of 200 miles of Vermont could well reach or exceed \$5 billion per year.”).



Colorado in 2014,<sup>79</sup> and it reports that out-of-staters comprised nearly *one-half* of the roughly 2,500 customers served by a Denver marijuana store in the course of a single week.<sup>80</sup> Federal drug enforcement agencies also report a nearly 400 percent increase in the number of seizures of Colorado sourced marijuana destined for other states between 2009 and 2012—a period following the proliferation of medical marijuana stores in Colorado but before the first recreational marijuana stores had even opened their doors.<sup>81</sup>

For local communities and possibly even for states and nations, it is just not feasible to prevent cheap marijuana from being smuggled across their borders. In their suit against Colorado, for example, Nebraska and Oklahoma claim they have had to invest substantial new resources in their unsuccessful attempt to stem the tide of marijuana flowing in from Colorado:

The result of increased Colorado-sourced marijuana being trafficked in Plaintiff States due to the passage and implementation of Colorado Amendment 64 has been the diversion of a significant amount of the personnel time, budget, and resources of the Plaintiff States' law enforcement, judicial system, and penal system resources to counteract the increased trafficking and transportation of Colorado-sourced marijuana.<sup>82</sup>

Not surprisingly, Nebraska and Oklahoma would probably prefer that Colorado shut off the water at the spigot instead—recall that a *single*

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79. MILES K. LIGHT ET AL., THE MARIJUANA POLICY GROUP, MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO 26 (2014).

80. *Id.* at 25 (reporting that 44.5% of the customers were out-of-staters). See also Aaron Smith, *Tourists Flock to Colorado to Smoke Legal Weed*, CNN MONEY (Aug. 22, 2014), <http://money.cnn.com/2014/08/22/smallbusiness/marijuana-tourism-colorado/> (reporting that a Colorado marijuana shop owner attributed 70% of business to out-of-state customers, with another shop owner attributing at least one-third).

While those out-of-staters did not necessarily take all of the marijuana they bought in Colorado back home, Colorado's restrictions on public consumption of the drug made it tough for them to consume all of it *in Colorado*. See *Retail Marijuana Use Within the City of Denver*, COLORADO: THE OFFICIAL WEB PORTAL (last visited Jan. 31, 2015) <https://www.colorado.gov/pacific/marijuanainfodenver/residents-visitors> (detailing limits imposed on the *consumption* of marijuana) [hereinafter *Denver Marijuana Use*].

81. ROCKY MOUNTAIN HIDTA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 38 (2013) (comparing the number of interdiction seizures involving Colorado marijuana from 2005 to 2008 and 2009 to 2012).

82. Complaint, *supra* note 23, at 26.

marijuana store in Denver serves *thousands* of customers every *week*.<sup>83</sup> But that preferred strategy is simply unavailable to local communities and even states and nations when the source of a drug lay outside their borders.

Marijuana smuggling threatens to undermine the policy objectives of local communities and hence their satisfaction with localism. For one thing, smuggling could undermine the efforts of some communities to curb consumption of marijuana and all of the harms those communities attribute (rightly or wrongly) to such consumption, including intellectual and motivational impairment, heart attacks, psychoses, traffic accidents, and moral corruption, to name a few.<sup>84</sup> As explained above, one goal of local regulation is to raise the price of marijuana and thereby reduce its consumption among residents. But if local regulations can be evaded by shopping at a marijuana store located in the town next door, those local regulations will not work as intended. And if local marijuana regulations do not actually work as intended, marijuana localism will not boost preference satisfaction in communities that adopt the regulations and might even diminish satisfaction.<sup>85</sup>

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83. As I have explained elsewhere,

Targeting suppliers as opposed to users has two obvious advantages. First, there are far fewer of them. . . . Second, the penalties for cultivation and distribution of marijuana are significantly higher than for simple possession, the charge most users would face . . . meaning that expected legal sanctions will be high even if the probability of being detected by . . . law enforcement is not.

Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1467. See also *United States v. Osburn*, 955 F.2d 1500, 1509 (11th Cir. 1992) (“If the government concentrates on eliminating the problem early in the distribution cycle, then it will be less necessary to control drug possession later when the numbers of retailers and users has multiplied. In addition, if the problem is addressed at an early stage, then it is less likely that the drug will ever reach users, and the consequent problems of drug use would be commensurately diminished.”).

84. See Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011) (to be codified at 21 C.F.R. ch. II) [hereinafter Denial of Marijuana Rescheduling] (discussing the harms that the Drug Enforcement Agency attributes to marijuana use).

The reader might take a very different view of marijuana’s harms. But the very premise of localism is that local governments ought to be allowed to reach different conclusions about such matters. Some local communities will base their policies on unsubstantiated views, but as long as they absorb the full costs and benefits of their decisions, they should be allowed to make that choice.

85. See Edward L. Powers & Janet K. Wilson, *Access Denied: The Relationship Between Alcohol Prohibition and Driving Under the Influence*, 74 SOC. INQUIRY 318, 318 19 (2004) (making the point for alcohol policy).

To be sure, local communities could attempt to achieve some of their policy objectives by means other than controlling the supply of marijuana. For example, a community could establish more sobriety checkpoints to combat driving under the influence. But many communities would not deem such measures to be perfect substitutes for source controls. For one thing, as noted above, they might believe that controlling marijuana at its source is a cheaper or more effective strategy compared to combatting harmful behaviors associated with use of the drug. In addition, harm-reduction measures like sobriety checkpoints will not necessarily address *all* of the harms local residents attribute to marijuana use; think of accidents that take place in the home or the moral corruption some people believe inheres in the use of substances like marijuana.

Local communities that ban the sale of marijuana might have more luck deflecting the “crime, congestion, blight, and drug abuse” they associate with dispensaries onto other communities. But as discussed in more detail below, that does not represent a gain to *society*.<sup>86</sup>

In addition to undermining efforts to combat consumption, marijuana smuggling could also undermine efforts to collect local taxes on the drug. Enthusiasm for marijuana legalization has been fueled at least in part by the promise of new tax revenues from sales of legal marijuana.<sup>87</sup> Many states have already imposed their own taxes on the drug, but local jurisdictions are now trying to get in on the act. As noted above, twenty-seven of the fifty-three municipalities that have legalized marijuana sales in Colorado have levied local add-on taxes on sales of marijuana.<sup>88</sup> For example, Denver imposes an 8.25% tax on retail marijuana sales on top of Colorado’s 12.90% tax (for a combined rate of 21.15%).<sup>89</sup> Now suppose that Aurora decides to legalize commercial marijuana sales. But to capture some of *Denver’s* marijuana

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86. *Cf. Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 687 (1981) (Brennan, J., concurring) (condemning Iowa law limiting the length of trucks on the state’s highways because it was designed to shift traffic onto other states and thereby “promote Iowa’s safety and other interests at the direct expense of the safety and other interests of neighboring States”).

87. *See Mikos, State Taxation of Marijuana Distribution*, *supra* note 17, at 223–24 (noting the prospect of new tax revenue bolsters the appeal of marijuana legalization).

88. *Murray & Aguilar*, *supra* note 6.

89. *See DENVER DEP’T OF FIN., DENVER COMBINED TAX RATES (201)* (observing that the combined tax rate for 2015 includes a 7.15% Denver tax; a 1.00% RTD (Regional Transportation District) tax; and a 0.10% Cultural Facilities District tax). It is worth noting that Colorado also imposes a 15% excise tax on wholesale marijuana. *See Colorado Dep’t of Rev., Taxpayer Svcs. Div., Excise 23: Excise Tax on Retail Marijuana* (Apr. 2014), available at <https://www.colorado.gov/pacific/sites/default/files/Excise23.pdf>.

business, suppose Aurora decides not to impose its own local tax on the drug.<sup>90</sup> Since a portion of the state sales tax would be returned to Aurora anyway, the city would not necessarily need to impose an additional local tax to help fill its coffers.<sup>91</sup> It would hardly be surprising if some Denverites now made the short trip to Aurora to buy marijuana. In so doing they could evade Denver's comparatively steep local tax and save a tidy sum in the process (marijuana costs roughly \$200–400 an ounce).<sup>92</sup> Indeed, in a recent report Professor Jonathan Caulkins and his co-authors conclude that “the idea that individual states can function as separate policy laboratories is optimistic.”<sup>93</sup> They warn that the budgetary impacts of legalizing marijuana in one state (Vermont) “are highly uncertain and depend very much on what neighboring states do about their own marijuana policies.”<sup>94</sup> Indeed, they suggest that “it might only take one of the lower 48 states breaking ranks and charging low marijuana taxes to challenge tax collections in the other states.”<sup>95</sup> Experience with local tobacco cigarette taxes likewise suggests local communities will have a very difficult time collecting marijuana taxes that are out of sync with those imposed by nearby jurisdictions. For example, it is estimated that roughly 75% of all tobacco cigarettes consumed by New York City residents are purchased outside city limits in order to evade the city's steep cigarette taxes.<sup>96</sup> At the very least, the threat of smuggling likely imposes a ceiling on the effective tax rate that any local community can realistically expect to collect on marijuana.

