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Localist Statutory Interpretation

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LOCALIST STATUTORY INTERPRETATION

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† Professor of Law, Fordham Law School. Thanks, most importantly, to Aaron-Andrew Bruhl, with whom I collaborated on a piece that inspired this one, Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012), and who also carefully read the manuscript and greatly improved it. Thanks to Henry Monaghan, Rick Hills, Richard Briffault, Michelle Wilde Anderson, Aditi Bagchi, Howie Erichson, Andrew Kent, Nestor Davidson, Paul Diller, Annie Decker, and Richard Schragger for conversations and comments on this project and paper in its various stages. Nestor Davidson was especially generous with his time and insights, and I was both consciously and unconsciously influenced by conversations with him about the themes here. Many local judges and county clerks around the nation were willing to correspond with me to help me learn about their work, and I am very grateful for their engagement. Fordham Law School provided financial support. Max Liporace and Larry Abraham provided research support.

INTRODUCTION

The average citizen's point of contact with the judicial system as a litigant is, most likely, in the nation's municipal, county, or local courts.[1] Whether she is contesting a traffic infraction, being charged with a misdemeanor, being cited for a violation of a local ordinance, or in a dispute with a neighbor or landlord, the average citizen is probably more likely to find herself in what might be called a "local court" than in a federal or high-level state court. Setting aside the controversy surrounding staffing village and town courts (which too often have nonlawyers with almost no legal training or knowledge serving as adjudicators),[2] legal scholars have almost universally

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[1] *See, e.g.*, ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 1 (2012), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx ("Of the 103.5 million incoming cases in 2010, 68 million (66%) were processed in limited jurisdiction courts."). In 2009, the CSP reported that about ninety-five percent of cases filed nationwide were initiated in state courts. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS, at ii (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf. Here, I exclude consideration of citizens' interaction with the judicial system as *jurors*, which I have taken up in a recently published book chapter. *See* Ethan J. Leib & David L. Ponet, *Citizen Representation and the American Jury*, *in* IMPERFECT DEMOCRACIES: THE DEMOCRATIC DEFICIT IN CANADA AND THE UNITED STATES 269 (Patti Lenard & Richard Simeon eds., 2012).

[2] Several years ago, the *New York Times*, reporting on town and village courts in New York State, discovered widespread abuse and ignorance of the law by town and village court adjudicators—and virtually no supervision by the state legal system. *See* William Glaberson, *Delivering Small-Town Justice, with a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1; *see also* William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. TIMES, Sept. 27, 2006, at

ignored the law in local courts, favoring the study of federal courts and state appellate courts.[3] Much like the drunk man who looks under the lamppost for his lost keys at night because it is the only place he has the light to see, so too the legal scholar often studies published cases because they are available from databases at her fingertips.[4] It is also likely that the sheer

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A1 (discussing the "long trail of injustice and mangled rulings" associated with the village court system and describing the system as "an anachronism that desperately needs to be overhauled or abandoned"); William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1 (describing the lack of legal experience or formal training among village judges and noting that "[s]imple men, and their simple wisdom, are the whole idea behind the justice courts");. For my purposes here, I am simply assuming it is necessary to staff lower courts in our legal system with those trained in the law.

[3] *But see* Martin A. Levin, *Urban Politics and the Criminal Courts: How Judicial Selection Methods Affect Sentencing,* JUDGES J., Winter 1977, 16, 18-21, 56 (comparing the judicial selection processes and the behavior of local judges in Minneapolis and Pittsburgh). Recently, scholars have paid careful attention to a class of courts that divert people from incarceration. *See, e.g.*, Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590-91 (2012) (documenting a decarceration approach taking place in roughly 3000 "specialized criminal courts," which "empower judges to adopt neo-realist problem-oriented roles [and] embrace less adversarial criminal procedures"). McLeod attests—albeit unsystematically—to the localist roots of these new judicial institutions. *Id.* at 1625-44. Other lower-level courts are also occasionally the subject of short investigations and small-scale case studies. *See, e.g.*, Victor E. Flango, *DWI Courts: The Newest Problem-Solving Courts*, CT. REV., Spring 2005, 22, 22 (discussing DUI courts developed in response to the success of drug courts in reducing recidivism). And a most interesting article revealed a now-defunct municipal court that served only "black defendants arrested by black patrolmen." Ernesto Longa, *Lawson Edward Thomas and Miami's Negro Municipal Court*, 18 ST. THOMAS L. REV. 125, 125, 128-33 (2005). To the extent scholars treat the lower state courts systematically, it is largely to evaluate citizens' perceptions of them, rather than how the law is practiced within them. *See, e.g.*, George W. Dougherty et al., *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 ST. & LOC. GOV'T REV. 176, 184 (2006). Even political scientists who study judicial elections empirically have concluded that "[a]t the trial court level, systematic research has yet to be conducted." CHRIS W. BONNEAU, FEDERALIST SOC'Y, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 5 (2012), *available at* http://www.fed-soc.org/doclib/20120719_Bonneau2012WP.pdf. *But see* Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 133 (2007) (studying the behavior of trial court judges when faced with "the threat of a viable challenger in an election"); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (analyzing the relationship between trial judges' sentencing behavior and electability). Local courts are studied even less frequently than trial courts as they are generally a hierarchical step below trial courts.

