Local options: good processes, controversial outcomes?

According to the Economist, around 18millions of Americans live in places where the selling of alcohol is illegal.[1]

In a 2001 article, Chronicle Senior Writer Peter Sinton ironically remarked: "Although all Americans are guaranteed certain inalienable rights such as life, liberty and the pursuit of happiness, access to wine is not one of them."[2] The quote refers to those local jurisdictions that regulate- and in some cases-prohibit the retail of liquor by enacting alcohol laws in virtue of their local option authority. A local option is defined as "a law authorizing divisions of the state to decide by popular vote whether a prohibitive or restrictive liquor law should apply is a valid exercise of the legislative power."[3]

In the case of alcohol, these options are also called "local opt-out options" because the local jurisdiction opts out of the state broader legalization of alcohol sale and consumption. State law-makers have been using opt-out options to permits municipalities to regulate the sale of alcoholic beverages within their borders and more recently, marijuana.

When the state, instead, decides to delegate freedom to its local jurisdictions to take initiative and regulate other policies, this is usually called just a 'local option'. Examples of widespread local options are local sale taxes, smart cities privacy laws, local rent control, regulations and, more recently, COVID related mandates.

The local opt options are, in theory, very virtuous legal and political processes. They avoid intra-state conflict and are an alternative to cooperative federalism at state level for controversial policies when an agreement cannot be reached. However, do they also produce desirable policy outcomes?

This article examines the ways in which local opt-out options have resolved the long-standing divide over the sale of alcohol and marijuana. It examines the history of local opt-out options, their current operation and expansion. It then examines local options and

[1] Why America still has "dry" counties, The Economist, https://www.economist.com/the-economist-explains/2018/06/05/why-america-still-has-dry-counties (last accessed 07.07.2022).
[2] Peter Sinton, No Wine Across the Line: Vintners Confront States' Shipping Laws, S.F. Chron., Jan. 29, 2001, at B1. Also at https://www.sfgate.com/business/article/No-Wine-Across-The-Line-Vintners-confront-2957994.php
[3] 48 C.J.S. Intoxicating Liquors § 43.

considers whether there is a correct balance between regulatory uniformity and local regulation in the context of sales tax, privacy, local rent control and COVID mandates. It discusses how each of the options has affected policy homogeneity and resource allocation but has also promoted local community standards and local innovation. This Article also contributes to the literature on localism scholarship. It discusses whether there is a correct balance between regulatory uniformity and local regulation and concludes on which lessons can the states learn from alcohol, marijuana and other local options.

Localism v. Preemption

Self-governance and local government were at the very heart of the origins of the United States. Since the early 1600s, before the American Revolution, British settlements were small towns administered as city-states and practicing limited forms of self-government. In 1835 Alexis de Tocqueville expressed his admiration for the American society where political decisions were still discussed in the many communities he visited during his eight months trip from Canada to New Orleans. He wrote: "the federation of the states was only the last to take shape"[4] and "local institutions are to liberty what primary schools are to science they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it."[5]

Upon drafting the US Constitution, however, the founders neglected to mention municipalities, counties and other types of local governments and focussed instead on the relationship between the federal government and the several states. As the United States grew in size, local governments were conceived as a creation of state governments under the authority of their state constitutions. States granted charters to municipalities that determined their powers and jurisdiction. Prof. Briffault summarized the supremacy of states over local governments in the following assertion:

> 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

[4] Alexis de Tocqueville, Democracy in America, trans. George Lawrence (Garden City, NY 1969), 61.
[5] *Id.*

> 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.[6]

Today cities and other types of local government are seeking to reclaim their right to self-governance in many areas: gun regulation, environment, immigration (the rise of sanctuary cities), lock-down measures during the 2020 pandemic and many more.

These attempts of local governments, however, have been hampered by many states legislatures that have enacted pre-emption laws to prohibit local governments from legislating in areas pre-empted by the state. Such phenomenon is on the rise across the 50 states and encompasses many policy areas. According to a 2020 report of the National League of Cities, forty-five states have legislation that pre-empts local firearms regulation, 37 pre-empt ride share, 29 rent control, 20 paid leave and 15 minimum wage.[7]

The rationale behind the use of pre-emption is that policy homogeneity promotes equality and fair resource allocation across the state. In his article "Intrastate pre-emption", Prof. Diller has examined the position of opponents to local regulation and argued that businesses tend to be the most powerful and frequent opponents of increased local regulatory authority.[8] Businesses usually see local bans as threats to their profit and, as Prof. Rick Hills has explained, businesses often have an institutional interest in regulatory uniformity for its own sake.[9] The literature has further identified political polarization as one of the main reasons for intra-state pre-emption and argued that pre-emptive statutes are attempts to control political defection of local authorities by legal means.[10]

The use of local options is instead tied to a wider philosophical conception of the relationship between the state and its local government that has been termed by Prof. Richard Briffault "localism".[11] Delegation of power to local government has been supported

---

[6] Briffault, Our Localism: Part I--The Structure of Local Government Law, 90 Colum. L. Rev. 1, 7 (1990).
[7] Preemption and the COVID-19 Pandemic: EXPLORING STATE INTERFERENCE BEFORE, DURING, & AFTER THE CRISIS, National League of Cities, https://www.nlc.org/wp-content/uploads/2020/11/COVID-19_Preemption_Report.pdf.
[8] Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1134 (2007).
[9] Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 22 (2007).
[10] See Fowler Luke, Witt Stephanie L., State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures. PUBLIUS: THE JOURNAL OF FEDERALISM 49 (3): 540–559 (2019).
[11] Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346 (1990) [hereinafter Briffault, Our Localism: Part II]; The Structure of Local Government Law, 90 Colum. L. Rev. 1 (1990).

by the home-rule movement of the late nineteenth and early twentieth centuries. In the last 135 years, states have experimented with delegating power over "local matters" to cities with the use of city charters and to some extent have codified their home rule system in the state constitutions. An interesting view on the interrelation between the development of home rule and the rise of pre-emption is that of Prof. Diller who argued that the evolution of home rule has created a patchwork of approaches to local authority across the 50 states and that pre-emption is "the primary battleground for determining the parameters of local authority in modern home-rule regimes."[12] In other words, Prof. Diller is arguing that pre-emption is the result of the misuse/patched implementation of Home Rule.

On the other hand, the arguments in favour of localism are mainly focussed on the conception of cities as "innovators" of policies and able to tailor policy to local needs. One of the main proponents of localism is Harvard Prof. Gerard Frug who emphasized the relationship between self-government, local power and community formation and maintenance. [13]

Another strand of thought claims that the inclusion of the local options provision is a response to the geographical variability in voter support. Sociologists have argued that such variability is due to population demographics, socio-political factors, and community differences in experience with criminalization of cannabis possession. David M. Yaskewich found that local governments were more tolerant of marijuana businesses in areas with lower densities of senior citizens and higher densities of Black residents.[14] Lindsey Beltz and others have demonstrated that stronger Republican political leanings and/or higher percentages of Black or Hispanic residents were associated with reduced support for marijuana retail.[15]

Furthermore, the case for localism emerges from a criticism of the effects pre-emption in the field of firearms, alcohol and tobacco. A study conducted in 1998 by Gorovitz, Mosher

[12] Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1127 (2007).
[13] See generally Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1109-10 (1980). See also from the same author *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993); *The Geography of Community*, 48 STAN. L. REV. 1047 (1996).
[14] David M. Yaskewich, Local Prohibitions on Marijuana: Factors Associated With Bans on Medical and Recreational Businesses,
[15] Lindsey Beltz, Clayton Mosher, Jennifer Schwartz, County-Level Differences in Support for Recreational Cannabis on the Ballot, 47 Contemporary Drug Problems 149 (2020).