Ultimately, the problem with marijuana localism is that marijuana sold legally in one community imposes costs on other communities, and

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90. In fact, Aurora has decided to allow its newly legalized marijuana stores to remain open three hours later than Denver rivals in order to attract more business from Denver residents. See Illescas, *supra* note 69.
91. See LEGIS. COUNCIL OF THE COLO. GENERAL ASSEMB., 2013 STATE BALLOT INFORMATION BOOKLET 19 27 (2013) (describing the allocation scheme for state marijuana sales tax under Proposition AA).
92. Philip Ross, *Marijuana Costs in the US: How Black Market, Retail and Medical Pot Prices Compare*, INT'L BUS. TIMES (July 8, 2014), <http://www.ibtimes.com/marijuana-costs-us-how-black-market-retail-medical-pot-prices-compare-1622362>.
93. See CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 78, at 115 (emphasis added).
94. *Id.*
95. *Id.* at 142.
96. See Editorial, *Cigarette Tax Burnout*, THE WALL ST. J., Aug. 11, 2008, at A14 (discussing how high state cigarette taxes often cause cigarettes to be purchased out of state). The tax gap for state cigarette taxes is generally lower. See Mikos, *State Taxation of Marijuana Distribution*, *supra* note 17, at 243–44 (discussing the findings of cigarette tax evasion studies).

the point-of-sale community will not necessarily consider these costs when deciding how to regulate marijuana distribution.<sup>97</sup> Nebraska and Oklahoma have emphasized the smuggling concerns in their suit against Colorado: “[m]arijuana flows from [the legal gap created by Amendment 64] into neighboring states, undermining Plaintiff States’ own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.”<sup>98</sup> As one Nebraska Sheriff explains, “Every time we stop somebody, that’s taking up my deputy’s time with your Colorado pot. . . . We have to pay overtime, pay the prosecutor, pay to incarcerate them, pay for their defense if they’re indigent. Colorado’s taxing it, but everybody else is paying the price.”<sup>99</sup> In light of concerns over smuggling, there is no reason to expect that local communities will necessarily adopt marijuana policies that boost *societal* welfare.

## 2. Marijuana Tourism

A related problem confronting local communities stems from marijuana tourism. Marijuana tourism occurs when residents travel to a neighboring locality not only to *buy* marijuana but also to *consume* it there as well. As noted above, residents have a constitutional right to travel to other jurisdictions “to take advantage of the legal entitlements” thereof, including, presumably, the right to consume marijuana to the same extent as locals.<sup>100</sup>

For the reasons discussed above, it is easy for residents to travel to neighboring communities to *buy* marijuana. It is clear that marijuana dispensaries do a brisk business with nonlocal residents.<sup>101</sup> In addition to dispensaries, other businesses have sprouted up to cater to the marijuana tourism industry. For example, one tour bus operator is offering regular \$400 round-trip service from Dallas, Texas, to one of Denver’s marijuana shops.<sup>102</sup>

Marijuana tourism threatens to impose costs on both home and destination jurisdictions. For home jurisdictions, marijuana tourism could create the same problems caused by marijuana smuggling even if residents never smuggle the drug back home. The psychoactive chemical found in marijuana (THC) can impair cognitive functioning

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97. In fact, the point-of-sale community might not even recognize some of those “costs” as such. After all, it might allow marijuana sales precisely because it has formed a more positive assessment of marijuana’s harms than have its neighbors.

98. Complaint, *supra* note 23, at 3–4.

99. See Marc Fisher, *A Dividing Line*, WASH. POST, July 26, 2014, at A1 (quoting Nebraska Sheriff Mark Overman).

100. See Kreimer, *supra* note 67, at 462.

101. See *supra* notes 79–80 and accompanying text.

102. Smith, *supra* note 80.

for hours, some even claim *weeks*, after use.<sup>103</sup> Hence, it is possible that marijuana could impair driving, learning, productivity, and so on in one community long after it was consumed somewhere else. For example, a Colorado Springs resident might legally consume marijuana at a club in Denver, then drive seventy miles back home and strike a pedestrian in Colorado Springs. The harm to Colorado Springs is the same regardless of where the consumption occurred.

Even long after the acute effects of marijuana wear off, users might experience latent harms caused by long-term chronic use of the drug. Under the right circumstances, these latent harms could cause concerns in outside communities. For example, suppose a young Colorado Springs resident goes on regular weekend marijuana binges in Denver; now suppose she takes no physical risks while there, but after several months of heavy use, she suffers permanent neurological damage. As a result, she might need medical care, special tutoring, and other social services—all paid for by her domicile (Colorado Springs) rather than by her weekend destination (Denver).

More controversially, the use of marijuana by local residents in neighboring communities could also cause moral harms back home. Some people object to drug use by others for religious or other moral reasons. To them, drug use constitutes a sinful indulgence, a debasement of the soul (to paraphrase James Q. Wilson).<sup>104</sup> They feel morally indignant when other people use drugs, whether or not such drug use causes them, or anyone else, *physical* injury.<sup>105</sup> Even readers who do not share this worldview might empathize a bit by thinking of the grief or

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103. Bengt Halvorson, *Pot Smoking Could Affect Driving for Weeks, Researchers Suggest*, WASH. POST, Mar. 5, 2013, [http://www.washingtonpost.com/cars/pot-smoking-could-affect-driving-for-weeks-researchers-suggest/2013/03/05/1e10733e-85c5-11e2-a80b-3edc779b676f\\_story.html](http://www.washingtonpost.com/cars/pot-smoking-could-affect-driving-for-weeks-researchers-suggest/2013/03/05/1e10733e-85c5-11e2-a80b-3edc779b676f_story.html) (reporting on a study that indicates that “cannabis can be detected in the blood, at a level that might affect driving, for weeks after the last ‘intake’”). See also Denial of Marijuana Rescheduling, *supra* note 84, at 40582 (citing studies suggesting that marijuana use can affect airplane pilot performance even twenty-four hours after consumption).

104. James Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21, 26 (“Tobacco shortens one’s life, cocaine debases it. Nicotine alters one’s habits, cocaine alters one’s soul.”). See also William Bennett, *The Plea to Legalize Drugs Is a Siren Call to Surrender*, IN DRUGS AND SOCIETY 339 (Michael Lyman & Gary Potter eds., 1991) (“The simple fact is drug use is wrong. And the moral argument, in the end, is the most compelling.”).

105. The widespread rejection of harm-reduction drug policies in the United States suggests that many people might care more about these moral harms than about the physical harms associated with drug use. See Wilson, *supra* note 104, at 26 (arguing that because “dependency on certain mind-altering drugs is a moral issue and [because] their illegality rests in part on their immorality, then legalizing them undercuts, if it does not eliminate altogether, the moral message”).

anger felt when hearing about racial bigotry, animal cruelty, greed, or other behaviors that occur elsewhere. To be sure, the law says that locals have no right to regulate their residents extra-territorially. And that may be a good rule from a normative perspective. But like many constitutional rules, it is not a rule designed to maximize preference satisfaction. It suggests that we should *ignore* some preferences (like my preference that you not use marijuana in your town), not *satisfy* them.

It is quite likely that marijuana prohibitions are motivated at least in part by majority judgments that the use of this mind-altering drug is *immoral* and not just (or even) physically dangerous.<sup>106</sup> Residents espousing such moral judgments might be no better off under localism, and might even be worse off if they could command a majority statewide, because local control does not enable them to block or condemn troublesome conduct occurring in other parts of their state. To the extent that moralistic reasoning drives marijuana policy preferences, it also undermines the claim that marijuana localism will necessarily boost preference satisfaction.