[4] There have been several empirical studies of small claims courts, however. *See, e.g.*, JOHN C. RUHNKA & STEVEN WELLER WITH JOHN A. MARTIN, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 189-98 (1978); Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 344 (1994); William G. Haemmel, *The North Carolina Small Claims Court—An Empirical Study*, 9 WAKE FOREST L. REV. 503, 508 (1973); Michael H. Minton & Jon E. Steffenson, *Small Claims Courts: A Survey and Analysis*, 55 JUDICATURE 324, 324 (1972); Austin Sarat, *Alternatives in Dispute Processing: Litigation in Small Claims Court*, 10 LAW & SOC'Y REV. 339, 369-73 (1976); John M. Steadman & Richard S. Rosenstein, *"Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study*, 121 U. PA. L. REV. 1309,

diversity of local courts, the limitations on their subject matter jurisdiction, and the complexity of their organization nationwide render it hard to study these courts as a unitary class.[5] The diversity and the lack of easily accessible decisions, however, cannot justify the lack of attention to how local judges should behave when faced with statutory questions, a task that comprises the day-to-day work of our local courts. These public officials are the face of law and justice to citizens in our democracy. What they do in their courtrooms when applying statutes is probably more relevant to citizens' sense of the legitimacy of our legal system and the rule of law than the vast majority of the Supreme Court's business at One First Street.

As an initial step in thinking about these courts' role in the administration of our legal system, the inquiry here focuses on two problems of statutory interpretation in local state courts. First, how should local courts interpret local ordinances? Second, may local courts bring local agendas to bear on the state statutes they implement? Previous scholarship in local government law has mined questions surrounding localities' rights and limitations in promoting federal constitutional visions,[6] and their relationships with and responsibilities to their home states and regions.[7] But virtually all of this work, which

1340 (1973); Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 545-49 (1984).

5 The American Judicature Society maintains a website that contains information about the patchwork that makes up states' lowest level courts with a useful interactive map. AM. JUDICATURE SOC'Y, http://www.judicialselection.us/ (last visited Feb. 8, 2013). I have included representative states' judicial organizational charts for reference in the Appendix.

6 *See, e.g.*, David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) (recognizing local governments as "important political institutions" that shape the lives of their citizenry rather than simply "agents of the states that 'create' them"); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1033 (2007) ("The federal government has chosen to pursue an array of policies through the intermediary of local government, raising challenging questions for any account of federalism that ignores intergovernmental cooperation and the vital local role in such regimes."); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 5-6 (2012) (arguing that "local constitutional enforcement . . . has the potential to promote local power" and that local government could be better utilized by abandoning the *Hunter* doctrine—named for *Hunter v. City of Pittsburgh*, 207 U.S. 161, 174, 176-78 (1907)—which characterizes local governments mere instrumentalities of the states).

7 *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 206 (2008) (discussing the lack of incentives for localities to work collectively); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 99 (1990) ("[T]he Court's belief that locally accountable governmental units are significant in practice and desirable in theory has led it to affirm . . . the operational independence of local governments from their states, and the important role local governments play in making law and policy in critical areas."); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 389 (1990) (describing local governments as "state-created and state-empowered yet particularly responsive to local residents' social concerns"); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1794 (2002) (borrowing "institutional ideas" from

is engaged in foundational debates surrounding the role of local governments within our state and federal constitutional structures, focuses on local governments' legislative and administrative powers, and the ability of state and federal judiciaries to constrain or foster these powers.[8] What has not been widely noticed is that the judges that serve in local courts are routinely selected locally and apply both local and state law. As a result, they occupy a complex position within the mosaic of local government. Indeed, local courts are quite often credibly part of the local government even though some local judges receive their salaries directly from the state.[9]

If many local courts are (at least in important ways) parts of local governments, this is yet another map on which we could, in theory, explore the debates between those in the "pro-localism" camp—interested in more local autonomy and vital democratic participation at the local level[10]—and those who are more skeptical—concerned about the dangers of homogeneity and exclusion at the local level. These skeptical scholars focus on the ways localism can impair the resolution of interlocal problems, prevent more equitable and less captured policies from taking hold at the state level, and

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the European Union to help "reconceptualize the relationship between local separateness and regional togetherness in the United States"). Some new and exciting work explores administrative law through local government practice. *See* Nestor M. Davidson & David Franklin, Local Administrative Law (2013) (unpublished manuscript) (on file with author).