and Pertschuk exposed the potential danger that preemptive legislation poses to efforts to prevent illness, injury and death caused by these products.[16]

Finally, it should be noted that local options are ideologically supported by public health advocates that campaign against pre-emption of alcohol control and nutrition in general. Writing for the American Journal of Public Health, Eric Crosbie and Laura A. Schmidt reported that social movements (such as the Local Solutions Support Center, the Campaign to Defend Local Solutions, Grassroots Change, ChangeLab Solutions, and Voices for Healthy Kids) have created "national preemption task forces to mobilize grassroots movements, counter industry strategies and tactics, and increase capacity and legal expertise."[17] Their suggestion is that such groups "should continue to expand their connections with prominent national political figures and leading health agencies."[18]

As seen above, the philosophical arguments for pre-emption and localism present valid arguments on both sides. This article now presents how-in practice- local options have operated in the United States and will shed light on the challenges and opportunities that local options present.

Alcohol opt-out options: a mapping exercise

"[N]o national or even regional consensus has emerged with respect to the morality and consequence of alcoholic beverages. It has seemed best, in default of consensus, to leave the matter to local preference as expressed in the voting booth."[19] As the Philly's v. Byrne quote recites, regulation of alcohol has proven so controversial in the United States that -in most cases- has been left to the local ballot. States vary widely-*de facto*- in the extent of authority they delegate to local jurisdictions to regulate alcoholic beverages. In seventeen states, remarkably, alcohol regulation is retained at the State level.[20] In the remaining 33 states, municipalities or other local government agencies are allowed to enact laws (often

---

[16] E. Gorovitz, M. Pertschuk, J.Mosher*, Pre-emption or prevention? Lessons from efforts to control firearms, alcohol and toba*cco. J Public Health Policy 1998;19(1):37–50. 10.

[17] Eric Crosbie and Laura A. Schmidt, *Preemption in Tobacco Control: A Framework for Other Areas of Public Health*. 110 Am J Public Health 345 (2020).

[18] *Id.*

[19] Philly's v. Byrne, Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington. 732 F.2d 87, 92 (7th Cir. 1984) (discussing Illinois' local-option liquor law).

[20] *Control State Directory and Info*, National Alcohol Control Association, https://www.nabca.org/control-state-directory-and-info.

ordinances) that regulate the sale and distribution of alcohol (and in some cases, consumption and possession) of liquor within their jurisdictions.

According to a report dated December 2019, there are 83 counties in the United States where the sale of alcohol is completely prohibited.[21] Another source reports that 10% of U.S. counties still maintain a ban on some or all forms of alcohol.[22] If we look at counties only, nine states still have dry counties (Arkansas, Florida, Georgia, Kansas, Kentucky, Mississippi, South Dakota, Tennessee and Texas) and Arkansas is the state with the most dry counties: 34 of the 75 counties. [23] Those laws are the product of the so-called local option laws, defined as "the right of the people in a city, town or other specified locality to determine for themselves by a decisive vote at an election the issue whether or not they shall prohibit intoxicating liquors or adopt a particular regulation of such".[24]

Some states establish local opt-outs by constitutional provision, and some other by legislative act. For example, Kentucky provided for local option as by section 61 of the Constitution, as follows: 'The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days.'[25]

The broad variation of the way in which local government is organised is reflected in the variation of local governments allowed to opt-out: some states allow entire counties while other allow cities, towns and any local jurisdiction. Alabama[26] and Colorado,[27] for instance, allow only cities and counties to elect the local option whereas Alaska, Arkansas, Georgia,

[21] See Evan Comen, These 9 States Still Have Dry Counties, 24/7 WALL ST, https://247wallst.com/special-report/2019/12/12/states-that-still-have-dry-counties/3/ (last updated Mar. 20, 2020).
[22] David J. Hanson, Local Option Alcohol Laws in the US: History & Status, ALCOHOL PROBLEMS AND SOLUTIONS, https://www.alcoholproblemsandsolutions.org/local-option-alcohol-laws-in-the-u-s/ (last visited 06.07.22)
[23] Evan Comen, These 9 States Still Have Dry Counties, 24/7 Wall St, https://247wallst.com/special-report/2019/12/12/states-that-still-have-dry-counties/2/.
[24] § 24:178. Local option, 6A McQuillin Mun. Corp. § 24:178 (3d ed.).
[25] Ky. Const. § 61
[26] Ala. Code Title 28, Chapters 2 and 2A
[27] Colorado Revised Statutes (C.R.S.) Section 12-47-105

California allow any local jurisdiction to do so. Remarkably, Kansas[28] and Tennessee[29] are dry by default and local jurisdictions choose whether to allow liquor sales.

The debut of local opt-out options: a short history of alcohol regulation

The state' authority to regulate the use, sale and traffic of liquor has traditionally been a matter of police powers falling under the states' power to make regulations upholding public safety, order, health, and morals.[30] This right to regulate was codified as early as 1890 in the Wilson Act,[31] and also in the Webb-Kenyon Act of 1913, which granted the states power to regulate the sale and transportation of liquor within their territory.[32]

During the 1800s alcohol regulation was entirely the province of state and local governments.[33] It was -in fact- at state level that the temperance movement began to spread and led to a series of state alcohol bans, one of which was upheld by the Supreme Court in Mugler v. Kansas (1887) as a valid exercise of the state police power to protect public health and public moral.[34] The temperance movement was led by the Anti-Saloon League (ASL), a federation of churches and religious societies of Protestant denominations, namely, Methodist, Baptist, Presbyterian, and Scandinavian Lutherans, strongest in rural and semi-rural areas. [35] ASL's initial strategy was to sponsor local legislation regulating saloons, and ultimately infiltrated the local political process with the aim of endorsing candidates for political office.[36] The local opt-out options made their debut during these years; they were the way in which temperance movement's local governments made their voice heard in those states that resisted going dry. Generally, a local option required the

[28] K.S.A. Ch. 41, Art. 13, Reserved.
[29] Tenn. Code Title 57, Chapters 2 and 3
[30] See Fuson v. Howard, 305 Ky. 843, 846, 205 S.W.2d 1018, 1020 (1947). "It will be noted, then, that almost since the beginning of our present system of government, the matter of liquor control has resided chiefly in the state in the exercise of its police power, except in so far as it is limited by the authority vested in the Federal Government.".
[31] Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1976)).
[32] Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (repealed and re-enacted without change by Liquor Law Repeal and Enforcement Act, ch. 740, tit. II, § 202, 49 Stat. 877 (1935)) (codified at 27 U.S.C. § 122 (1976)).
[33] See Thomas H. Walters, Note, Michigan's New Brewpub License: Regulation of Zymurgy for the Twenty-First Century, 71 U. Det. Mercy L. Rev. 621, 630 (1994).
[34] Mugler v. Kansas, 123 U.S. 623, 663, 8 S. Ct. 273, 298, 31 L. Ed. 205 (1887).
[35] *See* N. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 1 (1976) at 95-97.
[36] Sidney J. Spaeth, The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest, 79 Cal. L. Rev. 161, 170 (1991)

citizens of a town, city, or county to vote on the question of licensing saloons.[37] The options had been challenged in court and passed constitutional scrutiny in several occasions,[38] remarkably in 1904 when the Supreme Court declared that the power of a state to pass a local option law "is not an open question."[39]