Marijuana tourism could also undermine the interests of tourist destinations, notwithstanding the business it generates for them. Call this the “crashing the party problem.” For one thing, marijuana tourism enables outsiders to enjoy many of the benefits that tourist destinations generate without paying the full costs of those benefits.<sup>107</sup> Marijuana destinations like Denver are supplying a drug that has medical value, recreational value, or both to nonresidents. To illustrate, suppose that Colorado Springs bans marijuana shops and Denver allows them; suppose as well that some Colorado Springs residents enjoy using marijuana and make the short trek to Denver to buy and consume the drug. In this case, local activity in Denver is conferring an external *benefit* on the community of Colorado Springs. Denver cannot easily charge outsiders for this benefit. Neither can it recoup the costs those outsiders inflict while in Denver. For example, after consuming marijuana, those Colorado Springs residents might cause accidents, brawls, and other disorderly conduct that harms the citizens of Denver.

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106. Research on the determinants of preferences toward alcohol policy is instructive. See *infra* note 123 and accompanying text (finding correlations between religious beliefs and preferences toward alcohol policy). In particular, Strumpf & Oberholzer-Gee posit the following possibility:

[D]ry voters prefer to ban sales in all districts because they oppose drinking for moral reasons. These voters may oppose decentralization because they are worse off if other individuals drink. Similarly, wet voters may be opposed to restricting the sale of liquor in any district if they feel that such restrictions impair the way of life that is typical for members of their group.

Strumpf & Oberholzer-Gee, *supra* note 65, at 14.

107. In other words, tourists from other jurisdictions engage in free-riding.

In fact, it seems reasonable to suppose that outsiders will create *more* problems than locals because (1) their connection to the local community is weaker, so they feel less inhibited while there; (2) their lack of familiarity with the local environment may make them more prone to accidents; (3) they have to travel farther than residents to consume marijuana, so they might drive longer distances under the influence of marijuana;<sup>108</sup> (4) they may be more inclined to overindulge since they have limited access back home; and (5) on average, tourists may be less experienced with marijuana use and thus more susceptible to—or simply less aware of—its psychoactive effects.

Legal and economic forces arguably prevent tourist destinations from satisfactorily addressing the burdens imposed by outsiders. As discussed, tourist destinations may not deny outsiders the legal privileges they confer upon their own residents.<sup>109</sup> In other words, once a community allows its own residents to buy and consume marijuana it must allow non-residents to do so on the same terms.<sup>110</sup> For example, a community may not charge outsiders a discriminatorily high tax on legal marijuana purchases.<sup>111</sup> To be sure, communities can make it comparatively difficult to *consume* marijuana locally. For example, Denver, like many other jurisdictions that allow marijuana sales, nonetheless prohibits public consumption of the drug. According to the city's retail marijuana use FAQ page,

Retail marijuana is intended for private, personal use . . . [I]t is illegal to consume marijuana in public. This includes but is not limited to areas accessible to the public such as transportation facilities, schools, amusement/sporting/music venues, parks, playgrounds, sidewalks and roads and outdoor and rooftop cafes. It is also illegal to smoke at indoor-but-public locations like bars, restaurants and common areas in buildings.<sup>112</sup>

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108. Cf. Israel Colón, *County-Level Prohibition and Alcohol-Related Fatal Motor Vehicle Accidents*, 14 J. SAFETY RES. 101, 103 04 (1983) (reporting that states *with* county level alcohol prohibitions actually have higher levels of car fatalities, possibly because drinkers from dry counties must drive farther to obtain alcohol).

109. See *generally* Denning, *supra* note 17 (discussing the constitutional limits on state government power to discriminate against out-of-state residents' purchases of marijuana).

110. See *id.* at 2283 98 (discussing the constitutional limits on a state's ability to discriminate against nonresidents).

111. Cf. *id.* at 2285.

112. *Denver Marijuana Use*, *supra* note 80. Bans on public consumption are reminiscent of the early anti-saloon laws that both pre- and post-dated Prohibition. For a discussion of this early anti-saloon movement, see DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 83 95 (2010) (chronicling the efforts of the temperance movement)..



Such bans on public consumption arguably encourage buyers to consume marijuana in the privacy of their own homes, which, in the case of tourists, often means somewhere outside the confines of the point-of-sale community. But tourists still have several options for consuming marijuana near the point of sale, including on marijuana tour buses, in member-only clubs, and in marijuana-friendly hotels.<sup>113</sup> In any event, tourists and residents alike probably face minimal legal risk using marijuana in public, as long as they do so discreetly—for example, by using odorless and smokeless marijuana vaporizer pens.<sup>114</sup>

Neither can tourist destinations easily recoup the costs that nonresidents might impose on them. Destinations like Denver do, of course, generate tax revenues from marijuana tourism.<sup>115</sup> But it is difficult for any destination to charge nonresidents a sufficiently high Pigouvian tax to fully compensate for the unique costs they impose. To begin, as noted, destinations cannot simply charge nonresidents a higher tax rate than locals, even if those nonresidents are likely to inflict more harm than locals.<sup>116</sup> To recoup its full costs, a destination community would need to raise taxes on its own residents as well. But as discussed above, imposing local marijuana taxes creates its own set of problems; namely, the tourist destination might simply drive its own residents to purchase marijuana elsewhere. The scenario depicts a classic collective action problem; communities absorb the harms of local activity, but they are unable to exclude outsiders from enjoying the benefits of that activity.<sup>117</sup>

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113. *See 60 Minutes: Colorado Welcomes Cannabis-Curious Tour* (CBS News television broadcast Jan. 11, 2015), available at <http://www.cbsnews.com/news/colorado-welcomes-cannabis-curious-tourists/> (reporting on Denver amenities such as marijuana tour buses and “bud and breakfast” establishments).

114. *See* Miles Bryan, *Pot Smoke and Mirrors: Vaporizer Pens Hide Marijuana Use*, NPR, (Apr. 18, 2014, 12:29 PM), <http://www.npr.org/blogs/health/2014/04/18/302992602/pot-smoke-and-mirrors-vaporizer-pens-hide-marijuana-use> (noting that many public smokers use handheld vaporizers or vape pens because they are “easy to hide”).

115. *See* DENVER REV. MUN. CODE § 53-86 (declaring that Denver’s marijuana tax is designed to pay the expenses of, inter alia, “public health programs to mitigate any negative consequences associated with the consumption of marijuana”). *See also* Mikos, *State Taxation of Marijuana Distribution*, *supra* note 17, at 226–32 (discussing the rationale behind vice taxes).

116. Such discrimination would plainly violate the dormant commerce clause, though Brannon Denning makes a strong case that not all discrimination against outsiders would violate the Constitution. *See* Denning, *supra* note 14, at 2298–99 (arguing that discriminatory quantity limitations could survive constitutional scrutiny).

117. *See* Cooter & Siegel, *supra* note 30, at 117 (“When activities spilled over from one state to another, the Framers recognized that the actions of

The residents of communities that legalize marijuana might be aggrieved for a second reason as well. They cannot travel and enjoy easy access to marijuana in other communities that prohibit sales of drug. In other words, they cannot take their home communities' privileges into neighboring communities and must abide by their disagreeable laws. Not surprisingly, these residents do not want to be denied access to a drug that gives them joy, medical relief, or both.<sup>118</sup> Thus, while they might be pleased if their local community permits the distribution of marijuana, they might be *even happier* if the entire state (or nation) were to do the same. In other words, marijuana localism will not *necessarily* improve their well-being vis-à-vis federalism or nationalism because they too are not necessarily indifferent to how their neighbors regulate the drug.

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In sum, the desirability of marijuana localism hinges on empirical claims about the extent to which local communities disagree about marijuana policy and the extent to which local governments can address the concerns that matter to their residents. On the one hand, local majorities clearly disagree about how best to regulate marijuana sales. Localism would thus appear to boost satisfaction in communities that would disagree with the way their state would regulate such sales. But the appeal of localism may prove illusory. The mobility of marijuana and of its users undermines the efficacy of any local controls. In other words, localism will not necessarily give people what they really want—like a reduction in marijuana consumption or an increase in tax revenues or an increase in access to the drug. It is thus not safe to assume that local majorities have something to gain from localism, or that statewide majorities have nothing to lose by acceding to it.