8 *See, e.g.*, David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2367-84 (2003) (arguing that local governments cannot engage in local legal autonomy and that local communities will always be confined to state law regulations); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1168 (2007) (arguing that state courts should play an active role in resolving conflicts between state and local law); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062-74 (1980) (describing the restrictions placed on cities by state and federal government, with the result that current cities "do not have the power to solve their current problems or to control their future development"); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 964 (1991) (arguing that the doctrine of limited municipal powers has been invoked in a wide array of contexts to limit local power); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 101-20 (analyzing historical conceptions of municipal government).

9 For a book focusing on judges and cities that treats judges as outside the city looking in rather than as a part of the city itself, see GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY (1985). The organizational charts in the Appendix, *infra*, reveal the funding sources of some local courts.

10 Generally, Frug and Barron are the central "pro-localism" campers. *See* Barron, *supra* note 8, at 2384-86 (arguing for an active role for local government in battling sprawl); Barron, *supra* note 6, at 561-63 (arguing that localism expands the power of towns and cities to correct inequities and impart constitutional values); Frug, *supra* note 7, at 1788 ("The legal system needs to give metropolitan residents more choices."); Frug, *supra* note 8, at 1060 (calling for a "restructuring [of] American society itself" to restore power to cities).

fail to be sufficiently sensitive to citizens' multijurisdictional commitments.[11] That debate, regarding how much power and authority local governments should have, is unavoidable, but it is not one I will be able to resolve completely here.

Instead, I want to use the discovery of local courts as instrumentalities of local governments to analyze some practical problems of statutory interpretation in these institutions. Although the fount of so much local government law is actually a canon of statutory construction (known as "Dillon's Rule"),[12] almost no attention has been paid to statutory interpretation at the lowest levels of the judicial hierarchy.[13] Notwithstanding recent calls for "federalism all the way down,"[14] "intersystemic statutory interpretation,"[15] and more attention to "hierarchy and heterogeneity" in our nation's judiciaries,[16] no one is considering how local courts are interpreting statutes—whether the statutes are passed in state or local legislatures—or how they ought to do so. And these local courts perform the bulk of statutory implementation. I focus here on what approach local courts should take when interpreting local statutory law and state statutory law. The latter inquiry might be called an "intrastate reverse-*Erie*" problem.[17] Specifically,

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11 Briffault and Gillette are the likely skeptics. *See supra* notes 7-8; *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908-09 (1994) ("A centralized regional authority . . . leaves little opportunity for politically empowered cultural communities to form and thrive.").

12 For a discussion of Dillon's Rule and its parameters, see 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 237–239, at 448-55 (5th ed. 1911). The rule stands for the principle that local governments "possess and can exercise only (1) powers granted in express words; (2) powers necessarily or fairly implied in or incident to the powers expressly granted, and (3) powers essential to the accomplishment of the declared objects and purposes of the entity—not simply convenient, but indispensable." Shorts v. Bartholomew, 278 S.W.3d 268, 276 (Tenn. 2009). Many recent cases implement the rule. *E.g.*, *id.* at 276-77.

13 *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1760-71 (2010) (bringing new attention to statutory interpretation at the state level but not investigating lower-level state courts).

14 Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8-9 (2010).

15 Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1990-97 (2011).

16 Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 442 (2012). Lower federal courts have been the subject of study within constitutional law. *See* Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 987 (2010).

17 For introductions to "reverse-*Erie*" issues, see Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1554 (2006); Kevin M. Clermont, *Reverse-*Erie, 82 NOTRE DAME L. REV. 1, 20 (2006); and Joseph R. Oliveri, *Converse-*Erie*: The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372, 1377-79 (2008).

just as state courts need guidelines in order to apply substantive federal law in the typical reverse-*Erie* scenario,[18] local courts need similar guidelines in order to apply state law.

Part I of this Article defines the category of local courts for analysis, as well as the types of cases those courts typically hear. Part II then explores what it could mean for such local courts to pursue a "localist" agenda and analyzes its desirability under certain conditions. This analysis considers the kinds of elections that routinely place local judges into their offices and the manner in which local courts are embedded within state and local institutional structures. I conclude by asserting that the (concededly modest) accountability available for local judicial performance, combined with the possibility for careful state supervision of "localist" judicial action, supports giving local courts more discretion in interpreting both local ordinances and state statutes. On the whole, the argument aims to reveal the benefits of a type of "intrastate judicial federalism" that promotes dialogue and experimentation in the development of statewide policy. My conclusion draws from the perspectives of both "pro-localism" views as well as those more enamored of state power, highlighting some ways to settle that debate in at least this one understudied context.

