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## Intrastate Conflicts and Lessons Learnt from Marijuana Legalization

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# INTRASTATE CONFLICTS AND LESSONS LEARNT FROM MARIJUANA LEGALIZATION

*Ilaria Di Gioia\**

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## INTRODUCTION

Legalization of recreational marijuana has gained momentum in the United States. As of December 2021, 18 states, Washington D.C., and Guam have legalized recreational marijuana.<sup>1</sup> The relatively broad support at the state level, however, has not always been reflected at the local level. For example, in California — which has been at the forefront of efforts to liberalize marijuana laws since 1996<sup>2</sup> — two-thirds of municipalities banned marijuana cultivation and retail sales,<sup>3</sup> and in 2019, 24 local

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1. Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington. See Michael Hartman, *Cannabis Overview*, NAT’L CONF. ST. LEGISLATURES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/E92D-DSMB>].

2. Cannabis in California has been legal for medical use since 1996 and for recreational use since late 2016. See *id.*

3. Editorial, *Editorial: What Legalization? California Is Still the Wild West of Illegal Marijuana*, L.A. TIMES (July 15, 2021, 5:00 AM), <https://www.latimes.com/opinion/story/2021-07-15/illegal-marijuana-desert> [<https://perma.cc/HM93-FADJ>].

governments sued the state to block local home delivery of marijuana.<sup>4</sup> In Michigan, about 80 communities have opted out of the legalization law adopted by voters in November 2018.<sup>5</sup> In New Jersey, about one in four municipalities have introduced or adopted ordinances barring marijuana-related businesses.<sup>6</sup>

From a first glance, these local ordinances resemble similar push-back attempts of local authorities to regulate fracking,<sup>7</sup> firearms,<sup>8</sup> minimum wage,<sup>9</sup> genetically modified organisms (GMOs),<sup>10</sup> plastic bags,<sup>11</sup> and more recently — COVID-related mandates.<sup>12</sup> States have generally sought to strike down local regulations in these areas by issuing pre-emptive legislation.<sup>13</sup> But marijuana is exceptional. Remarkably, some states have left localities free to opt-out of the legalization and impose local bans on dispensaries. In New Jersey and New York, for example, states have set a deadline for municipalities to opt-out of the legalization of marijuana commerce.<sup>14</sup>

By using marijuana as a case study to understand the compromise between state and local government competing interests, this Essay explores the often-overlooked area of police powers granted to local

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4. See Patrick McGreevy, *California Cities Sue State over Home Deliveries of Pot*, L.A. TIMES (Apr. 5, 2019, 6:00 AM), <https://www.latimes.com/politics/la-pol-ca-california-sued-pot-deliveries-20190405-story.html> [<https://perma.cc/D8XE-KLNA>].

5. See Alan Greenblatt, *Legal in the State or Not, Some Cities Ban Marijuana*, GOVERNING (Feb. 20, 2019), <https://www.governing.com/archive/gov-legal-recreational-marijuana-cities-ban-sales.html> [<https://perma.cc/CBZ7-X6CD>].

6. See Tracey Tully, *The \$8 Billion Question: Which Towns Will Cash In on Marijuana?*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/nyregion/marijuana-sales-ny-nj-conn.html> [<https://perma.cc/2VU5-AHTH>].

7. See generally Jamal Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENV'T L. L.J. 297 (2015).

8. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999 (2018) (“As of 2013 . . . forty-five states preempted local firearms regulation.”).

9. See Alexis M. Johnson, Note, *Intersectionality Squared: Intrastate Minimum Wage Preemption & Schuette’s Second-Class Citizens*, 37 COLUM. J. GENDER & L. 36, 36 (2018).

10. See Jacob Garner & Ian Wesley-Smith, Note, *State Preemption of Local GMO Regulation: An Analysis of Syngenta Seeds, Inc. v. County of Kauai*, 47 URB. LAW. 275, 276 (2015).

11. See Madison Guyton, Note, *Bans on Bans: Plastic Bags, Power, and Home Rule in South Carolina*, 71 S.C. L. REV. 801, 802 (2020).

12. See David Gartner, *Pandemic Preemption: Limits on Local Control over Public Health*, 13 NE. U. L. REV. 733, 735 (2021).

13. Scholars have noted an increase in state pre-emption efforts. See generally Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018).

14. See Tully, *supra* note 6.

municipalities. Part I of this Essay will provide the context within which state pre-emption exists, considering areas where states have traditionally pre-empted local ordinances. Part II will consider the decriminalization of marijuana as a case study in understanding and exploring the alternatives to fully-fledged state pre-emption. It will also explore the different ways in which states have negotiated with and delegated to municipalities the authority to ban marijuana business, with particular reference to California, New Jersey, and New York. Finally, this Essay will conclude that the opt-out approach taken by the states in the legalization of marijuana could represent a possible solution for other intrastate conflicts and that state legislatures could benefit from the marijuana experience. State legislatures can use the marijuana experience to create alternatives to court pre-emption of local policies and identify new collaborative strategies with local governments.

### I. THE RISE OF INTRASTATE PRE-EMPTION

Intrastate pre-emption is on the rise. States have traditionally pre-empted local ordinances that do not comply with state law, but recently state legislatures have made broader use of pre-emption. In 2018, the National League of Cities reported a rise in the number of pre-emption statutes in the areas of minimum wage, paid leave, anti-discrimination, ride-sharing, home-sharing, municipal broadband, tax, and expenditure limitations.<sup>15</sup> Legal scholars have argued that this increase in the use of pre-emption statutes constitutes an “attack on American cities,”<sup>16</sup> as it is representative of an anti-urban disadvantage in national and state law-making<sup>17</sup> and that “the breadth and ambition of the recent preemption efforts have rarely been seen in American history.”<sup>18</sup>

In addition to the increase of pre-emption statutes, scholars have observed a change in the nature of the statutes, which are more aggressive. For example, Professor Erin Adele Scharff of Arizona State University has published extensive research on the rise of so-called hyper pre-emption statutes, statutes that not only assert state authority over a specific policy area but also include broad punitive measures, which apply a fiscally-

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15. See CTR. FOR CITY SOLS., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/QZ9D-9LLP>].

16. Schragger, *supra* note 13, at 1168.

17. See Paul A. Diller, *Reorienting Home Rule: Part I — The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 290 (2016).

18. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017).

disabling sanction whenever a locality is deemed in violation with state law.<sup>19</sup> Furthermore, the phenomenon of punitive pre-emptive statutes has been termed by Professor Richard Briffault, the “new preemption”<sup>20</sup> and by Bradley Pough, Deputy Associate Counsel in the White House Office of Presidential Personnel, a “super preemption” with particular reference to those statutes aimed at holding local actors personally accountable for ordinances that impermissibly expand local power.<sup>21</sup> Studies have also been conducted to identify the origin of pre-emption bills. Professor Jessica Bulman-Pozen, in particular, has contributed to the study of pre-emption as a nation-wide phenomenon and has investigated the role of interest groups such as the American Legislative Exchange Council or the National Rifle Association in encouraging the enactment of pre-emption bills by drafting model pre-emption legislation and “shop[ping] it to state lawmakers across the country.”<sup>22</sup> Her study confirms that pre-emption is a national phenomenon and that it is the product of broader national dynamics related to the polarization of U.S. politics rather than an individual state issue.

The connection between pre-emption and polarization has also been investigated by political scientists who suggested that the primary cause of the rise of pre-emption is to be found in the polarization of U.S. politics and that pre-emptive statutes are attempts to control political defection of local authorities by legal means.<sup>23</sup> Political scientists have speculated on the political meaning of pre-emption. For example, Professor Vladimir Kogan argued that engaging in political quibbles is actually beneficial for mayors because “[p]icking fights with state government over high-profile issues is a great way for big-city mayors to attract national notoriety.”<sup>24</sup> He, therefore, identified the political value of pre-emption statutes in the context of an increasingly polarized state politics.<sup>25</sup>

The connection between pre-emption and political polarization had been further evidenced by Professor Kenneth A. Stahl in his study of North Carolina’s HB2 (a Bathroom Bill) that pre-empted the city of Charlotte’s

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19. See Scharff, *supra* note 13, at 1495.