### III. THE LESSONS FROM ALCOHOL LOCALISM

The normative desirability of local marijuana regulation hinges to a great extent on an empirical assessment of the external effects of local marijuana activity. There is, as yet, far too little research examining the effects of local marijuana activity on outside communities to provide much guidance on the local option question. Fortunately,

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individually rational states produced irrational results for the nation as a whole—the definition of a collective action problem.”).

118. See Pat Oglesby, *Laws to Tax Marijuana*, TAX ANALYSTS, Jan. 24, 2011, at 255 (“The theory behind medical marijuana is hard to reconcile with local option, at least for possession. It’s hard for a state to say sick people in only some of its localities can use medicine.”). See also Strumpf & Oberholzer-Gee, *supra* note 65, at 14 (acknowledging that “wet voters may be opposed to restricting the sale of liquor in any district if they feel that such restrictions impair the way of life that is typical for members of their group”).

however, we can look to other policy domains for answers. Alcohol policy is one promising candidate. In this Part, this Article mines research on the nation's lengthy experience with local alcohol control for insights into the desirability of similar local control over marijuana.

Local communities have long regulated the sale and even possession of alcoholic beverages. Following the demise of national Prohibition, the temperance movement succeeded in securing the local option in thirty out of forty-two states that had legalized alcohol by 1935.<sup>119</sup> In little time, nearly 1,000 localities had exercised their option to ban alcohol sales.<sup>120</sup> Though the popularity of outright prohibition has waned over time,<sup>121</sup> some communities continue to ban sales of alcohol and others impose a variety of less onerous restrictions on distribution. The result is a patchwork of dry, damp, and wet communities in local option states.

The existence of this patchwork of regulations suggests that local communities disagree about the desirability of alcohol distribution and what government should do about it. Indeed, studies demonstrate that local decisions to legalize or prohibit alcohol sales reflect “the characteristics and preferences of county voters, such as religious affiliation, political ideology, economic interests associated with alcohol availability, alcohol restrictions in surrounding counties, and demographic factors.”<sup>122</sup> For example, some Protestant denominations are firmly opposed to the consumption of alcohol, and communities where those denominations command a majority are more likely to ban the sale of alcohol outright.<sup>123</sup> In their study of local alcohol policies, Professors Koleman Strumpf and Felix Oberholzer-Gee also find evidence that preference heterogeneity drives support for localism itself:

We argue that a state's choice of whether or not to decentralize liquor control is related to the degree of preference heterogeneity,

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119. See Strumpf & Oberholzer-Gee, *supra* note 65, at 5–8.

120. See *id.* at 10.

121. See *id.* at 8–10 (reporting that total number of dry counties fell by roughly 40% between 1935 and 1970). See also Baughman et al., *supra* note 66 (reporting that thirty-three dry Texas counties voted to legalize alcohol sales between 1975 and 1996).

122. Robert W. Brown et al., *Endogenous Alcohol Prohibition and Drunk Driving*, 62 S. ECON. J. 1043, 1046 (1996).

123. *Id.* at 1048 (finding a positive correlation between Baptists' percentage of population and county's dry status); see also Kenneth J. Meier & Cathy M. Johnson, *The Politics of Demon Rum: Regulating Alcohol and Its Deleterious Consequences*, 18 AM. POL. Q. 404, 413 (1990) (finding a positive correlation between reformist groups' percentage of population and dry status); Strumpf & Oberholzer-Gee, *supra* note 65, at 22–23 (finding a positive correlation between Baptists', Calvinists', and Methodists' percentage of population and dry status).

and we have found empirical support for this conclusion using a rich data set over the period 1934–70. The logic underlying the economic theory of federalism appears to drive actual policy choices.<sup>124</sup>

Given these heterogeneous preferences toward alcohol policy, it would appear that alcohol localism could satisfy more voters.

But it arguably takes more than *passing* laws to boost preference satisfaction. After all, people want to see *results* from these laws.<sup>125</sup> And whether local alcohol controls deliver the results people want depends to a large degree on whether local alcohol policies have effects on neighboring communities. On that score, the same obstacles I argued might prevent local communities from successfully controlling marijuana would presumably also prevent them from successfully controlling alcohol. Namely, alcohol could be smuggled from neighboring communities, though perhaps not quite as easily as marijuana; and alcohol could be consumed in neighboring communities, probably even more easily than marijuana. Given the similar obstacles confronting marijuana and alcohol localism—and the similar objectives animating controls—the nation’s experience with local alcohol regulation provides a good test of the efficacy and desirability of local marijuana controls as well.

So do local alcohol controls actually work? Social scientists have conducted a number of studies examining the impact of local access controls on alcohol consumption and other variables of interest, especially traffic fatalities. I scoured research databases to track down any study estimating the impact of local option laws on two key variables of interest—alcohol consumption and alcohol related traffic harms. While the studies I found are not unanimous, they find surprisingly little evidence that the local option actually has the desired impact on consumption and harms, arguably because alcohol is commonly available in neighboring communities.

First, consider the impact of local access controls on the consumption of alcohol. While prohibitions and restrictions on the sale of alcohol are designed in large part to curb alcohol consumption,<sup>126</sup> *local* access controls appear to have little if any demonstrable impact. In one study, Professors Kenneth Meier and Cathy Johnson examined the impact of both local alcohol prohibitions and statewide sales

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124. Strumpf & Oberholzer-Gee, *supra* note 65, at 32.

125. See Powers & Wilson, *supra* note 85, at 318–19 (“If prohibition has the potential to limit individual freedom, stunt economic growth, and stigmatize a community, it is reasonable for residents to expect certain benefits in return. If no effectiveness can be demonstrated, the level of control exercised over members of the community may be unwarranted.”).

126. See *id.* at 323 (“The primary emphasis of countywide prohibition is to reduce drinking by denying access to alcohol.”).

restrictions on statewide per capita consumption of alcohol (among other things),<sup>127</sup> controlling for relevant demographic characteristics. The authors found no statistically significant relationship between the percentage of a state's population living in a dry county and the state's per capita alcohol consumption.<sup>128</sup> By contrast, they did find that *state* imposed sales regulations were associated with lower alcohol consumption.<sup>129</sup> In a similar, earlier study, Professor Julian Simon likewise failed to find any relationship between a state's dry population and the consumption of liquor in the state.<sup>130</sup>

To be sure, scholars have established a positive relationship between access to alcohol and alcohol consumption. For example, Carla Campbell and her coauthors reviewed five studies of the impact of outlet density, i.e., the number of alcohol vendors per capita, on consumption and reported that all of them found "increased density was associated with increased consumption, and vice versa."<sup>131</sup> As the authors note, however, it is not clear what caused the differences in outlet density in the first instance,<sup>132</sup> thus making it impossible to credit local policies for the reduction in alcohol consumption. After all, these communities might have fewer alcohol outlets because they have less demand for alcohol, and not because they legally limit the number of vendors.

Local alcohol bans may have only muted impact on consumption because residents of dry counties can easily obtain alcohol in neighboring communities. Campbell and her coauthors found support for this hypothesis by comparing the impact of local alcohol bans in isolated versus less isolated communities.<sup>133</sup> In the former, consisting of isolated Alaskan villages, residents faced far greater difficulty obtaining alcohol

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127. *See* Meier & Johnson, *supra* note 123, at 406.

128. *Id.* at 419 (claiming that "[t]he model explains 86% of variation in per capita alcohol sales" and that "[t]hree policies have no impact on the level of alcoholic beverage consumption dry population, tax rates, and treatment facilities").

129. *Id.* (noting that "[a]lcohol sales regulation, on the other hand, has a significant negative impact on alcoholic-beverage sales").

130. Julian L. Simon, *The Economic Effects of State Monopoly of Packaged-Liquor Retailing*, 74 J. POL. ECON. 188, 193 (1966) ("It is . . . surprising that percentage of population in 'dry' counties was not significant, even though there must be *some* sociological relationship between prohibition and consumption.").

131. Campbell et al., *The Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, 37 AM. J. PREVENTATIVE MED. 556, 560 (2009).

132. *See id.* at 559 (noting that prior studies "directly evaluated the effect of changes in outlet density over time without identifying the causes for density changes").