I. WHAT IS A LOCAL COURT AND WHAT CASES DOES IT HEAR?

Given the great variety in state court systems, demarcating a category of "local courts" requires some specificity. The heterogeneity of these courts has likely been partially responsible for the academic community's unwillingness to study or theorize about them as a class in the past, so it is worth getting a more refined definition clear to begin that process. Here are a few common characteristics of the kinds of courts I focus upon: local courts, as discussed here, (1) are at nearly the lowest rung within state judicial hierarchies, but render decisions appealable to higher-level state courts; (2) have limited subject matter jurisdiction; (3) have decisionmakers who are formally trained, licensed attorneys;[19] (4) have judges who are seated through election

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18 State courts are essentially required to hear federal claims. *See* Testa v. Katt, 330 U.S. 386, 394 (1947). For the debate on why, whether, or to what extent this is so, see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 78; Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 118-20 (1998); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 75 (1998); and Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1750 (1992).

19 Here, I am avoiding the debate about whether it is sound (or constitutional) to have lay people adjudicating cases in the legal system. *See* Gordon v. Justice Court, 525 P.2d 72, 73 (Cal. 1974) (holding that it is a violation of the Federal Constitution to allow nonattorney judges to sit

by the population of a local government or a set of local government units; and (5) apply and enforce local and state law within their territorial jurisdiction. Who funds local courts—state or locality—is not decisive in this typology, since it is possible for a state to pay judicial salaries but still expect the judge to be serving primarily a local community and applying local law. In some local courts, the local government itself provides funding to pay the judges.

Admittedly, this classification leaves out some judicial institutions that might colloquially be viewed as local courts. Some justice courts, for example, are staffed by nonlawyers—and many magistrate, mayor's, and municipal courts are appointive institutions.[20] Some classes of lower trial courts of general jurisdiction might also "feel" local to residents within their reach who have elected their judges; but these courts are, for my typological purposes, considered part of the state, rather than the local, political system.[21] All of these institutions fall outside the ambit of my analysis here by definition; since "local courts" are not a natural category, I start with an

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in judgment over criminal defendants for offenses punishable by incarceration); *see also* North v. Russell, 427 U.S. 328, 339 (1976) (suggesting that it is not unconstitutional to subject an offender to possible imprisonment before a nonattorney judge, so long as de novo review is available in a court with a legally trained judge); City of White House v. Whitley, 979 S.W.2d 262, 267-68 (Tenn. 1998) (rejecting the logic of *North* and finding nonlawyer adjudications imposing jail time to violate Tennessee's Constitution). New York has many village and town courts without lawyer adjudicators, and given the *New York Times*'s reporting several years ago, *see supra* note 2, it is hard to think it is anything but a scandal. Still, once I perform an analysis of the kinds of courts at the center of my consideration here, it will be possible for others to use that analysis to explore those courts without lawyers at the helm.

[20] *See, e.g.*, *The Qualifications to Become a Municipal Court Judge*, N.J. JUDICIARY, http://www.judiciary.state.nj.us/mcs/qualifications.htm (last visited Feb. 8, 2013) (noting that New Jersey lower courts are largely appointive); *About the Courts*, UNIFIED JUDICIARY SYS. PA., http://www.pacourts.us/Links/Public/AboutTheCourts.htm (last visited Feb. 8, 2013) (describing how Pennsylvania lower courts allow nonlawyer adjudicators); *Court Structure of Texas*, TEX. COURTS ONLINE (Sept. 1, 1997), http://www.courts.state.tx.us/pubs/ar97/crtstr97.htm (noting that some Texas lower court judges are elected and staffed by lawyers, while others are not).

[21] Some county courts that hear cases under local law—as in Nebraska—see themselves, first and foremost, as instrumentalities of the state judiciary. Even though Nebraska county judges are subject to local retention elections (after gubernatorial appointment), they seem to adopt the culture of the state. *See* E-mail from Alan Brodbeck, Judge, Cnty. Court, Eighth Judicial Circuit, to author (July 9, 2012, 12:31 PM) (on file with author); E-mail from Philip Martin, Jr., Judge, Hall Cnty. Court, to author (July 5, 2012, 6:00 PM) (on file with author); E-mail from Beth Pullen, Clerk Magistrate, Merrick Cnty. Court, to author (July 5, 2012, 3:01 PM) (on file with author); E-mail from Frank J. Skorupa, Judge, Platte Cnty. Court, to author (July 6, 2012, 10:47 AM) (on file with author); E-mail from Darrie Streeter, Clerk Magistrate, Phelps Cnty. Court, to author (July 5, 2012, 3:30 AM) (on file with author). *But see* E-mail from Sandy Medinger, Clerk Magistrate, Harlan Cnty. Court, to author (July 11, 2012) (on file with author) (confirming that the judges in county court are a part of the state judiciary but that they maintain relationships with local constituents because of retention elections).