20. See Briffault, *supra* note 8, at 1997.

21. See Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J.L. & POL. 67, 69 (2018).

22. Jessica Bulman-Pozen, *State-Local Preemption: Parties, Interest Groups, and Overlapping Government*, 51 POL. SPOTLIGHT 26, 27–28 (2018).

23. See Luke Fowler & Stephanie L. Witt, *State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures*, 49 PUBLIUS 540, 559 (2019).

24. Vladimir Kogan, *Means, Motives, and Opportunities in the New Preemption Wars*, 51 POL. SPOTLIGHT 26, 28–29 (2018).

25. See *id.*

effort to provide civil rights protections for transgender individuals.<sup>26</sup> In 2017, during the first year of the Trump Administration, Professor Stahl argued that “preemption has become more prevalent because cities are now overwhelmingly Democratic while state legislatures, dominated by representatives of rural areas, are overwhelmingly Republican.”<sup>27</sup> One may wonder if things had changed since the 2020 elections and the change of administration.

As of June 2021, with the Democratic Biden Administration, preemption was still thriving. Forty-two states have pre-empted the local regulation of firearms,<sup>28</sup> and 23 states have pre-empted local smoking restrictions in government worksites, private worksites, restaurants, or bars.<sup>29</sup> The COVID-19 pandemic has also exposed major intrastate conflicts. Where governors had initially refused to issue lock-down orders and mask mandates, some cities and counties issued separate local restrictions such as “masking” and “stay-at-home” orders.<sup>30</sup> Governors responded to these conflicting local measures by issuing executive orders that pre-empted localities from implementing those restrictions that went beyond state policies.<sup>31</sup>

For instance, on March 25, 2021, Arizona Governor Doug Ducey signed an executive order that prohibited local authorities from enacting mask mandates or making any order in conflict with state policy,<sup>32</sup> and in May

26. See Stahl, *supra* note 18, at 154.

27. *Id.* at 134.

28. *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> [<https://perma.cc/NW2E-FDNA>] (last visited Feb. 17, 2022).

29. *STATE System Preemption Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 6, 2021), [https://www.cdc.gov/statesystem/factsheets/preemption/Preemption.html#anchor\\_1562857500](https://www.cdc.gov/statesystem/factsheets/preemption/Preemption.html#anchor_1562857500) [<https://perma.cc/G3BC-P6YB>].

30. See Nestor M. Davidson & Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AM. CONST. SOC’Y (June 22, 2020), <https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/> [<https://perma.cc/W9CC-QRA6>].

31. See Carol S. Weissert et al., *Governors in Control: Executive Orders, State-Local Preemption, and the COVID-19 Pandemic*, 51 *PUBLIUS* 396, 396–97 (2021). See generally SPENCER WAGNER, BROOKS RAINWATER & KATHERINE CARTER, NAT’L LEAGUE OF CITIES, *PREEMPTION AND THE COVID-19 PANDEMIC: EXPLORING STATE INTERFERENCE BEFORE, DURING, & AFTER THE CRISIS* (2020), [https://www.nlc.org/wp-content/uploads/2020/11/COVID-19\\_Preemption\\_Report.pdf](https://www.nlc.org/wp-content/uploads/2020/11/COVID-19_Preemption_Report.pdf) [<https://perma.cc/AFA8-TYBY>].

32. Ariz. Exec. Order No. 2021-06 (2021) (“Pursuant to A.R.S. § 26-307, no county, city or town may make or issue any order, rule or regulation that conflicts with or is in addition to the policy, directives or intent of this or any other Executive Order relating to the COVID-19 public health emergency, or any other order, rule or regulation that was not in place as of March 11, 2020. This includes but is not limited to mandated use of face coverings. Any city, town or county that has a rule, regulation or ordinance not in place as of March 11, 2020 that is in conflict with the provisions of this order shall not be enforced.

2021, Florida Governor Ron DeSantis issued an executive order that suspended and prohibited all local COVID-19 restrictions in the state, including mask rules.<sup>33</sup>

In Georgia, Governor Brian P. Kemp attempted to pre-empt local restrictions and even sued the city of Atlanta for issuing local mask mandates and going beyond state guidelines. Particularly remarkable was the executive order issued by Atlanta Mayor Keisha Lance Bottoms on July 8, 2020, that required restaurants to only have takeout and curbside pick-up, people to wear masks, shelter-in-place at home, and only leave for essential tasks.<sup>34</sup> The order went beyond state restrictions which allowed restaurants to reopen with restrictions and did not require masks. Governor Kemp's immediate reaction was to issue an executive order that forbid local authorities from issuing mask mandates.<sup>35</sup> In an attempt to further settle the dispute with local authorities, Governor Kemp sued Atlanta Mayor Keisha Lance Bottoms for having "exceeded her authority by issuing executive orders which were more restrictive than his Executive Orders related to the Public Health Emergency."<sup>36</sup> The Superior Court of Fulton County sent the case for mediation,<sup>37</sup> but the parties could not compromise.<sup>38</sup> Governor Kemp eventually dropped the lawsuit and decided instead to issue a new executive order that allowed local authorities to issue "Local Option Face Covering Requirement" only in public and on government property but restricted them from issuing mask mandates on

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Political subdivisions maintain the right to set and enforce mitigation policies in their own government buildings and on public transportation, including, but not limited to, requiring face coverings.").

33. Fla. Exec. Order No. 21-102 § 3 (2021) ("For the remaining duration of the state of emergency initiated by Executive Order 20-52, no county or municipality may renew or enact an emergency order or ordinance, using a local state of emergency or using emergency enactment procedures under Chapters 125, 252, or 166, Florida Statutes, that imposes restrictions or mandates upon businesses or individuals due to the COVID-19 emergency.").

34. City of Atlanta Exec. Order No. 2020-113 (2020).

35. Ga. Exec. Order No. 07.15.20.01 (2020) ("[A]ny . . . county, or municipal law, order, ordinance, rule, or regulation that requires persons to wear face coverings, masks, face shields, or any other Personal Protective Equipment while in places of public accommodation or on public property are suspended to the extent that they are more restrictive than this Executive Order.").

36. Complaint for Declaratory & Injunctive Relief at 9, *Kemp v. Bottoms*, No. 2020CV338387, 2020 WL 4036827 (Ga. Super. Ct. July 16, 2020).

37. See Kathryn Hayes Tucker, 'Kemp v. Bottoms' *Mask Lawsuit Heads to Mediation*, Law.com (July 23, 2020, 8:39 PM), <https://www.law.com/dailyreportonline/2020/07/23/kemp-v-bottoms-mask-lawsuit-heads-to-mediation/?slreturn=20220117221012> [<https://perma.cc/UJG7-AVU7>].

38. See Vanessa Romo, *Governor Drops Lawsuit Against Mayor over Masks, but Fight May Not Be Over*, NPR (Aug. 13, 2020, 7:14 PM), [npr.org/sections/coronavirus-live-updates/2020/08/13/902347003/governor-drops-lawsuit-against-atlanta-mayor-over-masks-but-fight-may-not-be-ove](https://www.npr.org/sections/coronavirus-live-updates/2020/08/13/902347003/governor-drops-lawsuit-against-atlanta-mayor-over-masks-but-fight-may-not-be-ove) [<https://perma.cc/XT2F-W295>].

private property.<sup>39</sup> The Georgia case demonstrates that even though pre-emption is still the first choice in case of intrastate conflict, there are effective alternatives to pre-emption and that they reside in the realm of political negotiation and compromise.

## II. THE DELEGATION OF MARIJUANA POLICE POWERS TO MUNICIPALITIES

State pre-emption of local laws is often considered as the only solution to intrastate conflict. However, the recent wide-spread delegation of marijuana regulatory powers to municipalities shows that there is a workable alternative to top-down policies and that it is possible to reconcile state and local government competing interests. The original research conducted for this Essay shows that 17 out of the 18 states that have decriminalized the cultivation, sale, and other marijuana operations,<sup>40</sup> have successfully negotiated and resolved political conflicts with local governments by including an opt-out clause for municipalities that do not wish to participate in the legalization of commercial marijuana activities.<sup>41</sup> The opt-out schemes differ in each state, and this Part will review a few examples of the different ways in which states have granted authority to regulate the business of marijuana to their localities.