The success of the temperance movement at local level, in turn, triggered a national prohibition movement that notably terminated in the enactment of the Eighteen Amendment (1919)[40] and the temporary suspension of state control over liquor regulations in favour of national prohibition. The 18th Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors" in the United States and its territories, it stripped the states of their exclusive power to control the liquor traffic within their borders and granted to Congress the authority to enact and enforce legislation to prohibit the manufacture and sale of intoxicating liquor. However, the experiment did not last long. In 1933 it was clear that the federal regulation of alcohol was ineffective and that "a single community in which a uniform policy of liquor control could [not] be enforced."[41] As Prof. Sidney J. Spaeth reported: "legislation was most effective where it enabled localities to determine the extent of liquor sales in their midst."[42] and "when federal laws were passed to stop the liquor traffic, opponents either went underground or ignored the laws completely. Even in the most fervent prohibitionist states, enforcement depended entirely on local opinion."[43] Her research into the repeal of the eighteenth amendment shows that politicians admitted that there had been a "misinterpretation of jurisdiction" and that "citizens and officials were looking to the Federal forces for the performance of police

---

[37] *Id*. at footnote 57.

[38] *See* Rippey v. State of Tex., 193 U.S. 504, 24 S. Ct. 516, 48 L. Ed. 767 (1904) and State of Ohio ex rel. Lloyd v. Dollison, 194 U.S. 445, 449, 24 S. Ct. 703, 705, 48 L. Ed. 1062 (1904) where it was decided that state local option law does not violate the due process of law clause of the federal Constitution.

[39] Lloyd v. Dollison, 194 U.S. 445, 448, 449, 24 S.Ct. 703, 48 L.Ed. 1062 (1904). See also, Rippey v. Texas, 193 U.S. 504, 24 S.Ct. 516, 48 L.Ed. 767 (1904).

[40] U.S. Const. amend. XVIII. National Prohibition, also called the "Great Experiment" was brought into being by the 18th Amendment to the Constitution in 1919, the so-called Volstead Act which in combination with other laws, prohibited "…the manufacture, sale, or transportation" of "intoxicating liquors" in the United States

[41] Sidney J. Spaeth, The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest, 79 Cal. L. Rev. 161, 165 (1991) quoting R. Fosdick & A. Scott, Toward Liquor Control 10 (1933).

[42] *Id*. at 166 quoting J. SAMUELSON, THE HISTORY OF DRINK 201-28 (1878) 226-227.

[43] Id. at 165 (1991).

duties which were purely local".[44] The failure of the national prohibition led to the return of full state control in 1933, when the Twenty-first Amendment repealed the Eighteenth Amendment and federal Prohibition and re-established the police power of the states over intoxicating liquors, in particular the power to either permit or prohibit the importation or sale of alcohol within their borders; to determine the specific structure of alcohol distribution within their borders; and to regulate various aspects of alcohol sales and possession.[45]

In the words of Justice Rehnquist the Twenty-First amendment "confer[red] something more than the normal state authority over public health, welfare, and moral."[46] However, the Twenty-first Amendment still "gave each State the option of banning alcohol if its citizens so chose." In virtue of the re-affirmed power, seven states initially prohibited the sale of package liquor (Alabama, Georgia, Kansas, Mississippi, North Dakota, Oklahoma, and Tennessee) but thirty-four started to use the local option to accommodate local preferences.[47] The result was an assortment of alcohol control laws varying dramatically from state to state.[48] Prof. Strumpf and Oberholzer-Gee report that from 1934 to 1939, a total of 5,140 local option elections took place and that until 1970, typically hundreds of elections were held in every year.[49]

The widespread use of the local option triggered substantial constitutional challenges that have been resolved in favour of the constitutionality of the option. In the majority cases, the options were challenged for violating due process and equal protection. In due process challenges, the courts repeatedly argued that local option provisions complied with due process clause, bore substantial relationship to stated objective and purposes of liquor code, and was proper condition of license issued to former liquor licensee.[50]

---

[44] *Id.* at 176 quoting 1926 Secretary of Treas. Andrew Mellon in Ann. Rep. 139-40.
[45] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.
[46] California v. LaRue, 409 U.S. 109, 114, 93 S. Ct. 390, 395, 34 L. Ed. 2d 342 (1972), abrogated by 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)
[47] Koleman S. Strumpf & Felix Oberholzer-Gee, *Endogenous Policy Decentralization: Testing the Central Tenet of Economic Federalism*, 110 J. POL. ECON. 1, 4 (2002).
[48] City of Newport v. Iacobucci, 479 U.S. 92, 96 (1986), reh'g denied, 479 U.S. 1047 (1987) (establishing that a state may delegate its powers under the Twenty-First Amendment to local governments).
[49] *Id.* at 4.
[50] Replogle v. Com., Pennsylvania Liquor Control Bd., 514 Pa. 209, 523 A.2d 327 (1987).

Furthermore, courts confirmed that local option provision, that permits municipalities to prohibit sale of alcoholic beverages within their borders, are a valid exercise of Commonwealth's police powers.

The Corpus Juris Secundum also sanctions the validity of local option laws and dedicates paragraph 43 of the Intoxicating Liquor section to the options:

> A local option law, authorizing subdivisions of the State to decide by popular vote whether or not a prohibitive or restrictive liquor law should be in force in their limits, is a valid and constitutional exercise of the legislative power provided it is a complete enactment in itself, requiring nothing further to give it validity and depending on the popular vote for nothing but a determination of the territorial limits of its operation.[51]

Local regulation of alcohol is today widespread and every American is aware of alcohol regulation. However, there are only a few studies that determine the actual shape and size of the local regulations. Prof. Shelley Ross Saxer in 1994 identified four different models illustrating how liquor control jurisdiction and authority under the Twenty-First Amendment is divided between state and local governments.[52] She included California and New York in the group of states that prohibits local governments from directly regulating the sale and/or distribution of intoxicating liquors.

In 2013 ChangeLab Solutions (a nonpartisan nonprofit organization that advocates health equity) conducted a 50-state analysis of local laws regulating alcohol outlet density i.e. the number of physical locations in which alcoholic beverages are available for purchase.[53] Their findings had then been updated in summer 2020 and consist of an exhaustive list of states with related state and local alcohol legislation.[54]

---

[51] 48 C.J.S. Intoxicating Liquors § 43

[52] Shelley Ross Saxer, "*Down with Demon Drink!": Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 132 (1994).

[53] Mosher, J, Treffers, R. State preemption, local control, and alcohol retail outlet density regulation. Am. J. Prev. Med. 2013; 44(4) 399-405.

[54] Status of Local Authority to Regulate Alcohol Outlet Density, ChangeLabSolutions, https://www.changelabsolutions.org/sites/default/files/2023-01/Status-of-Local-Authority-to-Regulate-Alcohol-Outlet-Density_FINAL_20221026A_rev3.pdf.

A more recent study of the same organization conducted in 2022 identifies state laws or regulations that specifically authorized local governments to regulate the days, hours, or both that on- and off-site retailers can sell alcohol, with a particular focus on authority to reduce days or hours of sale.[55] Future research and interpretation of data in needed because the reports do not provide an extensive analysis of the data and this is also outside the scope of this article.