133. *Id.* at 564.

in violation of strict local prohibitions. Not surprisingly, “[a]ll of the studies that evaluated the effect of bans in isolated northern communities found substantial reductions in alcohol-related harms with the exception of suicide.”<sup>134</sup> But less encouragingly, for localism proponents, Campbell and her coauthors also found that bans adopted by less-isolated communities produced at best “mixed results.”<sup>135</sup> The authors concluded that “[t]he effectiveness of bans in reducing alcohol-related harms *appears to be highly dependent on the availability of alcohol in the surrounding area.*”<sup>136</sup>

Consider, next, the impact local controls appear to have on drunk driving and the injuries caused thereby. Drunk driving constitutes one of the most salient harms of alcohol consumption and one of the primary rationales for restricting access to alcohol.<sup>137</sup> The problem is that there is little evidence that *local* prohibitions on the sale of alcohol—the strictest control a locality could adopt—actually reduce the rate of drunk-driving harms in a state. It appears that local access controls either do not curb drunk driving in dry counties—hardly surprising, given the limited impact they have on consumption, as noted above—or else they simply displace this harm onto neighboring wet counties.

Researchers have examined the potential impact of local bans on *local* accident rates. Early studies in this vein produced mixed results.<sup>138</sup>

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134. *Id.* at 563. *See also* Berman et al., *supra* note 72, at 315 (noting that “[m]ore restrictive measures (dry) have no effect on suicide rates,” but “[a]ccident and homicide death rates fall . . . in the group of communities going dry”); Wood & Gruenewald, *supra* note 72, at 400 (noting that while “dry villages were safer than wet villages . . . the incidence of self-harm was similar for wet and dry villages”).

135. Campbell et al., *supra* note 131, at 563. Campbell et al.’s assessment of local controls might have been even more dismissive had they also reviewed the Meier & Johnson and Simon studies discussed above.

136. *Id.* at 564 (emphasis added).

137. *See, e.g.*, Donald S. Kenkel, *Drinking, Driving, and Deterrence: The Effectiveness and Social Costs of Alternative Policies*, 36 J. L. & ECON. 877, 877 (1993) (“It is estimated that alcohol is involved in approximately half of all fatal accidents. The deaths and injuries of nondrinking drivers, passengers, and pedestrians both arouse public opinion and provide a clear-cut efficiency rationale for policies to correct the negative externalities.”); Powers & Wilson, *supra* note 85, at 323 (“The primary emphasis of countywide prohibition is to reduce drinking by denying access to alcohol. By logical extension, the reduction of drinking should result in fewer alcohol-related problem behaviors such as DUI.”).

138. *See, e.g.*, Russell G. Winn & David Giacomassi, *Effects of County-Level Alcohol Prohibition on Motor Vehicle Accidents*, 74 SOC. SCI. Q. 783, 784 (1993) (“The few studies [to date] that have specifically examined the impact of consensual local prohibition (dry by choice) come to very different conclusions about its effectiveness in reducing alcohol-related problems.”).

In one study, for example, Professors Thomas Dull and David Giacompassi modeled the impact of different local access controls on automobile fatalities and other harms in Tennessee's ninety-five counties.<sup>139</sup> In one model, the authors found that county-level prohibitions actually *increased* fatalities, and they hypothesized this could be "a result of individuals leaving their dry county to drink in damp or wet counties and being killed in auto crashes on their way home."<sup>140</sup> In another model, they found no relationship between county prohibitions and fatalities, thereby lending no support for the notion that local bans actually reduce driving harms—though also undermining their finding that local prohibitions could actually increase them.<sup>141</sup> In a subsequent study, Professors Russell Winn and David Giacompassi examined the impact of local prohibitions on average automobile accidents in Kentucky over a four-year period and found that "dry counties have significantly lower rates of nonfatal and property accidents,"<sup>142</sup> but not fatal accidents, after controlling for demography, geography, and police budgets.<sup>143</sup> The authors concluded that "whether a county is wet or dry does affect the rate of automobile crashes. However, caution is in order since numerous factors other than alcohol availability affect the rate of automobile accidents."<sup>144</sup> In a similar study, Professor Robert Brown and his coauthors analyzed average traffic fatalities in Texas's 254 counties from 1988 to 1992.<sup>145</sup> The authors categorized each county as either wet (201) or dry (53) circa 1993 and again controlled for demography, geography, and police budgets.<sup>146</sup> In a refinement of the Winn and Giacompassi study, however, Brown and his coauthors also

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139. See R. Thomas Dull & David J. Giacompassi, *Dry, Damp, and Wet: Correlates and Presumed Consequences of Local Alcohol Ordinances*, 14 AM. J. DRUG ALCOHOL ABUSE 499, 502 05 (1988) (describing the methodology of the study).

140. *Id.* at 505.

141. See *id.* at 507 (noting that their "findings suggest that factors other than the alcohol ordinance may be primarily responsible for many of the so-called alcohol-related conditions and behaviors.").

142. Winn & Giacompassi, *supra* note 138, at 790.

143. *Id.* at 788 ("The variables include population density, percentage of county population which belongs to a church, per capita income, percentage of population below poverty line, miles of roads, percentage of roads classified as primary, police officers per 1,000 population, police officers per mile of road, and percent minority.").

144. *Id.* at 791.

145. Brown et al., *supra* note 122, at 1048 ("Fatal alcohol-related motor vehicle accidents are averaged over five years (1988-92), in order to minimize any random yearly fluctuations, and then divided by the number of lane miles of road in a county.").

146. *Id.* at 1047-49.

attempted to address concerns over endogeneity, namely, the possibility that “[o]bserved variations in alcohol-related behavior may reflect differences in the characteristics of voters, rather than differences in how individuals react to policy-induced changes in their constraints.”<sup>147</sup> Using a measure of the local tourism industry as a proxy for demand for drunk driving,<sup>148</sup> the authors found that county prohibitions had a statistically significant impact on alcohol-related fatalities.<sup>149</sup>

These early studies of the local impact of county prohibitions arguably suffered from several shortcomings discussed below. More recent studies of county-level effects arguably address these shortcomings and consistently find little support for the proposition that local alcohol prohibitions actually curb drunk-driving-related harms. In a 2001 study, for example, Professor Reagan Baughman and his coauthors re-examined the impact of local access controls in Texas on automobile fatalities.<sup>150</sup> The authors made three refinements to the Brown study noted above. First, they examined automobile fatalities over a twenty-one-year period, whereas the Brown study examined only five years of data and further averaged yearly accident rates over that period—a problem given several changes to Texas law during that span.<sup>151</sup> Second, Baughman and his coauthors used county-specific fixed effects to account for the effects of unobservable variables—that is, effects that might be mistakenly attributed to local prohibitions or other observable variables (such as tourism).<sup>152</sup> Like other researchers,

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147. *Id.* at 1043–44.

148. *See id.* at 1047 (“The percentage of county population employed in the tourism industry, presumably highly dependent on alcohol sales, is used to measure the extent to which industry forces can affect alcohol availability.”).

149. *Id.* at 1049 (estimating the effect “crudely translates into 2.145 more fatal alcohol-related motor vehicle accidents per year for the average [wet] county”).

150. Baughman et al., *supra* note 66.

151. *See id.* at 1091 (noting the study included accidents from 1975 to 1996). In particular, the Brown et al. study uses *average* yearly fatalities from 1988 to 1992 as the dependent variable and legal status in 1993 as the independent variable. *See* Brown et al., *supra* note 122, at 1047–48 (noting that while “other factors” are presumed “constant,” the study observes the variation of the average of “[f]atal alcohol-related motor vehicle accidents”). The problem is that the legal status of at least fourteen of those counties *changed* during the time period between 1988 and 1992. *See* Baughman et al., *supra* note 66, at 1092 (reporting the legal status changes in Fig. 1). It is worth noting that other studies have similarly employed averages of harm statistics, but the Baughman et al. study does not.