The first consideration is that states usually include the opt-clause in the decriminalization statute. One exception is Colorado, which has included the opt-out clause in the home-rule provisions contained in the state constitution.<sup>42</sup> The other states have enacted statutes and regulations that set out the extent to which localities can prohibit marijuana commerce and enact zoning laws and local land use regulations.<sup>43</sup> Alaska’s recreational marijuana statute, for example, provides that: “A local government may prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana

39. *See id.*; *see also Executive Order Allows ‘Local Option Face Covering Requirement,’* NAT’L FED’N INDEP. BUS. (Aug. 15, 2020), <https://www.nfib.com/content/news/coronavirus-state/executive-order-allows-local-option-face-covering-requirement/> [<https://perma.cc/8JCD-LRD2>].

40. Namely Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington. Decriminalization in the states is tracked by the National Conference of State Legislatures. *See Hartman, supra* note 1.

41. *See Ilaria Di Gioia, Decriminalization of Recreational Marijuana in 18 States: Opt-Out Provisions* (on file with the author).

42. COLO. CONST. art. XVIII, § 16, cl. 5 (“A locality may prohibit the operation of marijuana cultivation facilities [and other marijuana operations] . . .”).

43. For a survey of land use restrictions related to cannabis dispensaries, *see William C. Bunting & James M. Lammendola, Why Localism Is Bad for Business: Land Use Regulation of the Cannabis Industry*, 17 N.Y.U. J.L. & BUS. 267, 271 (2021).



stores through the enactment of an ordinance or by a voter initiative.”<sup>44</sup> Like Alaska, the majority of the states require municipalities to either pass an ordinance or hold a referendum.<sup>45</sup>

Some states are more cautious. Massachusetts, for example, differentiates between municipalities that voted against the 2016 ballot initiative to legalize marijuana and those that voted in favor.<sup>46</sup> Only the municipalities that voted against decriminalization could adopt ordinances and bylaws that prohibit the operation of one or more types of marijuana establishments within the city or town, limit or ban the number of marijuana establishments in their jurisdiction, or restrict the licensed cultivation, processing, and manufacturing of marijuana.<sup>47</sup> Those that voted in favor of decriminalization, instead, were required to hold a referendum on the issue called upon the petition of at least 10% of voters.<sup>48</sup> Massachusetts is also cautious in authorizing municipalities to pass bylaws and ordinances governing the “time, place and manner” of marijuana establishments.<sup>49</sup> The language of the law only allows for “reasonable safeguards . . . provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter.”<sup>50</sup> The state legislators here have been careful in giving out discretion to the municipalities, and it is possible to read between the lines the concern that municipalities may regulate beyond their competences.

Similarly, the state of Montana legalized marijuana in 2020, after passing I-190, the Marijuana Legalization Initiative.<sup>51</sup> Montana requires cities that wish to opt-out to hold a local referendum,<sup>52</sup> which is to be petitioned by 15% of voters.<sup>53</sup>

The state of Virginia is also very cautious. It only legalized cultivation and possession of marijuana in 2021 but subjected the retail sales

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44. ALASKA STAT. § 17.38.210 (2022).

45. *See generally* Bunting & Lammendola, *supra* note 43.

46. *See* MASS. GEN. LAWS ANN. ch. 94G, § 3(a)(2) (West 2022).

47. *See id.*

48. *See id.*

49. *See id.* § 3(a)(1).

50. *Id.* (“A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter.”).

51. *See* German Lopez, *Montana Just Voted to Legalize Marijuana*, VOX (Nov. 4, 2020, 6:02 AM), <https://www.vox.com/2020/11/4/21514885/montana-marijuana-legalization-ci118-i190-results> [<https://perma.cc/Y39Y-RAGC>].

52. *See id.*

53. *See* MONT. CODE ANN. § 7-5-132 (West 2017).

provisions to a ‘re-enactment’ of the law in the 2022 legislative session.<sup>54</sup> As the law stands, municipalities can opt-out of the commercialization of marijuana only after holding a referendum that can be petitioned by the governing body of a locality to the circuit court.<sup>55</sup>

This Part started with the premise that 17 out of the 18 states that have legalized recreational marijuana allow municipalities to opt-out. The exception is the state of New Mexico. In this state, local governments can limit the number of dispensaries or adopt time, place, and manner regulations but cannot ban them entirely.<sup>56</sup> A proposed amendment that would have allowed local governments to opt-out of legalization was rejected by both the New Mexico House and Senate before the Cannabis Regulation Act was passed by the Legislature on March 31, 2021, during a special session called for that purpose.<sup>57</sup> The reason for the rejection of the opt-out provision was “to stamp out the black market and avoid a regulatory patch-quilt.”<sup>58</sup> The rationale here is that opt-out zones can become breeding grounds for an illicit market.<sup>59</sup> As seen before, the approach of New Mexico is exceptional and should be treated as the exception that proves the rule.

The Essay now proceeds to review and discuss the opt-out provisions in three states: California, New Jersey, and New York. These states have been chosen because they represent a range of approaches to delegation. California is very generous with localities and authorized cities and counties to completely prohibit all types of marijuana businesses. New Jersey represents a middle ground: it allowed municipalities a window of 180 days in 2021 to opt-out of the sale operations municipalities and also

54. See 2021 VA. LEGIS. SERV. 550 (West) (“The provisions of §§ 4.1–1101.1 and 4.1–1105.1 of the Code of Virginia, as created by this act, shall expire on January 1, 2024, if the provisions of the first, third, and fourth enactments of this act are reenacted by the 2022 Session of the General Assembly.”).

55. See *id.* § 4.1-629 (“The governing body of a locality may, by resolution, petition the circuit court for the locality for a referendum on the question of whether retail marijuana stores should be prohibited in the locality.”).

56. See N.M. STAT. ANN. § 26-2C-12(B) (West 2021) (“A local jurisdiction shall not . . . completely prohibit the operation of a license.”).

57. See Adrian Hedden, *Legalize It? Carlsbad Leaders Resistant to Recreational Marijuana in New Mexico*, CARLSBAD CURRENT-ARGUS (Apr. 4, 2021, 9:04 AM), <https://www.currentargus.com/story/news/local/2021/04/03/new-mexico-marijuana-carlsbad-leaders-resistant-legalization/4835229001/> [<https://perma.cc/M8XE-SAHH>].

58. Morgan Lee, *Cities Can’t Opt Out of Legal Pot Under New State Proposal*, AP NEWS (Jan. 18, 2020), <https://apnews.com/article/health-marijuana-new-mexico-bills-santa-fe-9d9f4aee1509a7a64ff42dec450e1b5> [<https://perma.cc/3JXD-7HVX>].

59. See Michael McDevitt, *New Mexico Might Legalize Marijuana. Here’s What You Need to Know About the Proposal.*, LAS CRUCES SUN NEWS (Jan. 18, 2020, 5:11 PM), <https://www.lcsun-news.com/story/news/2020/01/17/new-mexico-mulling-marijuana-legalization-what-know-proposal/4455250002/> [<https://perma.cc/UV4A-GENN>].

allowed municipalities that did not meet the 2021 deadline to opt-out again in five years. New York is more restrictive; it provided for a final deadline in 2021 and did not give the option to opt-out at a future date.<sup>60</sup> Furthermore, to opt-out, localities cannot simply enact a local ordinance but must hold a local referendum on the issue.<sup>61</sup>

### III. RECREATIONAL MARIJUANA ‘OPT-OUT’ PROVISIONS IN CALIFORNIA

The testing ground for state-municipality compromise related to legalization of commercial cannabis has arguably been California. The Golden State was the first state to legalize the use of marijuana for medical purposes in 1996<sup>62</sup> and for recreational purposes in 2016.<sup>63</sup> According to data from a 2019 study, two-thirds of California municipalities prohibited commercial cannabis activities,<sup>64</sup> and according to Forbes, most cities in the state still do not allow retail adult-use sales as of September 2021.<sup>65</sup> The authority to ban marijuana commercial activities is granted by the California legislation, which authorizes cities and counties “to completely prohibit the establishment or operation of one or more types of [marijuana] businesses . . . within the local jurisdiction.”<sup>66</sup> The delegation of complete discretion to localities makes California one of the most liberal states when it comes to decentralization of powers.