At the beginning of this section, it was noted that alcohol policies are 'local' because no other national compromise could be found in regulating alcohol. In this sense, social sciences have helped to identify the social and cultural reason for 'alcohol policy diversity' in the United States. Robert W. Brown and others have demonstrated 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."[56] The correlation between religion and alcohol preferences has been confirmed by Kenneth J. Meier & Cathy M. Johnson that found a positive correlation between reformist groups' percentage of population and dry status[57] and Strumpf & Oberholzer-Gee that found a positive correlation between Baptists', Calvinists', and Methodists' percentage of population and dry status.[58]

Having demonstrated their appropriateness to controversial policy areas, the alcohol opt-out options then become a model for other areas such as marijuana retail that this article discusses in the next section.

Marijuana Local option

As of January 2023, 21 states and Washington D.C. have legalized recreational marijuana for recreational purposes.[59]

---

[55] Status of Local Authority to Regulate Days & Hours of Alcohol Sales, ChangeLabSolutions, https://www.changelabsolutions.org/sites/default/files/2022-12/Status-of-Local-Authority-to-Regulate-Days-and-Hours-of-Alcohol-Sales_FINAL_20221216A_rev1.pdf.

[56] Robert W. Brown et al., Endogenous Alcohol Prohibition and Drunk Driving, 62 S. Econ. J. 1043, 1046 (1996).

[57] Kenneth J. Meier & Cathy M. Johnson, *The Politics of Demon Rum: Regulating Alcohol and Its Deleterious Consequences*, 18 AM. POL. Q. 404, 413 (1990).

[58] Strumpf, Koleman and Felix Oberholzer-Gee, *Local Liquor Control from 1934 to 1970* in Heckelman, J.C., Moorhouse, J.C., Whaples, R.M. (eds) Public Choice Interpretations of American Economic History. Springer, Boston, MA. (2000) at 22-23.

[59] See Marijuana State Legal Status Charts: Overview, Practical Law Practice Note Overview w-022-1732.

The wave of recreational cannabis legalization begun on Election Day in 2012, when voters in Colorado and Washington approved ballot measures to legalize the recreational use and sale of cannabis.[60] Since then, 19 other states have legalized the substance with the most recent legalization taking place in Rhode Island (May 2022), Maryland and Missouri (November 2022).

The legalisation of marijuana for recreational purposes has divided the nation and -as a consequence- the states and their local jurisdictions. The controversial regulation of the substance led states to look at alternative approaches and alcohol opt-out options served as a model for marijuana regulation.

In the 21 states that have legalised the substance, 20 have provided for- or are in the process of approving- local opt-out options that enable municipalities to prohibit cannabis retail dispensaries or on-site consumption licenses from locating within their jurisdictions. The only state that pre-empts local government from opting-out is New Mexico. In this state, the Cannabis Regulation Act pre-empts municipalities, including counties, from adopting any law, rule, ordinance, regulation, or prohibition pertaining to the operation or licensure of cannabis establishments. Municipalities and counties can only pass local laws and regulations governing consumption areas and the time, place, and manner of commercial cannabis establishments.[61]

Peculiar is the case of Vermont, where local governments, instead of opting-out, have to 'opt in' and authorize the operation of cannabis businesses at the local level. As of March 2022, nearly 70 Vermont communities had approved ballot measures and opted in.[62]

A general common feature is that opt-out provisions are mostly found in the marijuana decriminalization statute, they establish a state regulatory committee and a licencing system in which both the state and the local jurisdictions are somehow involved. However,

---

States where legal recreational marijuana has been approved: Colorado, Washington, Alaska, Oregon, Washington, D.C., California, Maine, Massachusetts, Nevada, Michigan, Vermont, Guam, Illinois, Arizona, Montana, New Jersey, New York, Virginia, New Mexico, Connecticut, Rhode Island, Maryland, Missouri.

[60] Claire Hansen, Horus Alas, and Elliott Davis Jr., Where Is Marijuana Legal? A Guide to Marijuana Legalization, U.S. News, https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization#ri.

[61] N.M. Stat. Ann. § 26-2C-1 through 26-2C-42 (West).

[62] Elizabeth Murray, *Nearly 70 Vermont towns have opted in to allow retail cannabis. Here's where.*, BURLINGTON FREE PRESS, https://eu.burlingtonfreepress.com/story/news/local/vermont/2022/03/04/which-vermont-towns-and-cities-allow-cannabis-marijuana-sales/9359678002/ (last accessed on Jan. 27th 2023).

the phenomenon is very heterogeneous: each state has tailored the local option to the legal, social and political framework in which they operate by affording a different degree of authority to its local jurisdiction.

The exception is the state of Washington where, in absence of legislative enactments, the courts have found that local governments retain the authority to prohibit cannabis activity within their local jurisdictions.[63]

What follows is an overview of the different ways in which states have tailored their opt-out options. This article argues that such differences tell us something about the way in which each state manages the relationship with its local jurisdictions and the extent to which they generally tend to 'preempt' local authority or to devolve powers.

The first evident difference between the states is the way in which they allow the local governments to opt-out out of the marijuana marketplace. Some states requires localities to enact a local ordinance or bylaw whereas others require that such initiative is backed by a voter initiative or a referendum.

The cautious state of New York, for example, required that local opt-out ordinances were subject to a permissive referendum governed by Section 24 of the Municipal Home Rule Law, [64] which allowed 10% of qualified voters within the municipality to gather signatures and trigger a special election to let the voters decide whether to override the opt-out.[65] On the other hand, California and Michigan (which are historically Home Rule states i.e. they grants municipalities and/or counties the ability to pass laws to govern themselves) have allowed local governments within their jurisdictions to prohibit the establishment of cannabis businesses through a simple local ordinance. Colorado and Alaska, also historically Home rule states, have allowed local jurisdictions to enact either a local ordinance or hold a referendum based on a voter initiative.[66]

Some states also limited the degree of authority that they grant to local jurisdictions by restricting the availability of the opting out provision to a specific timeframe. For example,

---

[63] See § 8:4. Introduction to local authority—Scope of local control, Cannabis Law Deskbook § 8:4 (2022-2023 ed.) citing Emerald Enterprises, LLC v. Clark County, 2 Wash. App. 2d 794, 413 P.3d 92 (Div. 2 2018).
[64] N.Y. MUN. HOME RULE LAW § 24 (McKinney 2021).
[65] *Id.*
[66] For Colorado, *see* Colo Rev. Stat. Ann. § 44-10-203. For Alaska, *see* Alaska Stat. § 17.38.210; 3 Alaska Admin. Code tit. 3, § 306.200.

the state of New York[67] permitted towns, cities, and villages to opt-out of adult-use marijuana retail dispensaries or on-site consumption licenses only until December 31, 2021 whereas the state of New Jersey[68] had initially provided a window of 180 days but will give another chance to opt-out in 5 years time.[69] Virginia has limited the means and the timeframe for local governments seeking to prohibit adult-use retail cannabis businesses to a referendum in 2022.[70]

Furthermore, some states have also limited the specific types of businesses (i.e. cultivation-manufacturing-retail) and specified what type of cannabis activity local jurisdictions may prohibit (delivery, retail or consumption). California that allows cities and counties to "completely prohibit the establishment or operation of one or more types of [marijuana] businesses" [71] and Colorado that has enacted an *ad-hoc* constitutional provision. [72]