archetype. Still, a large range of municipal, county, and district courts possess the listed criteria identified here—and millions of civil and criminal matters are adjudicated in these kinds of courts each year.[22]

The transsubstantive scope of cases local courts hear also makes it difficult to theorize about them as a singular category. For example, local courts can handle probate matters, family law matters (such as custody, divorce, and adoption), traffic infractions, small civil claims, juvenile matters, misdemeanor criminal offenses, landlord-tenant disputes, and violations of local ordinances. Yet, the diversity of subject matter notwithstanding, these local courts act within a circumscribed sphere, often being the first line of enforcement in a local legal culture. Let me describe two examples of local courts to provide a taste of the local flavor.

Charleston is West Virginia's capital and largest city. It has a population of about 51,000, which is 78% white and 16% black.[23] The municipal court judgeship in Charleston is an elective office with a four-year term.[24] Although West Virginia allows nonlawyers to be municipal judges, the charter in Charleston requires that the judge be a lawyer.[25] The current judge, Anne Charnock, ran for her office in Spring 2011. Judge Charnock serves part-time and also maintains a solo practice, specializing in wills and trusts.[26] Her father was also a municipal judge decades earlier.[27]

The jurisdiction of the court includes misdemeanors under state law (such as shoplifting, assault, battery, and prostitution), traffic violations, and local ordinance violations—but the court cannot, by state statute, punish a defendant with more than thirty days in jail or a $500 fine.[28] Defendants are entitled to a de novo appeal in the circuit courts of the state, which sit just below the state's high court, the Supreme Court of Appeals. Judge Charnock does not see the municipal court as part of the state judicial hierarchy; she sees herself as principally interested in local concerns.[29]

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22 See *supra* note 1 and accompanying text.

23 This information is from the 2010 census. *See State and County Quickfacts: Charleston (City), West Virginia*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/54/5414600.html (last revised Sept. 18, 2012).

24 CHARLESTON, W. VA., CODE OF ORDINANCES § 35 (2003), *available at* http://library.municode.com/index.aspx?clientId=13013.

25 *Id.* § 45.

26 E-mail from Judge Anne Charnock, Charleston Mun. Court, to author (July 16, 2012, 18:59 EDT) (on file with author).

27 *Id.*

28 E-mail from Judge Anne Charnock, Charleston Mun. Court, to author (July 3, 2012, 14:46 EDT) (on file with author).

29 *Id.*

Chillicothe, Ohio's first capital, is located in Ross County in the southern part of the state. It has a population of about 22,000, which is 88% white and 7% black.[30] Judge John Street was originally elected to the Chillicothe Municipal Court for a six-year term; he is currently serving his third such term.[31] The court has jurisdiction over local traffic violations, state criminal misdemeanors, civil cases with plaintiffs seeking less than $15,000, collection actions, and replevin cases.[32] The judge hears both local law and state law cases, both of which may be appealed to higher courts within Ohio's state appellate system.[33] Judge Street sees himself as part of the state judiciary but acknowledges that he was elected by the jurisdiction where he serves and thinks, therefore, it is "probably necessary" to maintain relationships with constituents to be reelected.[34]

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This is obviously a selective tour, meant only to illustrate the class of courts discussed in this Article. I have limited the category here not because there is a clear border around these local courts, but because the courts in this class routinely share the features I adumbrated earlier—features which form excellent starting points for the following analysis. Once I am able to

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30 *See State and County Quickfacts: Chillicothe (City), Ohio*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/39/3914184.html (last revised Sept. 12, 2012).

31 E-mail from John B. Street, Judge, Chillicothe Mun. Court, to author (July 5, 2012, 10:55 EDT) (on file with author).

32 *Id.*

33 *Id.*

34 *Id.*; *accord* E-mail from Mark Mihok, Judge, City of Lorain Mun. Court, to author (July 9, 2012, 10:13 AM) (on file with author) (claiming that the court's docket is comprised of equal numbers of state and local cases, that the court is principally part of the local government, and that it is important "to be visible in the community" because of the judge's elective status); E-mail from Julie L. Monnin, Judge, Darke Cnty. Mun. Court, to author (July 6, 2012, 11:08 AM) (on file with author) (confirming that judges in municipal court in Ohio are elected and maintain relationships with constituents, that the court applies "state law locally," that it is part of local government, and that its decisions are appealable to higher level courts in the state). *But see* E-mail from William G. Lauber, Judge, Lima Mun. Court, to author (July 9, 2012, 5:02 PM) (on file with author) (stating that he "feel[s he is] a member of the state judiciary" and that "maintaining a relationship to [his] constituents must be done carefully"); E-mails from Sharon Thomasson, Clerk, Maumee Mun. Court, to author (July 10, 2012, 11:58 AM & 2:31 PM) (on file with author) (noting that Judge Gary Byers thinks of himself as "fall[ing] under state government" and that "it is part of the Judge's job to maintain relationships with his constituents"); *see also* E-mail from Gary Dumm, Judge, Circleville Mun. Court, to author (July 5, 2012, 10:20 AM) (on file with author) (stating that he sees himself as "part of the state court system," while acknowledging that decisions must "have some regard for local concerns, but with equal consideration for uniformity around the state"). Notably, Judge Dumm claims that "handling cases with a major concern for public opinion would not be in keeping with the oath of office [he] took where [he] agreed to support the Constitutions of Ohio and the United States." E-mail from Judge Gary Dumm, *supra.*