The consequence is that California today is a patchwork of regulations with its 58 counties and 482 municipalities having different regulations for the cultivation, manufacturing, and retail of marijuana.<sup>67</sup> In southern California, for example, the counties of San Bernardino and Kern ban all

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60. See N.Y. CANNABIS LAW § 131 (McKinney 2021).

61. See *id.*

62. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 1996).

63. See *Proposition 64: The Adult Use of Marijuana Act*, CAL. CTS., <https://www.courts.ca.gov/prop64.htm> [<https://perma.cc/6NAB-GL5D>] (last visited Feb. 17, 2022); see also CAL. BUS. & PROF. CODE § 26000 (West 2022).

64. See John Schroyer & Eli McVey, *Chart: Most California Municipalities Ban Commercial Cannabis Activity*, MJBIZDAILY (Dec. 17, 2021), <https://mjbizdaily.com/chart-most-of-california-municipalities-ban-commercial-cannabis-activity/> [<https://perma.cc/L5ZK-2NQT>].

65. See Chris Roberts, *‘It’s Gonna Be a Bloodbath’: Epic Marijuana Oversupply Is Flooding California, Jeopardizing Legalization*, FORBES (Aug. 31, 2021, 7:25 PM), <https://www.forbes.com/sites/chrisroberts/2021/08/31/its-gonna-be-a-bloodbath-epic-marijuana-oversupply-is-flooding-california-jeopardizing-legalization/?sh=5232f29a7ddb> [<https://perma.cc/R3MZ-QJX3>].

66. CAL. BUS. & PROF. CODE § 26200(a)(1) (West 2022).

67. See *California Cannabis Laws by County*, CANNABUSINESS L., <https://cannabusinesslaw.com/california-cannabis-laws-by-county/?location=San-Diego> [<https://perma.cc/DDX7-GGML>] (last visited Jan. 24, 2022).

commercial marijuana operations, but the nearby counties of Los Angeles and Riverside have allowed them.<sup>68</sup> San Diego is an exception because it only allows cultivation but not manufacturing or retail.<sup>69</sup> Incorporated cities may also have their own local policies for regulating commercial marijuana activities separate from county regulations.<sup>70</sup> In August 2021, the media outlets reported that more cities were embracing decriminalization and that they were issuing a variety of marijuana licenses.<sup>71</sup>

From a purely theoretical point of view, California is an exemplary case study of intrastate federalism and the promotion of localism/local governance.<sup>72</sup> In practice, unfortunately, zoning and the heavy regulatory burdens imposed by localities have not helped with tackling the illegal marijuana industry, which is still the prevalent market in California.<sup>73</sup> The *Los Angeles Times* has defined California as “the Wild West of illegal marijuana” and argues that the illicit market remains three times as large as the legal market.<sup>74</sup> This is because, according to the same newspaper, high state and local taxes can add 50% or more to the price of the product in legal shops, and there has been little enforcement against illegal marijuana operators.<sup>75</sup>

Author Lori Lang argued that the black market is a consequence of “the amalgamation of local regulations and prohibitions that are inconsistent with state law” and that “the leakage of legally grown marijuana into an illegal market is made substantially easier when a locality introduces strict regulation or prohibition.”<sup>76</sup> Local restrictions have, arguably, curtailed the effectiveness of the decriminalization effort in the state and prevented the marijuana market from booming.<sup>77</sup>

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68. *See id.*

69. *See id.*

70. *See id.*

71. *See, e.g.,* John Schroyer, *California Marijuana Market Keeps Growing as More Cities, Counties Embrace MJ*, *MJBIZDAILY* (Dec. 17, 2021), <https://mjbizdaily.com/california-marijuana-market-keeps-growing-as-more-cities-counties-embrace-mj/> [<https://perma.cc/Q98C-2NFK>].

72. *See* Robert A. Mikos, *Marijuana Localism*, 65 *CASE W. RESV. L. REV.* 719, 720 (2015). *See generally* Stahl, *supra* note 18.

73. *See* Editorial, *supra* note 3.

74. *Id.*

75. *See id.*

76. Lori Lang, Comment, “*The Great Pot Experiment*”: *A Budding Industry Wouldn’t It Be Better if It Was a Legal Billion-Dollar Industry?*, 20 *HOUS. BUS. & TAX L.J.* 82, 110 (2020).

77. *See* Alexander Nieves, *California’s Legal Weed Industry Can’t Compete with Illicit Market*, *POLITICO* (Oct. 23, 2021, 7:00 AM), <https://www.politico.com/news/2021/10/23/california-legal-illicit-weed-market-516868> [<https://perma.cc/E52Y-NZGR>].

Here, the discourse around decriminalization intertwines with broader considerations around the correct balance between delegation and state regulation. California is an interesting case study as it represents one of the most — if not the most — generous state towards local governments. Its approach to state pre-emption of local authority has also been very moderate. The California Supreme Court has corroborated this ‘soft’ approach in 2013 when it concluded that the Compassionate Use Act and Medical Marijuana Program Act — which, respectively, permit the use of medical marijuana and make lawful the possession or cultivation of marijuana by a patient — did not “expressly or impliedly preempt[ ] the authority of California cities and counties . . . to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana.”<sup>78</sup> In that occasion, the court added a vision for state pre-emption in general and remarkably declared that pre-emption is not “lightly presumed,” leaving room for the empowerment of local authorities in other policy areas:

The California Constitution recognizes the authority of cities and counties to make and enforce, within their borders, “all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction’s borders, and preemption by state law is not lightly presumed.<sup>79</sup>

The case study of California shows that an extensive delegation of powers to localities is supported by explicit delegation language both in the legislation and in the jurisprudence and that the path towards localism and intrastate collaboration passes inevitably by a broader favorable attitude of the state towards delegation of police powers.

To further corroborate this point, it should be noted that the California marijuana opt-out provisions go hand to hand with a broader recognition of city powers enshrined in the California Constitution.<sup>80</sup> From this perspective, marijuana is therefore only one of the fields in which California expresses its liberal approach to delegation of powers to localities.

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78. *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 512 (Cal. 2013).

79. *Id.* at 496 (quoting CAL. CONST. art. XI, § 7).

80. *See* CAL. CONST. art. XI, § 7.

#### IV. RECREATIONAL MARIJUANA ‘OPT-OUT’ PROVISIONS IN NEW JERSEY

New Jersey is a recent example of decriminalization and experimentation in delegation of power to municipalities. The Garden State has used a silent-assent approach for decriminalization of marijuana business and had allowed municipalities a window of 180 days to opt-out within the borders of their jurisdiction.<sup>81</sup> If a municipality did not pass an opt-out ordinance by the deadline, marijuana businesses such as cultivators, manufacturers, wholesalers, or distributors are automatically permitted to operate in the municipality. This Part reviews New Jersey’s provisions for delegation to municipalities as elaborated by the state’s Cannabis Regulatory Commission (CRC) and argues that they are a good example of collaborative intrastate federalism.