152. Baughman et al., *supra* note 66, at 1090 n.4 (noting that “Brown et al. . . . use[s] local tourism as an instrument for alcohol policy” and that “[w]ithout a county fixed effect, local tourism revenue may not be a valid



the authors also controlled for key observable variables that could impact drinking and driving, including the “number of registered vehicles, highway expenditures, police expenditures, religious affiliations, population, per-capita income, and vehicle miles driven.”<sup>153</sup> Including county-specific fixed effects, the authors found the correlation between dry status and reductions in alcohol-related accidents to be “spurious.”<sup>154</sup> They concluded that local dry status has a “negligible and perhaps slightly negative effect [i.e., an increase] on the expected number of accidents.”<sup>155</sup> Third, the authors also subdivided each of Texas’s 254 counties into several discrete categories based on the stringency of access controls,<sup>156</sup> on the theory that the simple wet versus dry classification could mask important differences among counties falling within those broad categories.<sup>157</sup> In so doing, the authors again found that local access controls *increased* the rate of automobile deaths in a county.<sup>158</sup> The authors hypothesized that “the effect on alcohol-related accidents of consumers driving a shorter distance more than offsets the effect of any increase in consumption” attributable to more relaxed controls.<sup>159</sup>

In a 2004 study of DUI offenses in Arkansas, Professors Edward Powers and Janet Wilson sought to better control for differences in the enforcement of drunk-driving laws across counties. To do so, the authors calculated the amount of police time actually devoted to

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instrument if unobserved determinants of local tourism revenue are also related to the unobserved factors influencing highway safety”).

153. *Id.* at 1091.

154. *Id.* at 1093.

155. *Id.*

156. *Id.* at 1091 (“Specifically, we observe whether the county allows the sale of beer and/or wine, whether the county allows the sale of all liquors for off-premise consumption and whether the county allows all types of alcohol to be sold for off-premise and on-premise consumption.”).

157. *See id.* at 1093–95 (explaining that “previous models impose the restriction that law changes from dry to any local access have the same effect on highway safety. In addition, moving from one wet status such as access to beer and wine to another such as access to off-premise consumption of all liquors is assumed to have no effect on the expected number of accidents. To relax this restriction, we include[d] indicator variables for the specific type of alcohol access granted within each county.”). The Dull & Giocapassi study discussed in the text is an exception because it similarly divided Tennessee counties into five basic legal categories. *See* Dull & Giocapassi, *supra* note 139, at 502–03 (dividing alcohol access laws into five major categories: dry, semidry, damp, on-premise consumption, and wet).

158. Baughman et al., *supra* note 66, at 1095 (noting that “all three local access laws are associated with an increase in expected accidents”).

159. *Id.*

combatting drunk driving rather than the amount spent combatting all crimes, the control used in earlier studies.<sup>160</sup> Employing this refined control, the authors found “no significant relationship” between county prohibition and county DUI arrest rates.<sup>161</sup> The authors concluded the following:

Lack of local access to alcohol is more likely to relocate alcohol use rather than eliminate it. Dry county residents who desire alcohol must often travel many miles to the nearest legal point of sale. In Arkansas a thinly populated state deficient in public transportation this almost always means driving to obtain a drink.<sup>162</sup>

The studies above suggest that wet jurisdictions may be undermining the efforts of dry counties to curb consumption of alcohol and one of its most serious harms. But other studies suggest that dry counties might actually be displacing drunk-driving harms onto wet counties. To assess whether alcohol tourism poses this problem, Professor Sarah Lynn Schulte Gary and her colleagues analyzed details of more than 39,000 alcohol-related automobile crashes in Kentucky, including the location of crashes *and* the county of residence of drivers.<sup>163</sup> The authors found that wet and dry counties had significantly similar, though not identical, rates of alcohol-fueled crashes.<sup>164</sup> The authors speculated that “[p]eople from dry counties may be purchasing alcohol in a wet county and drinking at home or with neighbors and friends.”<sup>165</sup> Even more interestingly, however, the authors found that compared to wet county residents, dry county residents are

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160. Powers & Wilson, *supra* note 85, at 322. The authors note that total police budgets do not necessarily reflect the effort expended policing drunk driving. *Id.* (“Jurisdictions that possess high rates of crime in other categories may be forced to direct resources away from traffic patrol as the focus is shifted to other crimes perceived as more important.”). It is thus possible that controlling only for total police budgets will fail to accurately account for the impact that police sobriety checkpoints and similar measures have on drunk driving offenses. To address this concern, Powers & Wilson control for both the “proportionate number of sworn officers and the non-DUI arrest rate per officer.” *Id.* at 331.

161. *Id.*

162. *Id.* at 332.

163. Sarah Lynn Schulte Gary et al., *Consideration of Driver Home County Prohibition and Alcohol-Related Vehicle Crashes*, 35 ACCIDENT ANALYSIS AND PREVENTION 641 (2003).

164. *See id.* at 645 (6.3% in wet versus 5.8% in dry).

165. *Id.*

1.5 times *more* likely to be the involved in an alcohol-related crash.<sup>166</sup> Given the slightly lower rates of DUI offenses occurring in dry counties, it appears that dry county residents are consuming alcohol in wet counties and are causing accidents *there*—indeed, dry county residents committed nearly one-fourth (24.5%) of their DUI offenses in wet counties.<sup>167</sup> The authors concluded that “county-level prohibition is not necessarily effective in improving highway safety. In fact it may be counterproductive in that individuals are driving farther under the influence of alcohol, thus, increasing their exposure to crashes.”<sup>168</sup>

In similar fashion, studies have also found that local prohibitions on alcohol sales produce little if any impact on the total incidence of drunk driving statewide. In one study, Professor Frank Chaloupka and his coauthors found that the percentage of a state’s population living in a dry county had little or no impact on total driving deaths in the state.<sup>169</sup> The authors concluded that “local limits on the sale of alcoholic beverages have little effect on drunk driving,” and they speculated that the lack of impact “may be due to the fact that alcohol could be purchased easily in nearby counties.”<sup>170</sup> Similarly, the Meier and Johnson study discussed earlier found that local alcohol prohibitions had no impact on statewide nighttime traffic fatalities,<sup>171</sup> though it is worth noting that state-imposed alcohol sales restrictions did reduce fatalities.<sup>172</sup> Even more stunningly, Professor Christopher Ruhm has found that automobile fatalities are “positively and significantly related to . . . the percentage of the population living in dry counties in most

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166. *Id.* (finding that .29% of dry county residents but only .19% of wet county residents were involved in alcohol-related crashes).

167. *Id.*

168. *Id.* at 648.

169. See Frank J. Chaloupka et al., *Alcohol-Control Policies and Motor-Vehicle Fatalities*, 22 J. LEGAL STUD. 161, 183 (1993) (“The variable measuring the percentage of state populations in dry counties is negative and significant only in a few specifications.”).

170. *Id.* at 183. See also Colón, *supra* note 108, at 104 (finding the rate of car fatalities significantly higher in states with county level prohibitions than in states without and hypothesizing that county prohibitions might simply force drinkers to drive farther to obtain alcohol).

171. A very high percentage of nighttime automobile fatalities are caused by drunk drivers. See Meier & Johnson, *supra* note 123, at 422 (“A common, accepted measure of drunk driving is nighttime fatalities because a high proportion are alcohol related.”).

172. See *id.* at 423 (finding that “sales regulation, treatment capacity, dry population, and tax rates [all] have a negative relationship with nighttime traffic fatalities”).

specifications<sup>173</sup>—i.e., banning alcohol locally may actually increase the rate of DUI, because it forces local drinkers to drive farther for a drink. Like Meier and Johnson, however, Ruhm found that certain state-imposed measures, including minimum drinking ages and beer taxes, were more successful at reducing automobile fatalities.<sup>174</sup>

Further evidence that dry counties may be foisting some of the harms of their own alcohol use onto wet counties comes from county decisions on legal status. In their fascinating study of the determinants of the local option, Professors Koleman Strumpf and Felix Oberholzer-Gee analyzed factors influencing the alcohol policy choices of 3,100 counties in the contiguous forty-eight states across a thirty-six-year period (1934–70).<sup>175</sup> The authors found that several variables correlated with county decisions to restrict sales of liquor, including religious affiliations (as discussed above).<sup>176</sup> More interestingly for present purposes, the authors found evidence of a strategic interaction among county policy choices. In other words, it appears that a county's decision whether to allow or prohibit alcohol sales is influenced by what its neighbors have decided.<sup>177</sup> The authors suggested that “being surrounded by wet neighbors lowers the cost of being wet, possibly because it decreases the number of drunk drivers from neighboring districts.”<sup>178</sup>

To be sure, local governments are not completely helpless and there are undoubtedly some things they could do to reduce alcohol consumption and its related harms. In a study of three local communities, for example, Harold Holder and his coauthors found that adopting a broad array of measures, including limits on access, police sobriety checkpoints, community mobilization, and training of alcohol vendors, reduced the incidence of alcohol-related automobile injuries and other harms in the community.<sup>179</sup> But for reasons explained above,

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173. Christopher J. Ruhm, *Alcohol Policies and Highway Vehicle Fatalities*, 15 J. HEALTH ECON. 435, 443 n.16 (1996).