identify some relevant normative benchmarks for how to think about this category of courts, it will be possible to ask about another court with somewhat different features whether it is susceptible to the same treatment. Whether it is a village court, town court, police court, or lower court of general jurisdiction, the analytics presented in what follows will be helpful when considering how that court should do its work in interpreting statutes.

II. ARE LOCAL COURTS "LOCALIST" IN THEIR STATUTORY INTERPRETATION? SHOULD THEY BE?

A. *"Localist" Judging: What Is It? Does It Occur?*

There are several different types of what might be termed "localist" judging—some more controversial than others.[35] From one perspective, "localist" judging might mean infusing local court decisions with local preferences. Specifically, a localist judge might engage in self-conscious or un–self-conscious majoritarian estimation by trying to apply a state statute or local ordinance in a manner she expects her constituents to prefer. Alternatively, a judge could be "localist" in reading a statute in a way that takes especial concern for the welfare of local citizens or local government, focusing not on public opinion but on the judge's sense of the locality's best overall interest. This localism could be set against statewide or interlocal interests (the traditional way people characterize "localism"); but even where those sets of interests do not conflict, the judge could still be focusing principally on the interests of the locality. Finally, a judge can be "localist" by applying local mores and norms to legal texts before him or by paying more attention to local morality and ethics than to the enactor's legislative intent, whether of the state or the local government. Note that all these strains of "localist" judging can occur more easily when the underlying language (or legislative intent) being interpreted is ambiguous or open to multiple interpretations. And I limit my analysis of "localist" judging here to contexts where text and legislative will produces some ambiguity in statutory interpretation. Ultimately, some limited evidence shows that "localist" statutory interpretation is occurring, and there are good arguments for why it should be welcomed as a practice within certain parameters.

Admittedly, it is not easy to ascertain what is occurring in these local courtrooms with a high level of confidence. Because local courts are much less likely to publish their decisions than state courts higher in the judicial hierarchy, a scholar would need to sit in local courtrooms for long periods of

35 Thanks to Nestor Davidson and Annie Decker for encouraging me to be clearer here.

time and read reams of motion papers to discover with any degree of reliability what goes on in these halls of justice. There are, however, a few indirect methods of gathering information about the form statutory interpretation takes within local courts: one can ask relevant judges about their practices and one can read appeals taken from local courts in the state court reporters. To be sure, much interpretation goes on with little self-consciousness, so direct questioning has its limitations. And there is a built-in bias in looking at decisions of higher courts reviewing local courts: precisely because decisions from these local courts are appealable to higher state courts, these courts might anticipatorily take statewide interests into account, knowing they might be reversed otherwise. The places where one would likely see the most aggressive use of the law to address local needs and priorities, perhaps, are in the most invisible courts, where decisions are barely supervised by the rest of the state judiciary. Still, these imperfect sources of evidence suggest that local courts are, in fact, engaging in some brands of "localist" judging.

One local judge in the Lima Municipal Court in Ohio, for example, said the following:

> Local concerns are considered when sentencing with regard to how our county and city (as embodied in my judgment) feel about how certain crimes should be punished, and whether or not the goals of punishment can be met with a fine only; probation or community control; a jail sentence; or, any combination of all of the aforementioned. I, also, consider the local capacity of our jail and the most judicious use of our resources.[36]

Although this judge considers himself "a member of the state judiciary,"[37] he is clearly in the business of using statutory law to address and accommodate local needs and priorities. These sentencing decisions, made under state law, color the application of state statutes with local considerations. It is reasonable to assume that in a close question of statutory interpretation, this judge would allow local interests to infuse state law.

Another judge in a municipal court in Lorain, Ohio—a manufacturing district between Cleveland and Toledo—said that that he is sensitive to local "employability" issues and tries hard to find "appropriate sentence[s]" with prosecutors to deal with state-mandated sentencing, convictions that lead to required driver's license suspension, and convictions that would harm a

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36 E-mail from William G. Lauber, Judge, Lima Mun. Court, to author (July 9, 2012, 17:02 EDT) (on file with author).