The decriminalization of recreational marijuana followed a 2020 referendum on legalization in which New Jersey voters approved an amendment to the state constitution to legalize the recreational use of marijuana by people age 21 and older, with 67% voting yes and 33% voting no.<sup>82</sup> New Jersey had previously legalized the medical use of marijuana under the Jake Honig Compassionate Use Medical Cannabis Act.<sup>83</sup>

On February 22, 2021, New Jersey Governor Phil Murphy signed three bills that legalized the use of recreational marijuana and established regulations of the marijuana marketplace.<sup>84</sup> The first bill, titled the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, legalizes and regulates marijuana use and possession

81. N.J. STAT. ANN. § 24:6I-45.b (West 2022).

82. *See New Jersey Public Question 1, Marijuana Legalization Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/New\\_Jersey\\_Public\\_Question\\_1\\_Marijuana\\_Legalization\\_Amendment\\_\(2020\)](https://ballotpedia.org/New_Jersey_Public_Question_1_Marijuana_Legalization_Amendment_(2020)) [https://perma.cc/W8DF-7SVM] (last visited Feb. 17, 2022).

83. *See* N.J. STAT. ANN. § 24:6I-1 to -30 (West 2022).

84. The three bills are respectively:

1. New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J. STAT. ANN. § 24:6I-31 to -56 (West 2022).

2. 2020 N.J. Assemb. Bill No. 1897, Pub. L. 2021, c.19.

The bill decriminalized marijuana and hashish possession. It reformed criminal and civil penalties for marijuana and hashish offenses and provided remedies for people already facing certain marijuana charges. *See id.*

3. 2021 N.J. Senate Bill No. 3454.

The bill clarified marijuana and cannabis use and possession penalties for individuals younger than 21 years old. The legislation corrects inconsistencies in A21 and A1897 concerning marijuana and cannabis penalties for those underage. *See id.*

for adults 21 years and older.<sup>85</sup> It expands the powers of the CRC<sup>86</sup> to regulate the purchase, sale, cultivation, manufacturing, packaging, transportation, and delivery of marijuana and to oversee the applications for licensing of marijuana businesses.<sup>87</sup> The CRC was initially created to administer the state's medicinal marijuana program but is now the main governing body responsible for establishing rules and regulations governing the sale and purchase of recreational marijuana and overseeing licensing for all areas of the marijuana industry. The Commission adopted its initial rules on August 19, 2021,<sup>88</sup> and underscored that the rules were based on the CRC's two core values of "equity and safety."<sup>89</sup> The rules further specify that in order to opt-out of marijuana commerce within their borders, municipalities can enact a local ordinance or regulation that prohibits the operation of any one or more classes of marijuana business within the jurisdiction.<sup>90</sup> Such an ordinance may also include the authorization or prohibition of outdoor cultivation.<sup>91</sup>

Municipalities that do not want to prohibit marijuana commerce outright can enact an ordinance or regulation that establishes a numerical limit on the number of marijuana businesses and types of licensed businesses operating within their borders,<sup>92</sup> can determine location, manner, and times of operation of marijuana businesses,<sup>93</sup> can establish civil penalties for the

85. The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, 2020 N.J. Assemb. Bill No. 21, Pub. L. 2021, c. 16 (codified at N.J. STAT. ANN. § 24:6I-31 (West 2022)).

86. The Cannabis Regulatory Commission, created by Pub. L.2019, c. 153 had initially been created to oversee the state's medical cannabis program, which is primarily set forth in the Jake Honig Compassionate Use Medical Cannabis Act, Pub. L.2009, c. 307.

87. 2020 N.J. Assemb. Bill No. 2, Pub. L. 2021, c. 16 (codified at N.J. STAT. ANN. § 24:6I-31 to -56 (West 2022)).

88. See generally N.J. CANNABIS REGUL. COMM'N, 53 NJR 9(2), PERSONAL USE OF CANNABIS RULES (2021), <https://www.nj.gov/cannabis/documents/rules/NJAC%201730%20Personal%20Use%20Cannabis.pdf> [<https://perma.cc/7Q5L-N8LW>].

89. See *Commission Members*, N.J. CANNABIS REGUL. COMM'N, <https://www.nj.gov/cannabis/about/members/> [<https://perma.cc/PA5M-BVWQ>] (last visited Feb. 22, 2022).

90. See N.J. ADMIN. CODE § 17:30-5.1(b) (2022) ("A municipality may enact and amend an ordinance or regulation to prohibit the operation of any one or more classes of cannabis business within the jurisdiction of the municipality pursuant to N.J.S.A. 24:6I-45(b), and such prohibiting ordinance shall apply throughout the municipality.").

91. See *id.*

92. See *id.* § 17:30-5.1(a)(1) ("A municipality may enact an ordinance or regulation . . . [t]hat establishes a numerical limit on the number of cannabis businesses, provided that any such ordinance or regulation shall specify the maximum number of each class of license that is allowed within the municipality and for which the municipality has established a numerical limit.").

93. See *id.* § 17:30-5.1(a)(2) ("A municipality may enact an ordinance or regulation . . . [t]hat governs the location, manner, and times of operation of cannabis businesses, except for the times of operation of a delivery service, including an ordinance or

violation of such rules,<sup>94</sup> can impose a separate local licensing requirement,<sup>95</sup> and can enact a 2% transfer tax on any sales between marijuana businesses.<sup>96</sup>

The licensing process, led by the CRC, is also an opportunity for intrastate collaboration. After the receipt of a license application from the Commission, municipalities have the opportunity to submit their preference(s) on which applicants seeking to operate within their town should be issued a license.<sup>97</sup> The involvement of municipalities is even more evident during the licensing process because marijuana businesses can only be licensed by the CRC if they have demonstrated support from the municipality and they operate in compliance with municipality restrictions. Specifically, the business applicant must first seek zoning approval of a proposed location for the business premises of license applicants.<sup>98</sup>

To add to the regulatory freedom of municipalities, it should be noted that even though they have no authority to prohibit their residents from possessing or consuming legal weed, they can prohibit the consumption of marijuana items through smoking, vaping, or aerosolizing in all places where tobacco smoking is prohibited under the N.J. Smoke-Free Air Act.<sup>99</sup> They can also prohibit the consumption of marijuana in any indoor public place such as bars, restaurants, sport venues, etc.<sup>100</sup> On this point, the N.J.

regulation that requires a cannabis business premises to be a certain distance from the closest church, synagogue, temple, or other place used exclusively for religious worship; or from the closest school, playground, park, or child daycare facility.”).

94. *See id.* § 17:30-5.1(a)(3) (“A municipality may enact an ordinance or regulation . . . [t]hat establishes civil penalties for a violation of such ordinance or regulation.”).

95. *See id.* § 17:30-5.1(a)(4) (“A municipality may enact an ordinance or regulation . . . [t]hat imposes a separate local licensing requirement.”).

96. *See id.* § 17:30-5.1(j) (“A municipality may adopt an ordinance imposing a transfer tax or user tax on the sale of any usable cannabis or cannabis products by a cannabis establishment located within the municipality pursuant to N.J.S.A. 40:48I-1.”).

97. *See id.* § 17:30-5.1(e) (“A municipality may provide input to the Commission as to the municipality’s preferences for licensure pursuant to N.J.A.C. 17:30-6.3.”).

98. *See id.* § 17:30-5.1(f) (“A municipality and its governing body entrusted with zoning or the regulation of land use may provide zoning approval of a proposed location of a license applicant’s cannabis business premises . . .”).

99. *See* N.J. STAT. ANN. § 26:3D-58 (West 2022) (stating that “[s]moking is prohibited . . . in an indoor public place, [or] workplace,” unless otherwise provided for in the statute).