174. *Id.* at 451 (“[L]egal drinking ages are strongly negatively related to the fatalities of 18 to 20 year olds and . . . higher beer taxes appear to reduce vehicle deaths . . .”).

175. Strumpf & Oberholzer-Gee, *supra* note 65, at 18.

176. *Id.* at 22–24 (reporting results of empirical models).

177. *See id.* at 24 (concluding that “local liquor policies are strategic compliments”).

178. *Id.*; cf. Eugenia F. Toma, *State Liquor Licensing, Implicit Contracting, and Dry/Wet Counties*, 26 ECON. INQ. 507, 516 (1988) (hypothesizing, but not finding, a strategic interaction among county alcohol policies in Kentucky).

179. *See* Harold D. Holder et al., *Effect of Community-Based Interventions on High-Risk Drinking and Alcohol-Related Injuries*, 284 JAMA 2341 (2000)

this is probably not the first choice of many dry communities.<sup>180</sup> Sobriety checkpoints, for example, could be an expensive alternative compared to broadening access controls.<sup>181</sup>

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The experience with alcohol localism provides a sobering lesson. It appears that counties have encountered many of the problems that I predicted could plague local marijuana controls. Wet counties have probably undermined the controls imposed by dry counties, or dry counties have displaced their harms onto wet counties, or both. If alcohol localism has failed to meet expectations, why would we expect marijuana localism to fare any better?

#### IV. RECOMMENDATIONS

Building upon the foregoing assessment of marijuana localism, this Part proceeds to make some recommendations for the states. First, it briefly explains why states could reject marijuana localism if they so choose. Second, it surveys the choices the states have made so far concerning marijuana localism. Third, it recommends that states severely limit the role their local governments play in the marijuana policy domain.

##### A. *What States Could Do*

It is up to the states to decide whether or not to allow local governments to regulate marijuana sales. In other words, states do not necessarily have to tolerate local resistance to decisions made by statewide majorities. The states can prevent local governments from exercising authority over marijuana sales in two basic ways.

First, states can withhold regulatory authority from local governments. Local governments are creatures of the state and derive all of their regulatory authority from the state.<sup>182</sup> In other words, the

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(discussing the effects of community action on alcohol consumption and alcohol-related accidents).

180. See *supra* Part II.B.1 for a discussion of the practical difficulties in preventing marijuana smuggling.

181. See Kenkel, *supra* note 137, at 909 (discussing relative costs of alternative policies to combat drunk driving).

182. See Briffault, *Our Localism: Part I The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990) (“The local government is a creature of the state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units. The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it.”).

states decide what powers local governments shall exercise.<sup>183</sup> It follows that the states could withhold the power to regulate marijuana from local governments. Without the grant of authority from the state, local governments would be powerless to regulate the drug.

This is a distinguishing feature of localism and one of the primary ways it differs from federalism. Unlike localities, the states are not creatures of the national government, and they do not require the national government's blessing to pass legislation. The states are presumed to have authority to regulate for the health, safety, and morals of the population, with the exception of a few narrow instances under which the Constitution deprives them of authority.<sup>184</sup> The states are, of course, entitled to limit their powers via their own constitutions; but the important point here is that the national Constitution does not impose such constraints, at least in ways that are relevant here.

Now, to be sure, it is easier to withhold authority in some states than in others. In Dillon's Rule states, local governments wield only those powers that are "indispensable to the purposes of their incorporation as well as any others *expressly* bestowed upon them by the state."<sup>185</sup> Local governments in Dillon's Rule states would need an express grant of authority from the state to regulate (ban, legalize, etc.) marijuana. If the state's marijuana law was silent on the issue of local power, local governments presumably would lack authority to regulate the drug.

In Home Rule states, by contrast, local governments are presumed to wield "any power the state possessed, unless the state legislature had exclusively reserved power over a particular subject matter to the state."<sup>186</sup> In California, for example, the state constitution expressly provides that "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."<sup>187</sup> While a state may still withhold power from local governments, it must do so affirmatively—the courts will not presume the absence of power from silence, as they do in Dillon's Rule states.

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183. *Id.* at 7–8 (noting that "[t]he local government is an agent of the state, exercising limited powers at the local level on behalf of the state").

184. *See, e.g.*, U.S. CONST. art. I, § 10 ("No state shall enter into any treaty, alliance, or confederation . . .").

185. Diller, *supra* note 31, at 1122–23 (emphasis added).

186. *Id.* at 1125. As Diller notes, the majority of states have some form of Home Rule. *Id.* at 1126–27. *See also* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER U. L. REV. 1337, 1364–71 (2009) (discussing variation in home rule across states).

187. CALIF. CONST. ART. XI § 7.

Second, states can also preempt local legislation.<sup>188</sup> That is, even if a local government has express or implied authority to regulate marijuana, the state may still veto any local regulations adopted pursuant to this authority. Intrastate preemption follows the same basic rules as federal-state preemption.<sup>189</sup> Local law is preempted when it conflicts with state law, with or without any express statement of the legislature's preemptive intentions.<sup>190</sup>

Importantly, the states have not encountered the same preemption barrier in enacting their most recent marijuana reforms. To the extent states have merely legalized marijuana—i.e., removed state prohibitions on marijuana—they have not done anything that Congress *could* preempt.<sup>191</sup> And to the extent the states have gone beyond merely legalizing marijuana, they have done little that Congress would actually *want* to preempt.<sup>192</sup>

Local governments would not fare so well against intra-state preemption claims. Local bans on marijuana sales are clearly preemptable, and private actors subject to those bans have every incentive to challenge the assertion of local authority. Local legalization of marijuana could prove more durable against an intra-state preemption challenge. But it is not clear there is any state law analog to the federal anticommandeering rule that would protect local communities from being forced to criminalize sales of marijuana.<sup>193</sup> In other words, states might command local governments to ban marijuana, even though Congress could not command states to do the same. In any event, local legalization might not have much practical effect in the shadow of a statewide ban on marijuana. State law enforcement, for example, might have the resources needed to shut down locally regulated marijuana shops. The federal government, by contrast, has lacked the resources needed to clamp down on state-

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188. See Diller, *supra* note 31, at 1140–42 (discussing intrastate preemption).

189. See *id.* at 1140 (“Despite some superficial distinctions, most states’ preemption analyses are similar in form to the federal model.”).

190. See *id.* at 1140–53 (discussing the rules of implied conflict preemption in the states).

191. See Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1445–50 (arguing that Congress cannot stop states from merely legalizing marijuana under state law).

192. See Mikos, *Preemption Under the Controlled Substances Act*, *supra* note 17, at 18 (explaining that Congress would not want to preempt state regulations that restrict the marijuana market—including state marijuana taxes, licenses, and similar measures—because those measures actually help to curb the marijuana market).

193. Cf. Kevin Miller, *Bill to Ban Local Votes on Legalizing Marijuana Draws Fire at Hearing*, *Portland Press Herald*, Mar. 2, 2015 (discussing state legislative proposal that would bar local governments from voting on marijuana legalization proposals).

regulated shops,<sup>194</sup> giving the states de-facto if not de-jure control over them.

In sum, marijuana localism is on precarious legal footing. States have the power to determine the precise role, if any, local governments will play in the marijuana policy domain. To be sure, this choice may be more or less constrained, depending on the rules of state constitutional law, but it is one the states are clearly empowered to make.

*B. What States Have Done*

Twenty-three states have legalized marijuana for some purposes under state law. As of the November 2014 election, at least twenty-one of those states have also legalized some form of retail distribution of marijuana.<sup>195</sup> But they have split regarding whether to allow local communities to ban retail distribution.

Seven states have authorized local governments to ban retail marijuana shops that are otherwise legal under state law.<sup>196</sup> Five of these states have done so expressly via statute or ballot initiative.<sup>197</sup> For example, Amendment 64 specifies that “[a] locality may prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or through an initiated or referred measure.”<sup>198</sup> In the two other states, state laws failed to address the localism question, but key state authorities have found local bans to be consistent with state law. In California, the state supreme court upheld a local ban on medical marijuana dispensaries against a

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194. See Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1463 69 (highlighting the federal government’s limited capacity to enforce its marijuana ban).