37 *Id.*

person's ability to get or maintain a job.[38] In the municipality of Cambridge, Ohio, Judge John Nicholson (who thinks of himself as a member of the state judiciary but acknowledges that he is perceived by the public as part of the local government) said that "in those areas where aspects of judicial discretion are proper, it is good to know what the local public standards are, and what the electorate expects would be 'just.'"[39] This local judge referenced former Ohio Supreme Court Chief Justice Thomas Moyer, who "used to tell the municipal judges that since, for most people, their only contact with the legal system would be in the municipal court, that [local judges] were responsible for the . . . people's perspective on the law."[40]

The appellate state court reporters also reveal some local courts promoting local policies through their decisions. Consider one example, in which an Indiana state appellate court found itself reviewing the statutory interpretation of a county juvenile court. The juvenile court judge, an elected local judge,[41] had read a state adoption statute to preclude same sex–couple joint adoptions, and the state appellate court disagreed with its reading in the following words:

> We observe that one of the bases for the Juvenile Court's . . . order was [the local court's] understanding of the policies of Morgan County. . . . But county courts must be guided by state law rather than local practice in carrying out their duties: "[a] general statute, enacted by the people of the entire state through their representatives, speaks for and to the whole population, and therefore cannot be given or be supposed to have a merely local meaning, or a meaning varying to suit the special usage prevailing in the several localities." In fact, "[u]niformity in the interpretation and application of the law is the keystone in our system of jurisprudence." Accordingly, the Juvenile Court—and, indeed, all local courts—must base its decisions on state law, and must also ensure that local practice complies with state law.[42]

It is, perhaps, not altogether surprising to see a state court in this context seeking to achieve, and expecting, state uniformity. Even if a state's

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38 E-mail from Mark Mihok, Judge, City of Lorain Mun. Court, to author (July 10, 2012, 10:27 EDT) (on file with author).

39 E-mail from Katherine Archibald on behalf of John M. Nicholson, Judge, Cambridge Mun. Court, to author (July 17, 2012, 14:29 EDT) (on file with author).

40 *Id.*

41 I confirmed with the County Commissioner that the Juvenile Court Judge (now a higher level judge in the county) was elected. *See* E-mail from Don Adams, Comm'r, Morgan Cnty., to author (July 9, 2012, 09:12 EDT) (on file with author).

42 *In re* Infant Girl W., 845 N.E.2d 229, 244 (Ind. Ct. App. 2006) (quoting Cook v. State, 59 N.E. 489, 490 (Ind. Ct. App. 1901); Warren v. Ind. Tel. Co., 26 N.E.2d 399, 405 (Ind. 1940)).

constitution and statutes are generous in their home-rule provisions—giving localities broad spheres of dominion within their jurisdictions—it might be assumed that state legislatures, executives, and courts expect statewide statutes to have uniform application within the state. But that is not necessarily true. Instead, states might have good reason to tolerate disuniformity, and it may be desirable to allow local courts some room to infuse statutes with local preferences, interests, and mores. In the Sections below, I consider the best arguments that can be marshaled to defend localist judging in statutory interpretation cases.

B. *The Case for Localist Readings of Local Law*

Before considering the dynamics associated with what one might call "intrastate judicial federalism," it is worth considering a more purely local context: where a local judge applies only local law, an ordinance passed within the legislative competence of the local legislature.[43] Imagine certain features of a local traffic code or fishing rules, adopted by a city council, that apply only within the boundaries of a locality. Litigants in a local court under these ordinances may make statutory arguments, asking the court to interpret the relevant ordinance in a manner favorable to their preferred disposition. Prosecutors may ask judges to consider local norms in determining how a vague or complex ordinance should be applied. Defendants or plantiffs may ask local judges to consider local culture in evaluating a legal standard. How ought the local judge think of her role in adjudicating these statutory cases?

Admittedly, few of these local court cases are likely to present particularly difficult questions of statutory interpretation.[44] And it is only in the band of difficult cases where statutory interpretation approaches diverge anyway, and where the interpretation wars between strict textualists and purposivists

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[43] I am removing from consideration here challenges to *ultra vires* local ordinances, which are preempted by state law or are otherwise outside the home-rule authorization granted by the state. *See generally* Diller, *supra* note 8, at 1126 ("[A]n ordinance conflicting with state law is necessarily *ultra vires* in a legislative home rule system because it lies outside the grant of authority to the city."). Obviously, when challenges to local ordinances are rooted in conflict with state statutory law, the question of whether the ordinance is *ultra vires* will be a question of statutory interpretation (of potentially both the ordinance and a statewide law). *See, e.g.*, City of Portland v. Jackson, 850 P.2d 1093, 1098 (Or. 1993) (relying on legislative commentary to determine that the Oregon Criminal Code does not conflict with a local ordinance).