100. *See id.* § 24:6I-31 (“[A] municipality would be empowered to enact an ordinance making it unlawful for any person 21 years of age or older to consume any cannabis item in a public place, other than school property (which would be punishable as a disorderly persons offense), and the ordinance could provide for a civil penalty of up to \$200 per violation.”); *see also Can a Municipality Prohibit the Consumption of Cannabis on Public*



State League of Municipalities argues that due to the broad definition of public place as defined by N.J. Statute § 26:3D-57, a municipality in effect has the authority to restrict the consumption by any means, even to a private residence.<sup>101</sup> The only real limit on municipalities' regulatory discretion is that they cannot restrict the transportation or delivery of marijuana items.<sup>102</sup> Dozens of localities had already passed ordinances that outlawed sales or possession of the drug in 2019, before the legislature legalized it.<sup>103</sup> However, the bill clarified that the ban on marijuana could only be valid if enacted after the bill and that previous bans were null.<sup>104</sup>

According to the *New Jersey Herald*, nearly 71% of towns across New Jersey — around 400 municipalities — have opted out of the recreational marijuana industry and passed ordinances that prohibit marijuana cultivation facilities, manufacturers, wholesalers distributors, delivery companies, and legal weed dispensaries completely as of September 2021.<sup>105</sup> According to the same study, 98 municipalities, mostly in South Jersey and Central Jersey, passed ordinances allowing legal weed dispensaries within their borders.<sup>106</sup> Forty-one municipalities passed ordinances that specifically prohibit dispensaries but allow some combination of the other five classes of New Jersey marijuana licenses, from cultivation centers to delivery companies, and ten municipalities

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*Property and in Public Places?*, N.J. ST. LEAGUE MUNS., <https://www.njlm.org/Faq.aspx?QID=286> [<https://perma.cc/UND4-MXRF>] (last visited Jan. 24, 2022).

101. See N.J. STAT. ANN. § 24:6I-31 (West 2022). New Jersey law explicitly defines public space. See *id.* § 26:3D-57 (“Indoor public place” means a structurally enclosed place of business, commerce or other service-related activity, whether publicly or privately owned or operated on a for-profit or nonprofit basis, which is generally accessible to the public . . .”).

102. See N.J. ADMIN. CODE § 17:30-5.1(I) (2021) (“In no case may a municipality restrict the transportation of cannabis items through, or delivery of cannabis items within, the municipality by adopting an ordinance or any other measure. Any such restriction shall be deemed void and unenforceable.”).

103. See Alan Greenblatt, *supra* note 5.

104. See The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, 2020 N.J. Assemb. Bill No. 21, Pub. L. 2021, c.16 (codified at N.J. STAT. ANN. § 24:6I-31 (West 2022)) (“Only an ordinance to prohibit operations by one or more license classes enacted pursuant to the specific authority to do so by the bill would be valid and enforceable; any ordinance enacted prior to the bill’s effective date addressing the issue of prohibition within the jurisdiction of a municipality would be null and void, and that municipality could only prohibit the operation of one or more classes of cannabis business by enactment of a new ordinance in accordance with the bill’s provisions.”).

105. See Mike Davis & Susanne Cervenka, *Legal Weed Dispensaries Banned in More than 70% of NJ Towns: Where Will You Buy Marijuana?*, N.J. HERALD (Aug. 23, 2021, 9:42 AM), <https://www.njherald.com/story/news/local/new-jersey/marijuana/2021/08/23/nj-legal-weed-dispensaries-marijuana-legalization-opt-out-in/8211230002/> [<https://perma.cc/EMU3-WV7P>].

106. See *id.*

opted out of the marijuana industry completely but made an exception for medical marijuana uses.<sup>107</sup>

For instance, according to *The Philadelphia Inquirer*, Ocean City adopted an ordinance that bans businesses that cultivate, manufacture, test, or sell marijuana, and other shore towns, including Stone Harbor, Sea Isle City, Wildwood Crest, and Cape May, were “well along in the process of passing similar ordinances” as of April 2021.<sup>108</sup>

The New Jersey State League of Municipalities, together with the Institute of Local Government Attorneys, have played an important role in guiding municipalities through the opt-out process. In particular, they organized meetings and published guidance documents and sample opt-out ordinances to assist those municipalities that were uncertain as to the implications of the liberalization of marijuana commerce.<sup>109</sup>

It should be noted, however, that many municipalities adopted opt-out ordinances only to buy time (wait and see approach) and be able to draw up rules for the new industry.<sup>110</sup> The state, in fact, allows municipalities to opt-in at any time but limits the opt-out window to 180 days.<sup>111</sup> According to *The Herald*, localities needed a time-saving option.<sup>112</sup> This is evident, for example, in the case of the city of Paterson, the third most populated city in New Jersey after Newark and Jersey City.<sup>113</sup> In August 2021, the City Council banned all recreational marijuana businesses from Paterson, but the council members stated that this was a temporary decision and that they would eventually want to strike a compromise to allow some types of marijuana businesses to reap the benefits of a regulated and taxed market.<sup>114</sup>

107. *See id.*

108. Amy S. Rosenberg, *Legally Buying Weed at the Jersey Shore Will Depend on What Town You're In*, PHILA. INQUIRER (Apr. 26, 2021), <https://www.inquirer.com/news/new-jersey-shore-cannabis-law-opt-out-20210426.html> [<https://perma.cc/Y2FZ-YP4V>].

109. *See Cannabis Legalization*, N.J. ST. LEAGUE MUNS., <https://www.njlm.org/969/Cannabis-Legalization> [<https://perma.cc/3VVP-PCUY>] (last visited Jan. 24, 2022).

110. *See Mike Davis, NJ Legal Weed Was Overwhelmingly Backed by Voters; So Why Are Towns Banning It?*, ASBURY PARK PRESS (Apr. 23, 2021, 9:04 PM), <https://www.app.com/story/news/local/new-jersey/marijuana/2021/04/19/nj-marijuana-legalization-legal-weed-dispensary-ordinances/7227609002/> [<https://perma.cc/LJ24-L293>].

111. *See* N.J. STAT. ANN. § 24:6I-45 (West 2022).

112. *See* Davis & Cervenka, *supra* note 105.

113. *See* Joe Malinconico, *Paterson City Council Votes No on Recreational Cannabis Businesses*, NORTHJERSEY.COM (Aug. 8, 2021, 6:21 PM), <https://www.northjersey.com/story/news/paterson-press/2021/08/06/new-jersey-marijuana-legalization-paterson-votes-no-pot-businesses/5514003001/> [<https://perma.cc/EHG4-G9JE>].

114. *See id.*

The same is true for municipalities such as Cherry Hill, which set a timeline to revisit the opt-out in February 2022;<sup>115</sup> South Orange adopted only a temporary ban;<sup>116</sup> and Toms River, a village of 95,438 people that banned marijuana business in July 2021 but also introduced a companion measure that sets a December 31, 2021, expiration date on the business ban.<sup>117</sup> The expiration date was deemed necessary in order to give Toms River's marijuana committee more time to continue discussions on whether to permit weed-related businesses in the township and, if so, to decide where they should be located.<sup>118</sup> The municipality of Lacey even called a referendum in October 2021 to let citizens decide whether marijuana should be sold and cultivated in the town.<sup>119</sup> Other municipalities such as Lakewood, on the other hand, adopted an outright ban to meet the decision of their voters during the November 2020 referendum.<sup>120</sup>

The consequence of the patchwork of regulations and rules in New Jersey is that the black market continues to thrive. But this is, in the opinion of the Author, not an excuse to stop the regulatory effort. As explained above, the opt-out ordinances are in many cases only temporary measures that municipalities adopt in order to buy time and design detailed regulations of the market.

This is also what happened in other states, such as Colorado, where after an initial refusal to cooperate with the state, municipalities have started to embrace the regulation of commercial marijuana.<sup>121</sup> From this perspective, the outcome of a state's non-pre-emptive and derogatory approach is one of successful intrastate collaboration that often is not achieved when pre-emptive legislation is in place.

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115. See Anthony Bellano, *Cherry Hill Bans Recreational Pot, Sets Timeline to Reconsider*, PATCH (July 29, 2021, 11:57 AM), <https://patch.com/new-jersey/cherryhill/cherry-hill-bans-recreational-pot-sets-timeline-reconsider> [<https://perma.cc/J9GL-R863>].

116. See *South Orange Passes Temporary Cannabis Opt-Out Ordinance*, TAPINTO SOMA (Aug. 21, 2021, 10:00 AM), <https://www.tapinto.net/towns/soma/sections/government/articles/south-orange-passes-temporary-cannabis-opt-out-ordinance> [<https://perma.cc/DUS2-SKEV>].

117. See Jean Mikle, *Toms River Passes Weed Business Ban, but It Could Expire Dec. 31*, ASBURY PARK PRESS (July 15, 2021, 5:01 AM), <https://www.app.com/story/news/local/new-jersey/marijuana/2021/07/15/nj-marijuana-legalization-toms-river-bans-weed-shops-but-could-expire-december/7963991002/> [<https://perma.cc/7ULU-5TB8>].