The state of Alaska, for instance, allows municipalities to prohibit most of marijuana related-activities, namely: "the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores" and to prohibit delivery.[73] Conversely, New York only allows local governments to opt-out of allowing adult-use retail cannabis businesses or onsite consumption licenses[74] and New Jersey prohibits its local governments from prohibiting delivery into their jurisdiction.[75] As to cultivation for personal consumption, each state has established its own provisions and only Colorado, Maine and California have granted local governments some authority to regulate-but not prohibit-personal cultivation. California, for example, allows a city or county to enact 'reasonable regulations'[76] but Maine specifies that the regulation should allow at least for the cultivation of "3 mature marijuana plants, 12 immature marijuana

[67] N.Y. CANNABIS LAW § 10 (McKinney 2021). The statute set a deadline to 31st December 2021 and does not givewith no the option to opt-out at a future date.
[68] N.J. STAT. ANN. § 24:6I–45.b (West). The statute only granted a window of 180 days.
[69] See Ilaria Di Gioia,
[70] 2021 Virginia Laws Ch. 550 (S.B. 1406); Va. Stat. Ann. § 4.1-629 (eff. July 1, 2022).
[71] CAL. BUS. & PROF. CODE § 26200(a)(1) (West 2022). Cities and counties can "completely prohibit the establishment or operation of one or more types of [marijuana] businesses . . . within the local jurisdiction."
[72] COLO. CONST. art. XVIII, § 16, cl. 5 ("A locality may prohibit the operation of marijuana cultivation facilities [and other marijuana operations] . . . .").
[73] Alaska Stat. § 17.38.210. Alaska Admin. Code tit. 3, § 306.200.
[74] N.Y. Cannabis Law § 131.
[75] N.J. Stat. Ann. 24:6I-45.
[76] Cal. Health & Safety Code § 11362.2(a)(1).

plants and an unlimited number of seedlings".[77] In the case of Colorado, instead, the state prohibits the personal cultivation, grow, or production of more than 6 marijuana plants per resident and more than 12 plants of marijuana per household (except for medical purposes) but leaves municipalities free to either restrict the number of plants or permit the cultivation of more than twelve plants as long as they are in "an enclosed and locked space and within the limit set by the county, municipality, or city and county where the plants are located."[78]

It should be noted that states differ also in the way in which they involve local governments in the licensing process: several states expressly require local governments to participate in the state's marijuana business licensing process by asking local governments to provide a pre-authorization or some form of local license before issuing a state license to cannabis businesses. For example, the state of New Jersey has provided for a two-tier licencing system in which marijuana business should first seek zoning approval of the location for the business premises from the municipality and then apply for licence to the Cannabis Regulatory Commission (CRC).[79] Similarly, in Oregon, local governments must sign a Land Use Compatibility Statement before the state can issue a business license.[80] On the other side of the spectrum, Washington and Illinois do not involve local governments in the process at all. Respectively, Washington does not mention local governments in the state's licencing process[81] and Illinois explicitly prohibits local governments from regulating licensing activities.[82] The case of Illinois is peculiar, not only it does not involve local governments in the licence regulation process but it also leaves them very limited opt-out options i.e. to "enact reasonable zoning ordinances or resolutions, (…) regulating cannabis business establishments" and "enact ordinances to prohibit or significantly limit a cannabis business establishment's location."[83]

[77] Me. Rev. Stat. Ann. tit. 28-B, § 1502.
[78] Colo. Rev. Stat. Ann. § 18-18-406(B).
[79] N.J. ADMIN. CODE § 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 . . . .").
[80] Or. Rev. Stat. Ann. § 475C.053.
[81] Wash. Rev. Code Ann. § 69.50.345.
[82] 410 Ill. Comp. Stat. Ann. 705/55-90. "
[83] 410 Ill. Comp. Stat. Ann. 705/55-25.

One more aspect to consider is the share of tax revenues coming from state marijuana sales tax. Of course, if a local government does not allow for marijuana sales it is also excluded from the share of state marijuana sales revenues. However, for the purposes of demonstrating the variability and flexibility of local options, this article presents some of the different ways in which states have approached tax-share with local governments that do permit the sale of marijuana. On one side of the spectrum are Washington, Nevada and Michigan[84] that prohibit local governments from levying any additional excise tax and on the side are very 'liberal' Colorado, Alaska and California that have allowed local governments to establish an unspecified additional local tax.[85]

Other states such as Oregon and Massachusetts, instead, have set a cap of 3% on local tax rate.[86] Similarly, Illinois limited the tax rate to 3% for municipalities and 3.5% tax rate for unincorporated areas.[87] Taxes have notably been one of the most controversial aspect of the marijuana legalization because the increasing costs of the substance have arguably favoured the persistence of the black market and in some cases even the increase of black market.[88] Adeline Dixon has reviewed the possible reasons for the increase of black market and has argued that this is due to the fact that consumers did not abandon their old habits and that the legalization in some states has made obtaining marijuana easier even in the other states.[89]

As seen above, state legislatures have been very creative and have adopted local options to the specific political, legal and social circumstances in which they operate. It has also been noted that some of those approaches to local options reflect the general tendency of the state to delegate powers or pre-empt- local action.

---

[84] Mich. Comp. Laws Ann. § 333.27956; State of Nevada, Department of Taxation, FAQs on Taxes for Cannabis Establishments, https://tax.nv.gov/FAQs/Retail_Marijuana/ (last accessed Jan.27, 2023); Wash. Rev. Code Ann. § 69.50.535.

[85] Alaska Admin. Code tit. 3, § 306.200; Cal. Rev. & Tax. § 34011(c); Colo. Rev. Stat. Ann. § 29-2-115.

[86] Or. Rev. Stat. Ann. § 475C.453 and Mass. Gen. Laws Ann. ch. 64N, § 3.

[87] 65 Ill. Comp. Stat. Ann. 5/8-11-23.

[88] *See* Joseph Detrano, Cannabis Black Market Thrives Despite Legalization, RUTGERS CENTER OF ALCOHOL & SUBSTANCE USE STUDIES, https://alcoholstudies.rutgers.edu/about-us/.

[89] Adeline Dixon, Legalization of Marijuana and Its Effects on Licit and Illicit Markets in the United States in by MICHAEL MORRONE ET. AL., PERSPECTIVES ON BLACK MARKET V.2 available at https://iu.pressbooks.pub/perspectives2/chapter/legalization-of-marijuana-and-its-effects-on-licit-and-illicit-markets-in-the-united-states/#_edn27.

The marijuana opt-out option schemes are excellent case studies for understanding the flexibility that such schemes provides and their adaptability to local specific circumstances.

Local Option Sales Tax

Local option sales tax (often abbreviated LOST) are tax administered by a local jurisdiction, a county or city. They are optional local increases to the statewide sales tax rate, with the exception of Alaska which does not have any statewide sale tax.[90] Local jurisdiction can levy such taxes towards a local general fund or to finance specific purposes, such as building new roads, a school or improve local transportation, in which case they are commonly referred to as "Special Purpose" Local Option Sales Taxes (SPLOST).[91]

The SalesTaxHandbook, a free public resource site, reports that a total of thirty-seven states allow local governments to collect some form of local sales tax and that in all of these states (with the exception of Alaska) these local option taxes are in addition to a statewide sales tax collected by the state's Department of Revenue.[92] The same website reports that local option sales taxes are more common in the southern and western portions of the United States where municipal governments are more reliant on sales taxes for revenue and thus levy higher local-option tax rates.[93] As any other local option, local taxes rate varies hugely. It ranges from 0.003% in New Jersey to 5.097% in Louisiana.[94] A LOST generally requires a passing vote by the general public before they can be implemented.