195. These states include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Massachusetts, Maryland, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Hawaii and Michigan permit certain individuals to grow marijuana for their own medical purposes, but they do not formally permit retail distribution of the drug. See Robert A. Mikos, Expert Report in *Allard v. Her Majesty the Queen in Right of Canada* (Oct. 2014) (surveying state laws governing distribution of marijuana as of fall 2014). Alaska voted to legalize the retail distribution of marijuana in November 2014. See Alaska Ballot Meas. 2, (2014).

196. The states include Alaska, California, Colorado, Montana, Nevada, Vermont, and Washington.

197. See Alaska Ballot Meas. 2, (2014); COLO. CONST. art. XVIII, § 16(5)(f), *amended by* Use and Regulation of Marijuana Amend. 64 (2012); S.B. 423, 62nd Leg. (Mont. 2011); S.B. 374, 77th Sess. (Nev. 2013); S.B. 17, 2011 12 Sess. (Vt. 2011).

198. COLO. CONST. art. XVIII, § 16(5)(f).



preemption challenge brought under the state's long-standing medical marijuana law.<sup>199</sup> It reasoned that state law "merely exempts" medical marijuana dispensaries from "prohibitions that would otherwise apply under state law. . . . [It] does not thereby mandate that local governments authorize, allow, or accommodate the existence of such facilities."<sup>200</sup> Similarly, in Washington, the state attorney general opined that local governments could ban retail marijuana shops, reasoning that the state's law legalizing and regulating marijuana distribution did not "amount to entitling one to engage in such businesses regardless of local law."<sup>201</sup>

Four states have denied local governments the power to ban retail marijuana shops.<sup>202</sup> Three states have rejected the local option expressly via statute or ballot initiative.<sup>203</sup> In Oregon, for example, Measure 91 expressly provides that the essential portions of the measure are "designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed."<sup>204</sup> Massachusetts' medical marijuana law is silent regarding local authority over marijuana dispensaries. However, the state's attorney general has invoked the law to block local communities from banning medical marijuana dispensaries outright.<sup>205</sup> She noted that state law is

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199. *See generally* City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc., 300 P.3d 494 (Cal. 2013) (upholding a local ban on medical marijuana dispensaries).

200. *Id.* at 510.

201. *See* ATT'Y GEN. OF WASH., AGO 2014 No. 2, WHETHER STATEWIDE INITIATIVE ESTABLISHING SYS. FOR LICENSING MARIJUANA PRODUCERS, PROCESSORS, AND RETAILERS PREEMPTS LOCAL ORDINANCES (2014) (concluding that "[l]ocal governments have broad authority to regulate within their jurisdictions, and nothing in 1-502 limits that authority with respect to licensed marijuana businesses").

202. The states include Arizona, Delaware, Massachusetts, and Oregon.

203. ARIZ. REV. STAT. § 36-2806.01 (LexisNexis 2010); DEL. CODE ANN. tit. 16, §§ 4901A, 4917A (2014); Or. Ballot Meas. 91, § 58 (2014).

204. Or. Ballot Meas. 91, § 58 (2014). Just prior to the passage of Measure 91, a lower state court had ruled that local governments could ban medical marijuana dispensaries. Noelle Crombie, *Medical Marijuana in Oregon: Court Rules that Local Governments May Ban Dispensaries*, THE OREGONIAN, Oct. 17, 2014.

205. Letter from Martha Coakley, Att'y Gen. Mass., to Mary K. Galvin, Town Clerk, Town of Wakefield (Mar. 13, 2013) *available at* <http://www.mass.gov/ago/docs/municipal/wakefield-6601.pdf> [hereinafter Coakley Letter] (concluding that "a town meeting vote to completely ban medical marijuana treatment centers . . . would frustrate the purpose of [state laws]"). The Massachusetts Attorney General has authority to

intended to give qualifying patients “reasonable access” to medical marijuana dispensaries, and to serve that end, it requires dispensaries to be “reasonably dispersed throughout the Commonwealth.”<sup>206</sup> The attorney general reasoned that “This legislative purpose could not be served if a municipality could prohibit treatment centers within its borders, for if one municipality could do so, we see no principled basis on which every other municipality could not do the same.”<sup>207</sup>

Notwithstanding 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.<sup>208</sup> For example, Measure 91 permits localities to adopt “reasonable time, place and manner regulations of the nuisance aspects of establishments that sell marijuana” but only if “the city or county makes specific findings that the establishment would cause adverse effects to occur.”<sup>209</sup>

In the remaining ten states that permit retail distribution of marijuana, the status of local power to ban marijuana shops remains unsettled because no statute expressly addresses the issue and no high court or other high-level state official has yet opined on the question.

### C. *What States Should Do*

Not surprisingly, I strongly recommend that states limit local authority over marijuana. In light of the threat posed by marijuana smuggling and marijuana tourism, it seems reasonable to suppose that a large portion of a state’s population might be more satisfied living under imperfect but effective state regulations than under more agreeable but ineffective local regulations. To be sure, it is impossible to gauge with certainty localism’s net impact on total satisfaction in a state. But the fact that local communities do not bear the full costs and benefits of the marijuana policies they adopt suggests that states cannot expect those communities to necessarily adopt policies that enhance the well-being of the entire state. Because the state is the only forum in which all interested parties have a voice, I suggest the states

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disapprove of (i.e., block) a local bylaw when it is inconsistent with state law. *Id.* at 5.

206. *Id.* at 6.

207. *Id.*

208. ARIZ. REV. STAT. § 36-2806.01 (LexisNexis 2010) (“Cities, towns and counties may enact reasonable zoning regulations that limit the use of land for registered nonprofit medical marijuana dispensaries to specified areas.”); DEL. CODE ANN. tit. 16, §§ 4901A, 4917A (2014) (preventing the local government from prohibiting a “registered compassion center”); Coakley Letter, *supra* note 205, at 1 (conceding that “municipalities are not prohibited from adopting zoning bylaws to regulate medical marijuana treatment centers, so long as such zoning by-laws do not conflict with the [Massachusetts Medical Marijuana] Act”); Or. Ballot Meas. 91, § 59(1) (2014).

209. Or. Ballot Meas. 91, § 59(1) (2014).

should reserve to themselves exclusive authority to decide key policy questions, like whether retail sales of marijuana are to be permitted and what tax shall be imposed upon them, and should not enable local communities to override state decisions.

Local communities could still play a role in shaping marijuana policy. It would make sense for state regulators to listen to the concerns expressed by local officials. States could even allow local officials to formulate their own policy on matters that are less likely to impact people outside the community, like the location of and signage used by marijuana stores. This obviously will not give local communities everything they want, but it will limit the danger local communities pose to each other.

Importantly, no matter what the states decide, they should address the localism issue early and clearly in legislation. Addressing localism this way should help reduce resort to costly and protracted litigation to settle the boundaries of local power. And addressing localism via statute could also result in a better allocation of power. There is no guarantee that the rule adopted by a court applying generic preemption principles will be the socially optimal one for marijuana.

### CONCLUSION

In the battle for control of marijuana policy, the states have scored an impressive and surprising victory.<sup>210</sup> Their reforms have not only survived but thrived in the shadow of a strict federal marijuana prohibition. In the process, the states have exposed the *de jure* and *de facto* limits to federal supremacy.

But the states now face a very different challenge—managing the conflict within. Local governments are now clamoring for the right to opt out of state reforms, employing the same normative arguments the states used to defend their resistance to federal authority. Should the states accede to local control?

This Article has examined the economic case for marijuana localism. While communities clearly disagree about marijuana policy, it is not clear that localism would enhance satisfaction. Disparities in local marijuana policies could trigger rampant marijuana smuggling and marijuana tourism, leaving many residents dissatisfied with local control. For these reasons, and heeding the sobering lessons of local alcohol control, the Article tentatively concludes that states should enjoy their apparent victory over the federal government, embrace marijuana *federalism*, and keep marijuana *localism* at bay.

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210. See Mikos, *On the Limits of Supremacy*, *supra* note 10, at 1425 (“The states have not only kept the patient breathing, so to speak, in anticipation of a day when federal policy might change; they have, for all practical purposes, already made medical marijuana *de facto* legal within their jurisdictions.”).