118. See *id.*

119. See Kimberlee Bongard, *Lacey Voters to Decide Whether Marijuana Should Be Sold in Town*, PATCH (Oct. 18, 2021, 4:57 PM), <https://patch.com/new-jersey/lacey/lacey-voters-decide-whether-marijuana-should-be-sold-town> [<https://perma.cc/NGT4-DF75>].

120. See Joe Strupp, *Lakewood Unanimously Bans Marijuana Sales, Production in Town*, ASBURY PARK PRESS (Apr. 23, 2021, 11:59 AM), <https://www.app.com/story/news/local/new-jersey/marijuana/2021/04/23/nj-marijuana-lakewood-bans-both-sales-and-production/7335547002/> [<https://perma.cc/DH7U-9NBY>].

121. See Davis & Cervenka, *supra* note 105.

The New Jersey case study confirms that the opt-out provisions go hand to hand with an extensive recognition of local government's powers enshrined in the state constitution, the state legislation, and the state constitutional jurisprudence.

Respectively, New Jersey State Constitution Article 4, § VII, clause 11 (the so-called “liberal construction” article of the Constitution) confers implied regulatory powers on municipalities and counties and encourages the courts to interpret laws concerning municipal corporations in favor of local governments:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.<sup>122</sup>

The liberal approach to local power enshrined in the constitution is further complemented by state legislation. Remarkably, N.J. Statute § 40:41A-28 defines municipalities as “the broad repository of local police power in terms of the right and power to legislate for the general health, safety and welfare of their residents,”<sup>123</sup> and confers all municipalities “the fullest and most complete powers possible over the internal affairs of such municipalities for local self-government.”<sup>124</sup> This recognition of local police power constitutes a strong basis for sustaining local legislative acts.<sup>125</sup> New Jersey courts have implemented this liberal approach by presuming the validity of local enactments,<sup>126</sup> and assuming that local laws are *not* pre-empted by state law unless they violate the New Jersey Constitution, are *ultra vires*,<sup>127</sup> or are unreasonable.<sup>128</sup>

Like California, the situation in New Jersey highlights a need for explicit delegation language in the state constitution, in state legislation, and in state jurisprudence to support a sustainable delegation of regulatory powers to localities.

122. N.J. CONST. art. IV, § 7, cl. 11.

123. N.J. STAT. ANN. § 40:41A-28 (West 2021).

124. *Id.* § 40:42-4.

125. See Michael A. Pane, *Choosing a Remedy — Local Legislative Latitude*, in N.J. PRAC., LOCAL GOVERNMENT LAW 35A, § 29:4 (4th ed. 2021).

126. See *Brown v. City of Newark*, 552 A.2d 125, 135 (N.J. 1989).

127. See Pane, *supra* note 125, at § 29:4.

128. See *Dock Watch Hollow Quarry Pit, Inc. v. Warren Twp.*, 361 A.2d 12, 19 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 377 A.2d 1201 (N.J. 1977).

### V. RECREATIONAL MARIJUANA ‘OPT-OUT’ PROVISIONS IN NEW YORK

New Jersey’s legalization of marijuana has pressured New York to get up to speed with their neighbor or — as New York Governor Kathy Hochul stated — see “all the money go to New Jersey” as a consequence.<sup>129</sup> On March 31, 2021, former New York Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act, legalizing recreational marijuana in New York state.<sup>130</sup> The law allows possession of up to three ounces of marijuana for recreational use or 24 grams of concentrated marijuana, such as oils derived from a marijuana plant.<sup>131</sup>

The intent of the law was to create significant new revenue, reduce the illegal drug market and violent crime, end the racially disparate impact of existing marijuana laws, increase employment, and strengthen New York’s agriculture sector, among other goals.<sup>132</sup> New York Governor Kathy Hochul reiterated those intents in September 2021 at the Business Council of New York State’s annual meeting, stating marijuana legalization would generate “thousands and thousands of jobs” in the state and that she intended to make regulatory appointments for the industry to get implementation underway.<sup>133</sup>

While the New York and New Jersey laws have many similarities, one of the main differences between the two resides in the provisions for home grow: in October 2021, the New York Cannabis Board issued rules allowing residents to grow up to six marijuana plants at home,<sup>134</sup> whereas New Jersey’s cannabis law does not contain a home grow provision. The other difference resides in taxation. While in New Jersey, adult-use sales are subject to the state sales tax of 6.625%, and each municipality can impose a maximum local tax of 2% of the receipts from each sale by a marijuana cultivation, manufacturer, wholesaler, and retailer, cannabis products in New York will be subject to a state tax of 9%, plus an additional 4% local tax that would be split between counties and cities, towns, or villages.<sup>135</sup>

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129. Kathy Hochul, *Bolton Landing Business Council 2021 Annual Meeting 09 24 2021*, YOUTUBE (Sept. 24, 2021), <https://www.youtube.com/watch?v=mnhPO6ULMjI> [<https://perma.cc/7KH8-AB2T>] (statement at 20:55).

130. S.B. 854, 244 Leg. Sess. (N.Y. 2021) (enacted).

131. See N.Y. PENAL LAW § 222.05 (McKinney 2021).

132. N.Y. CANNABIS LAW § 2 (McKinney 2021).

133. Hochul, *supra* note 129.

134. See *Cannabis Control Board Approves Regulations for Cultivation of Medical Cannabis*, OFF. CANNABIS MGMT. (Oct. 21, 2021), <https://cannabis.ny.gov/news/cannabis-control-board-approves-regulations-cultivation-medical-cannabis> [<https://perma.cc/7SJS-GS3Y>].

135. See Nikolas Komyati, Jessica Gonzalez & Taylor Anderson, *Comparing Cannabis Laws of Neighboring States: NY and NJ*, LAW.COM (June 8, 2021, 12:06 PM), <https://www.law.com>.

Similar to New Jersey's law, New York's marijuana legislation created a new Office of Cannabis Management governed by a Cannabis Control Board to oversee and implement the law (collectively referred to as OCM). The OCM is responsible for issuing licenses, developing regulations, and overseeing the State's existing Medical Marijuana Program and Cannabinoid Hemp Program, previously regulated by the Department of Health.<sup>136</sup>

New York's decriminalization statute is less permissive of local governments compared with New Jersey's. For example, New York permits towns, cities, and villages to opt-out of adult-use marijuana retail dispensaries or on-site consumption licenses from locating within their jurisdictions, but unlike New Jersey's — where municipalities could opt-out again in five years — New York's provides for a *final* deadline on December 31, 2021, with no option to opt-out at a future date.<sup>137</sup> Furthermore, the local opt-out law is subject to a permissive referendum governed by Section 24 of the Municipal Home Rule Law.<sup>138</sup> This allows 10% of qualified voters within the municipality to petition a referendum on whether or not to approve the local law to be placed on the ballot at the next general election of state or local government officials for the municipality.<sup>139</sup>

Similar to what happens in New Jersey, towns, cities, and villages are permitted to pass local laws and regulations governing the time, place, and manner of adult-use retail dispensaries and on-site consumption licenses.<sup>140</sup> This means that local governments may pass laws and regulations pertaining to local zoning, the location of licensees, hours of operations, and adherence to local building codes.<sup>141</sup>

Municipalities are also involved in the licensing process but to a lesser extent than in New Jersey. In New York, before a business applies for an adult-use retail dispensary or on-site consumption license, it must notify the municipality and seek an opinion for or against the granting of the license.<sup>142</sup> Such opinion then becomes part of the record and is used by the

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law.com/thelegalintelligencer/2021/06/08/comparing-cannabis-laws-of-neighboring-states-ny-and-nj/ [https://perma.cc/RP6U-PLQ9].