The literature has criticised local sales taxes for exacerbating inequalities between urban and rural communities. In particular, the criticism springs from the fact that urban communities have a bigger tax raising power and can deliver better services than rural communities where the tax-payers are fewer.[95] On the other hand, as Prof. Erin Adele Scharff contented, local taxes are fundamental means of Home Rule power for local government: "Without adequate revenue, even robust initiative authority and strong home-

---

[90] Fabio Ambrosio*, How Tax Competition May Be Exacerbating Inequalities Among Washington Counties*, 14 U. St. Thomas J.L. & Pub. Pol'y 223, 232 (2020).
[91] See *id.*
[92] What is a Local Option Sales Tax / Special District?, SalesTaxHandbook, https://www.salestaxhandbook.com/articles/local-option-sales-tax.
[93] Map of Local Sales Tax Rates in the United States, SalesTaxHandbook, https://www.salestaxhandbook.com/local-salestax-map.
[94] *Id.*
[95] See Ross Rubenstein & Catherine Freeman, Do Local Sales Taxes for Education Increase Inequities? The Case of Georgia's ESPLOST, 28 J. EDUC. FIN. 425 (2003) and Matthew M. Craft, *Lost and Found: The Unequal Distribution of Local Option Sales Tax Revenue Among Iowa Schools*, 88 IOWA L. REV. 199, 201 (2002).

rule immunity leave local governments with empty legal authority."[96] In an earlier publication, Prof. Scharff suggested that state law should grant municipal governments "presumptive taxing authority" i.e. should let the municipalities free to establish a tax or regulation as long as the tax or regulation did not conflict with state law.[97] Her argument is that presumptive taxing authority leads to local innovation and offers an opportunity to localities to create more efficient revenue sources that better reflect local needs.[98]

Of course, one of the big obstacles for the future of local (and state) sales taxes is the increasing prevalence of internet purchases. Before 2018, state taxes could only be charged by retailers with a physical presence in the state.[99] However, on June 21, 2018 the Supreme ruled in *South Dakota v. Wayfair* that South Dakota could require collection of its sales tax on sales to its residents by out-of-state internet retailers hence including also on-line purchases.[100] The decision has effects also on local sales tax and the literature has suggested that states with a large number of local sales tax jurisdictions might consider imposing a 'flat' local sales tax on internet sales.[101] Alabama has done this by enacting Act 2015-448, titled the Simplified Sellers Use Tax Remittance Act[102] which allows eligible sellers to participate in a program to collect, report and remit a flat eight percent (8%) sellers use tax on all sales made into Alabama.[103]

Privacy Localism and Local Options in Smart cities

In a 2014 article of the Washington Law Review symposium on "Artificial Intelligence and the Law?," Professor Elizabeth E. Joh analyzed Fourth Amendment's challenges raised by big data policing and joined a wide a large number of scholars discussing the limitations of the

---

[96] Erin Adele Scharff, *Local Budgets, Local Decisions: The Home Rule for the 21st Century Project's State Support for Local Democracy Provisions*, 100 N.C. L. Rev. 1505, 1508 (2022).
[97] Erin Adele Scharff, Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them, 91 N.Y.U. L. Rev. 292, 298 (2016)
[98] *Id.*
[99] Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91, and National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505.
[100] S. Dakota v. Wayfair, Inc., 201 L. Ed. 2d 403, 138 S. Ct. 2080, 2088 (2018).
[101] POST- OPTIONS FOR STATES, 28-NOV J. MULTISTATE TAX'N 8, 12, 2018 WL 5278808, 4
[102] Ala. Code §§ 40-23-191 through 40-23-199 (1975).
[103] Simplified Sellers Use Tax (SSUT), Alabama Department of Revenue, https://www.revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/#:~:text=The%20state%20of%20Alabama%20does,no%20business%20locations%20in%20Alabama).

current Fourth Amendment search and seizure jurisprudence to the contemporary privacy challenges.[104]

The use of big data, defined as "large, diverse, complex, longitudinal, and/or distributed datasets generated from instruments, sensors, Internet transactions, email, video, click streams, and/or all other digital sources available today and in the future"[105] has created serious privacy concerns and constitutes one of the obstacles to the development of smart city programmes across the United States.

Cities will often have no alternative but to collect personal or identifiable information if they are going to become "smarter."[106] However, this article flags that they can also be innovative and create ways in which the collection of data does not impact privacy. For example, local opt-out options have provided an answer to the privacy concerns derived by the use of smart meters to support the operation of smart grids. The latter are defined as a network of transmission lines, substations, transformers and more that deliver electricity from the power plant to your home or business.[107] In order to operate efficiently and to optimise energy production, smart grids require the installation of smart meters in consumers' homes. These are devices that measure energy consumption by appliance every fifteen minutes, unlike traditional electricity meters, which simply measure total electricity usage. The frequent energy measurements capture details on consumers' habits that enables utilities to more effectively operate the grid [108] but that have created a series of privacy concerns on the collection of consumption data. [109] In some instances, those

[104] See, e.g., KATE CRAWFORD ET AL., BIG DATA, COMMUNITIES AND ETHICAL RESILIENCE: A FRAMEWORK FOR ACTION 2 (2013); Andrew Guthrie Ferguson, The "Smart" Fourth Amendment, 102 Cornell L. Rev. 547 (2017); Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 803 n.7 (2004); Dan Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 S. Cal. L. Rev. 1083, 1086-87 (2002) (arguing that the current view on Fourth Amendment privacy "is not responsive to life in the modern Information Age").

[105] See Exec. Office of the President, supra note 22, at 3 (quoting Nat'l Sci. Found., Core Techniques and Technologies for Advancing Big Data Science & Engineering 5 (2012), http://www.nsf.gov/pubs/2012/nsf12499/nsf12499.pdf).

[106] Janine S. Hiller & Jordan M. Blanke, Smart Cities, Big Data, and the Resilience of Privacy, 68 Hastings L.J. 309, 323 (2017).

[107] The Smart Grid, https://www.smartgrid.gov/the_smart_grid/smart_grid.html

[108] Samuel J. Harvey, Smart Meters, Smarter Regulation: Balancing Privacy and Innovation in the Electric Grid, 61 UCLA L. Rev. 2068, 2072 (2014).

[109] *See* generally Cheryl Dancey Balough, Privacy Implications of Smart Meters, 86 Chi.-Kent L. Rev. 161 (2011). See also Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521 (7th Cir. 2018) (The Seventh Circuit upheld smart metering as a reasonable search because there was no prosecutorial intent in the data collection and because the government's interest in smart meters was substantial).

concerns have been soothed by local jurisdictions' opt-out programs that, instead of stopping smart meter installation, have found innovative ways to anonymize the collected information and tighten security requirements.[110]

The literature has described the recent trend as "privacy localism" and argues that cities are ideally suited to regulate police use of surveillance technology and local data practices because of their willingness to innovate, experiment, and devise novel approaches to privacy protection.[111]

Local rent control

Rent control in the United States was implemented for the first time by Congress as a temporary measure in Washington D.C. during the aftermath of World War I.[112] The 'congressional' origins of rent control, however, do not speak to the actual evolution of the policy which has been traditionally implemented on a state or local basis, therefore constituting another meaningful case study in local option.