136. See N.Y. CANNABIS LAW § 10 (McKinney 2021).

137. See *id.* § 131.

138. See N.Y. MUN. HOME RULE LAW § 24 (McKinney 2021).

139. See *id.*

140. N.Y. CANNABIS LAW § 131 (McKinney 2021).

141. See N.Y. OFF. OF CANNABIS MGMT., WHAT IS IN THE LAW: LOCAL GOVERNMENTS 2 (2021), <https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-local-government-06.pdf> [https://perma.cc/QJY6-QWXN].

142. See NY CANNABIS LAW § 76 (McKinney 2021).

OCM to determine whether to grant or deny the application.<sup>143</sup> In New Jersey, as seen above, the authorization of the municipalities does not constitute an opinion but a real pre-condition for the issuance of a license. The different ways in which the two states consider municipalities' approval reveals a very different approach to the sovereignty of municipalities. New York state prefers to make the final decision on the applications for adult-use retail dispensary or on-site consumption license and could, in theory, overcome the negative opinion of a municipality.<sup>144</sup> This approach to decriminalization reveals that the state of New York is less inclined to delegate full decision-making power to municipalities and therefore suggests that New York is a state where delegation to local power is still controversial. This is also somehow evident in the language used by legislators in the decriminalization bill that explicitly mentions 'pre-emption' of local laws pertaining to the operation or licensure of registered organizations, adult-use marijuana licenses, or cannabinoid hemp licenses.<sup>145</sup> It is clear that the licensing process is centralized and managed by the Office of Cannabis Management, but the state here wanted to point out that it actually "pre-empts" any attempt of municipalities to regulate the field.

The state of New York is evidently less keen on delegating powers to local government than California and New Jersey. Such a moderate approach to delegation is noticeable in the New York Constitution and in the state statutes that govern the distribution of powers within the state. The New York Constitution Article IX, § 2(c) and New York Municipal Home Rule Law § 10(1)(ii)(a)(12) confer local governments the power to adopt laws "not inconsistent with the provisions of the constitution"<sup>146</sup> and that relate to, among other things, the "protection, order, conduct, safety, health and well-being of persons or property."<sup>147</sup>

The difference between California, that confers "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws,"<sup>148</sup> and New Jersey, that confers implied powers,<sup>149</sup> is striking, and it is reflected in the more restrictive opt-out options.

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143. *See id.*

144. *See id.*

145. *See id.* § 131 ("[A]ll county, town, city and village governing bodies are hereby preempted from adopting any law, rule, ordinance, regulation or prohibition pertaining to the operation or licensure of registered organizations, adult-use cannabis licenses or cannabinoid hemp licenses.")

146. N.Y. CONST. art. IX, § 2(c)(i); N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 2021).

147. N.Y. CONST. art. IX, § 2(c)(10); N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (McKinney 2021).

148. CAL. CONST. art. XI, § 7.

In the Author's opinion, New York is an exemplary case of a liberal state that uses conservative techniques in order to be more liberal. In other words, New York is so keen on decriminalizing marijuana and opening the market that the state is only delegating a certain amount of decision-making power to cities, leaving them with little wiggle-room as to the extent to which the decriminalization takes place. At the time of writing, it is still very early to assess the response of the municipalities, but a few have already passed opt-out ordinances to buy time and see how the regulatory framework will unfold.<sup>150</sup> News outlets report that Colonie, a town in the Capital Region,<sup>151</sup> Wellsville village,<sup>152</sup> Mount Kisco, Eastchester, Somers and North Castle in the lower Hudson Valley,<sup>153</sup> Chautauqua along with the towns of Gerry, Busti, Carroll, Clymer, Harmony, Ellery, and the villages of Lakewood and Cassadaga in western New York<sup>154</sup> have already opted out. Like the towns in New Jersey, it should be noted that the opt-out ordinances in these New York towns may be temporary and that the localities may just want to buy time before allowing dispensaries within their borders.

### CONCLUSION

This Essay did not assess the merits of certain marijuana policies or the desirability of delegation of marijuana regulatory powers to local governments. As seen in the California, New Jersey, and New York case studies, the assessment of such policies involves complex economic, political, and legal considerations. The aim of this Essay was, instead, an

149. See N.J. CONST. art. IV, § 7, cl. 11.

150. The Rockefeller Institute has been tracking the opt-in/opt-out decision-making by localities. See Heather Trela, *To Opt In or Opt Out — That Is the Question for NYS Municipalities*, ROCKEFELLER INST. GOV'T (Oct. 29, 2021), <https://rockinst.org/blog/to-opt-in-or-opt-out-that-is-the-question-for-nys-municipalities/> [https://perma.cc/8VQH-6FXV].

151. See Morgan McKay, *NY Cities Grappling with Marijuana Opt-out Decisions*, NY1 (Sept. 16, 2021, 9:30 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2021/09/17/ny-cities-grappling-with-marijuana-opt-out-decisions> [https://perma.cc/LS33-D6B3].

152. See Chris Potter, *Will Your Town Sell Weed? Why Some NY Municipalities Will Opt Out of Marijuana Law*, STAR GAZETTE (Oct. 20, 2021), <https://www.star-gazette.com/story/news/local/2021/10/20/new-york-weed-marijuana-law-opt-out-southern-tier-towns/8450033002/> [https://perma.cc/6FLJ-R688].

153. See *Mount Kisco Mayor: Village Taking a Wait-and-See Approach to Retail Marijuana Consumption Lounges*, NEWS 12 N.J. (July 7, 2021), <https://newjersey.news12.com/mount-vernon-mayor-village-taking-a-wait-and-see-approach-to-retail-marijuana-consumption-lounges> [https://perma.cc/63RF-NE24].

154. See Gregory Bacon, *Chautauqua Town Opt's Out of Pot Dispensaries*, OBSERVER (Sept. 16, 2021), <https://www.observertoday.com/news/page-one/2021/09/chautauqua-town-opt's-out-of-pot-dispensaries/> [https://perma.cc/S2LP-KS8J].



analysis of the deployment of opt-out provisions to resolve intrastate political and legal conflict.

The Essay has demonstrated that the peculiar circumstances of marijuana decriminalization have forced states to think “out of the box” and to work out alternatives to traditional pre-emption of local action. It has presented the different ways in which states have delegated regulatory power to municipalities and provided in-depth insights into the regulatory framework of the states of California, New Jersey, and New York.

As the California and New Jersey case studies demonstrated, the broader constitutional framework that governs intrastate relations plays a fundamental role in promoting local government. The delegation of powers to localities is sustainable only if it is coupled with a solid recognition of local power in the state constitution and in the related state constitutional jurisprudence. The case study of New York has confirmed that a more restrictive approach to delegation is due, or possibly influenced by, the limits set out in the state constitution. The 17 states that provided for opt-out provisions arguably did so in recognition of cities’ local land-use authority and police powers, but most of these states have not included such recognition of local powers in their constitutions.<sup>155</sup>

This is arguably also the reason why Professor Paul A. Diller suggested that a broader use of constitutional home rule could represent the solution to “the urban disadvantage that exists in many state legislatures.”<sup>156</sup> He described the delegation of power to local government as “a modest corrective [that could] shift the cumulative local, state, and national legal framework back toward the views of the national median voter.”<sup>157</sup> This Essay has contributed to the work of Professor Diller by providing evidence that such a shift towards local power is workable. The way in which states have approached marijuana decriminalization could represent the beginning of a new era of intrastate relations just as the New Deal represented a shift in our conception of federal-state relations and led to an era of “cooperative federalism.”<sup>158</sup>

To conclude, the Author suggests that the recognition of local police powers is potentially applicable to other areas of state policy and invites

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155. See Di Gioia, *supra* note 41.

156. Diller, *supra* note 17, at 1051.

157. *Id.* at 1048.

158. The term “cooperative federalism” appeared for the first time in a court case in 1950 in *Alaska Steamship Co. v. Mullaney*, 180 F.2d 805, 816 n.14 (9th Cir. 1950). In *Mullaney*, the Ninth Circuit cited a law review article by Samuel Mermin entitled “Cooperative Federalism” *Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements*, 57 YALE L.J. 1, 18 (1947).

policymakers to think about possible ways in which they can avoid pre-emption in favor of collaboration with local authorities.