States differ widely in the way in which they have legislated on the issue: the National Multifamily Housing Council tracks state rent control policies and has made available to public an interactive map that classifies states under seven categories: states with statewide rent control (Oregon and the District of Columbia), states with rent control caps & city specific laws (California), states with no statewide rent control but with county and city laws in effect (New York, New Jersey, Maryland and Maine), states that preempt rent control (26 states), states that have no rent control or preemptions (Montana, Wyoming, Rhode Island, Delaware, Hawai and Nebraska), states that have Dillon rule with no rent control nor preemptions (Pennsylvania, Virgina, West Virginia, Vermont, Nevada and Alaska) and states that preempts mandatory inclusionary zonings & rent control (Arizona, Texas, Kansas, Wisconsin, Indiana, Tennessee).[113]

What emerges from the data is that the sheer majority of states pre-empts rent control and that, as of July 19, 2022, only four states (New York, New Jersey, Maryland and Maine) allow

[110] Dustin Vergason, Preventing the Impending Death of Privacy by the Smart Grid, 51 Envtl. L. 549, 571 (2021).
[111] Ira S. Rubinstein, Privacy Localism, 93 Wash. L. Rev. 1961, 1967 (2018)

[112] See The Food Control and District of Columbia Rents Act, ch. 80, 41 Stat. 297 (1919) (setting temporary rent control ordinance in District of Columbia).
[113] Rent Control Laws by State, National Multifamily Housing Council, https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/.

their local jurisdictions to enact rent control laws. California is an exceptional case because it has state-wide rent control caps but also allows city specific laws. This section will examine the rent control option with a special focus on New York and will discuss the main benefits and drawbacks of the policy.

Generally speaking, rent control consists of a cap on the rent price for a certain category of housing but there are various types of rent control with constraints on rent increases.

For example, New York City makes a distinction between rent control (also called call "first generation rent controls") and rent stabilization laws (also called "second generation rent controls"). The 2021 NYC Housing and Vacancy Survey reported that the latter is the most popular system with around 1,048,860 rent-stabilized apartments in the city compared to the 16,400 rent-controlled apartments.[114] The difference between the two systems lays in the extent of the restraints: rent control laws are an actual cap on the rental price whereas rent stabilization laws include the right to renew and constraints on rent increases which are determined every year.[115]

Rent control is the legacy of the post-World War II housing emergency regulation.[116] It applies to buildings built before February 1, 1947, where the tenant is in continuous occupancy prior to July 1, 1971. Under the Maximum Base Rent (MBR) system, the Division of Housing and Community Renewal (DHCR) determines a maximum base rent and a maximum collectible rent for each individual apartment.[117] Rent stabilization, on the other hand, applies generally to apartments in buildings with at least six units that were built either from 1947 to 1974, or before 1947, where an apartment was leased after June 1971. It also applies to newer buildings that receive tax breaks for having units that rent at below

[114] City of New York, Rent Guidelines Board. "Rent Control FAQ", https://rentguidelinesboard.cityofnewyork.us/resources/faqs/rent-control/#difference.
[115] See Homes and Community Renewal, Office of Rent Administration, New York State, https://hcr.ny.gov/system/files/documents/2022/09/fact-sheet-01-09-2022.pdf#:~:text=Rent%20control%20is%20the%20older,apartments%20removed%20from%20rent%20control.
[116] Gabrielle DeNaro, *Welcome to the Jungle, Where the Rent Is Too Damn High: Using Rent Regulation in New York City to Maintain an Affordable Housing Stock*, 16 Cardozo J. Conflict Resol. 939, 941 (2015).
[117] Rent Control, New York State, https://hcr.ny.gov/rent-control#:~:text=In%20New%20York%20City%2C%20rent%20controlled%20apartments%20operate%20under%20the,rent%20for%20each%20individual%20apartment.

the market rate.[118] It is mainly a system that protects tenants from sharp increases in rent, while also guaranteeing to the tenant the right to renew the lease each year.[119]

Rent control has not free of criticism both on the legal and the social-economic aspects of the policy. Already in 1988 Prof. Richard Epstein argued that all rent control statutes, regardless of their peculiar features and structures, are *per se* unconstitutional under the takings clause of the Constitution.[120] The courts have rejected such claim in various instances[121] and the Supreme Court has unanimously confirmed that rent control does not constitute a taking in a very brief decision by Justice O'Connor in 1996.[122] Furthermore, courts in Massachusetts[123] and California[124] had recognised local rent control as an exercise of state police power, making the delegation to local authority legitimate.

Free market economists have also criticized rent control for discouraging new construction and investment and affecting both the quality and quantity of housing.[125] A similar argument had been made in 2012 when it was noted that rent control disincentives the construction of amenities (gym, swimming pools etc. in the buildings) and the maintenance of the units.[126] The counterarguments are that rent control-in fact- does help low- income residents by keeping prices affordable and that -at least for the most part- its goals are effectuated.[127] More recently, the rent control policies in San Francisco have been praised

---

[118] Mihir Zaveri, Understanding Rent Regulation in N.Y.C., THE NEW YORK TIMES, https://www.nytimes.com/2022/06/22/nyregion/rent-regulation-new-york.html#:~:text=How%20many%20New%20York%20City,44%20percent%20of%20all%20rentals.

[119] *See* Guy McPherson, *It's the End of the World As We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1147 (2004). *See also* Madeleine Parker & Karen Chapple, *Revisiting Rent Stabilization in the Neighborhood Context: The Potential Impact of Rent Regulation on Community Stability and Security in the New York Metropolitan Region*, 46 FORDHAM URB. L.J. 1137, 1154 (2019).

[120] Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741, 742 (1988).

[121] See Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. and Cmty. Renewal, 83 F.3d 45 (2d Cir. 1996) and Rent Stabilization Ass'n of New York City, Inc. v. Higgins, 630 N.E.2d 626 (N.Y. 1993).

[122] Yee v. City of Escondido, 503 U.S. 519 (1992).

[123] Marshal House, Inc. v. Rent Control Bd., 266 N.E.2d 876, 886, 889 (Mass. 1971).

[124] Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976).

[125] See Guy McPherson, *It's the End of the World As We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1157 (2004). For an exhaustive treatment of pro and cons of rent control *see* Gabrielle DeNaro, *Welcome to the Jungle, Where the Rent Is Too Damn High: Using Rent Regulation in New York City to Maintain an Affordable Housing Stock*, 16 CARDOZO J. CONFLICT RESOL. 939, 947 (2015).

[126] Lauren C. Wittlin, Access Denied: The Tale of Two Tenants and Building Amenities, 31 Touro L. Rev. 615 (2015)

[127] Gabrielle DeNaro, Welcome to the Jungle, Where the Rent Is Too Damn High: Using Rent Regulation in New York City to Maintain an Affordable Housing Stock, 16 Cardozo J. Conflict Resol. 939, 949 (2015) citing Steven

for alleviating the affordable housing crisis[128] and generally increasing the availability of affordable units[129] by also allowing the integration of low-income housing into wealthier, high-opportunity neighborhoods.[130]

Similarly to the other local options discussed above, rent control is a very controversial issue and there is no right or wrong approach just an approach that suits the local needs and social landscape.

A study conducted by the Urban Institute in 2020 found that pre-emption of state rent control in Florida and Illinois had constrained local housing policy responses to COVID-19 and that, due to pre-emption, local governments did not consider adopting local protections that would flout state preemption laws even if such protections could help stabilize housing for at-risk renters.[131] The authors argued in favour of lifting housing pre-emption because it would give advocates new opportunities to push for local housing policies, removing an excuse often cited by policymakers for not acting more swiftly and aggressively to protect renters and limit rent increases.[132]

Local option and Covid mandates

The COVID-19 pandemic has been a laboratory for local government initiatives and has tested state-local relations. The need for a fast response put pressure on both municipalities and states that struggled to determine the most appropriate level of government for policymaking.

In some cases, cities, counties and municipalities have been on the frontline of the response and took the initiative of imposing local lock downs, closure of nonessential businesses, local mask mandates, local COVID-safety provisions etc. When such measures did not match

---

Wishnia, Why The Push To Abolish Rent Regulation Is Stupid And Irresponsible, The Gothamist, July 31, 2013, http:// gothamist.com/2013/07/31/abolishing_rent_regulation_is_stupi.php.

[128] Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 FORDHAM URB. L.J. 1041,1044 (2019).
[129] Madeleine Parker & Karen Chapple, Revisiting Rent Stabilization in the Neighborhood Context: The Potential Impact of Rent Regulation on Community Stability and Security in the New York Metropolitan Region, 46 FORDHAM URB. L.J. 1137, 1148 (2019)
[130] *Id.* at 1147.
[131] Solomon Greene, Kriti Ramakrishnan, and Jorge Morales-Burnett, *State Preemption of Local Housing Protections, Lessons from a Pandemic*, https://www.urban.org/sites/default/files/publication/102981/state-preemption-of-local-housing-protections_1.pdf.
[132] *Id.*

with the state policy, this has led to states' preempting or otherwise limiting municipal and county policymaking.

A study conducted by Mark Treskon and Benjamin Doctor at the Urban Institute showed a relationship between preemption and policymaking related to COVID-19. In states that preempt more laws, municipalities have been less proactive in responding to the crisis while in states with fewer preemptive laws, local policymaking has been more widespread.[133]

Similarly, Prof. Davidson and Kim Haddow reported that during the pandemic, the states of Arizona, Georgia, Florida, Mississippi, South Carolina, Texas, Tennessee and West Virginia established a regulatory ceiling barring efforts by cities and counties to impose stricter requirements than the state.[134] They add that such pre-emptive measures hampered local government response to the crisis, made it harder to protect the lives and livelihoods of their residents, and impeded early efforts towards equitable recovery.[135]

Scholars have mostly focussed on examining state pre-emption during the pandemic[136] but have neglected to report instances in which the state governor recognised the role of local government and allowed cities/counties and municipalities to enact COVID-19 safety measures. Remarkably, the literature (and the media) focussed on Georgia's Governor shelter-in-place pre-emptive Executive Order (April 2020) that suspended any previous local COVID-related local ordinance, but do not report that four months later he issued a further Executive Order which allowed cities and counties with infection rate above a certain threshold to adopt a local option mask mandate.[137] CBS news reported that according to data from the state Department of Public Health only two of Georgia's 159 counties did not fall under the threshold. [138] It further required local authorities to warn non-compliant citizens "about the health risks posed by not wearing a face mask or face covering" prior to

[133] Mark Treskon and Benjamin Doctor, *Preemption and Its Impact on Policy Responses to COVID-19*, Urban Institute. (September 23, 2020) https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf.
[134] Nestor M. Davidson and Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AMERICAN CONSTITUTION SOCIETY, https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/.
[135] *Id.*
[136] David Gartner, *Pandemic Preemption: Limits on Local Control over Public Health*, 13 N.E. U. L.R. 733 (2021).
[137] Empowering a Healthy Georgia, State of Georgia Executive Order 07.31.2020. Cities and counties that had 100 or more confirmed cases of COVID-19 per 100,000 people over the previous 14 days.
[138] Georgia governor allows local mask mandates, with limits, CBS News, https://www.cbsnews.com/news/georgia-face-mask-mandate-brian-kemp-allows/ (last accessed 21.01.2024)

issuing a citation and limited the amount of the fine that local authorities could only issue to $50.[139]

This executive order is an illuminating case study in understanding the dynamics between state and local governments during the pandemic and demonstrates how the local option had been key in untangling the difficult *impasse* created by the conflict of jurisdiction in issuing mask mandates.

In this particular instance, the option was the result of the pressure made by city mayors, in particular Atlanta Mayor Keisha Lance Bottoms who fought a court battle focussed on the issue of local mask mandates.[140] The lawsuit involved city attorneys and the Georgia Municipal Association and was an opportunity for the city of Atlanta to shed light on its claim to the rights to take action to protect the public in time of emergency[141] and more generally, to the competences of local governments *vis a vis* the state. The lawsuit was eventually withdrawn and did not lead to a court decision on the issue but it arguably persuaded the Governor of the need for targeted local action resulting in a victory for Georgia's cities claims.

If anything, the pandemic has demonstrated the importance of tailored local response to health crisis and the importance of legal mechanisms to support such response. Based on the Georgia's pandemic experience, this article suggests that carefully crafted local options should be considered as a valid alternative to *tout-court* pre-emption especially when circumstances require a targeted, tailored local response and the state action is either too slow, broad or ineffective.

---

[139] Empowering a Healthy Georgia, State of Georgia Executive Order 07.31.2020.

[140] Gov. Brian P. KEMP, Plaintiff, v. Hon. Keisha Lance BOTTOMS, Felicia A. Moore, Carla Smith, Amir R. Farokhi, Antonio Brown, Cleta Winslow, Natalyn Mosby Archibong, Jennifer N. Ide, Howard Shook, J.P. Matzigkeit, Dustin R. Hillis, Andrea L. Boone, Marci Collier Overstreet, Joyce Sheperd, Michael Julian Bond, Matt Westmoreland, and Andre Dickens, Defendants., 2020 WL 4036827 (Ga.Super.) *See* Madeleine Carlisle, *Georgia Gov. Brian Kemp Sued to Block Atlanta's Face Mask Ordinance. Here's What to Know*, July 18, 2020, https://time.com/5868613/georgia-governor-brian-kemp-face-mask-atlanta-keisha-lance-bottoms/.

[141] Gov. Brian P. Kemp v. Hon. Keisha Lance Bottoms,Felicia A. Moore,Carla Smith,Amir R. Farokhi,Antonio Brown,Cleta Winslow,Natalyn Mosby Archibong,Jennifer N. Ide,Howard Shook,J.P. Matzigkeit,Dustin R. Hillis,Andrea L. Boone,Marci Collier Overstreet,Joyce Sheperd,Michael Julian Bond,Matt Westmoreland,Andre Dickens, 2020CV338387

Conclusion

This article started with a question: do local opt-out options also produce desirable policy outcomes? It is evident that, unfortunately, the answer lies on our individual opinions on what is a desirable policy outcome. Local options are designed to satisfy different ideas on what is right and what is wrong. In philosophical terms they are the relativist answer to an impossible equation to solve. They have historically been the solution to the controversial regulation of the sale of alcohol across the United State and now represents the compromise for the regulation of marijuana in states that have legalized the drug. Virtuous or not, they are the solution to an ongoing ideological battle between those that promote legalization and those that oppose it.

I echo here the words of Fosdick & A. Scott when they said that "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced."[142] The reality of the United States is one of inherent diversity and it could not be different due to the size and history of the country. '*E pluribus unum'* was a compromise that only worked for certain policy areas but that is not fit for a society where political, religious and social diversity predominates. The "local option" framework attempts to balance local control with state-wide consistency. The key question seems to be about the proper *'locus'* of political power--cities, states or federal government, and if local preferences should have priority. Perhaps Justice Marshall was already aware that allocation of powers at every level of jurisdiction would have been the most challenging aspect of the creation of the American nation when he stated: "[T]the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[143]

[142] R. Fosdick & A. Scott, Toward Liquor Control 10 (1933)
[143] Mc Culloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819).