[44] *See* E-mail from Anne Charnock, Judge, Charleston Mun. Court, to author (July 15, 2012, 20:14 EDT) (on file with author) ("In the big scheme of things much of what comes to [Municipal Court] is not subject to many interpretations.").

produce real differences in decisionmaking.[45] When text is clear, or precedent is directly on point,[46] almost all agree that lower courts should follow clear law. This is, after all, the minimum of what the rule of law likely requires. But every difficult case starts in a lower court. Theorists of statutory interpretation argue about what the highest courts in the land ought to do about these difficult cases, but we similarly need to account for what local courts should do when faced with a difficult question of local law.

In previous work (with Professor Aaron-Andrew Bruhl), I have considered whether the electoral status of certain state judges should affect how those judges read statutes.[47] As a general matter, the paper drew the following conclusions, which serve as a point of departure for my inquiry here:

First, there is a strong assumption among scholars that "a judge is a judge" and that the office of judge carries with it interpretive duties that supervene over selection methods.[48]

Second, the conventional idea in statutory interpretation cases that judges are supposed to be "faithful agents" of the legislature does not make as much sense in the context of elective judiciaries as it does in environments of appointive judiciaries. Legislatures do not obviously and always

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45 *See, e.g.*, John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 203 (2001) ("Easy cases are resolved short of litigation or settled early; the costs of litigation normally filter them out, leaving appellate judges with the hard [statutory interpretation] cases."); *see also* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 60-61 (2010), http://yalelawjournal.org/images/pdfs/900.pdf ("Ultimately, the easy cases hardly require elaborate theorizing . . . .").

46 There is a plausible argument, however, that elective judiciaries might have a looser relationship to stare decisis. *See* Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm* (noting that "partisan elected courts are far more likely to overturn existing precedent than courts selected by other methods"), *in* WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS 173, 184-85 (Charles Gardner Geyh ed., 2011). Arguably, when an electorate strongly reacts to a decision it thinks is bad, it is no great surprise and no great betrayal to the rule of law for newly elected judges to set the law back on the course constituents prefer.

47 *See* Bruhl & Leib, *supra* note †, at Part III.

48 *See id*. at 1227 (citing, for example, James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?* (explaining that a majority of respondents want judges to follow the law, though many also report that they want judges to reflect voters' views), *in* WHAT'S LAW GOT TO DO WITH IT?, *supra* note 46, at 281, 289); *see also* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 3-4 (1997) ("[A]pproaches to statutory interpretation are not divisible into 'state' and 'federal.' Differences in interpretive approaches are the product of individual judicial sensibilities and not, for the most part, particular jurisdictions."); Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1572 (2010) ("[J]udges are selected, one way or another, to act like judges, a role whose specifications does not depend on the presence or absence of popular election."); Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1447 (asserting that "voter decisionmaking in judicial elections" is based more on conceptions of "procedural justice" than voters' "own policy preferences")).

have better democratic credibility than legislatures when judges are elected. If state constitutions (or local charters) determine that judges should be elected, the internal logic of that design choice probably should have some effect on how those judges decide hard cases.[49]

Third, if elected judges have democratic credibility, they may have interpretive freedom to pursue the interests of their constituents, rather than the revealed preferences of voters or legislators who passed the law in the first instance.[50] Although these kinds of exercises of statutory interpretation may be troublesome for appointed judges with no real knowledge of their constituents and with no democratic credibility to go beyond the legislature, elected judges are often in a position to exercise interpretive freedom competently because they have real information about their constituents and are subject to accountability.

Finally, the type of election to which the relevant judge is subject—competitive, retention, nonpartisan—might tell us something important about the range of interpretive freedom that is normatively defensible. The more democratically credible the election or future mode of accountability, the greater the berth of discretion to pursue an approximation of the constituents' common good in hard cases.[51] The common good may be minoritarian rather than majoritarian, too.

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[49] *See* Bruhl & Leib, *supra* note †, at 1229 (citing, for example, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 318 (1989) (discussing how the metaphor "of the court as the legislature's agent . . . is useful to illuminate the ways statutes constrain courts" but that it does not address the extent to which courts should shape policy); Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1575 (2010) ("[F]aithful agent interpretation is necessary in order to preserve the bedrock principle of our constitutional government—popular sovereignty."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 437 (1989) ("The agency view starts from the important truth that it would be improper for judges to construe statutes to mean whatever the judges think best; the lawmaking primacy of the legislature, with its superior democratic pedigree, prohibits such a conception of statutory 'interpretation.'")).

[50] *See* Bruhl & Leib, *supra* note †, at Parts II & III (discussing scenarios in which judges are more democratically accountable and less subject to interest-group capture than legislators). Bruhl and I also considered other forms of interpretive freedom—like the freedom to pursue a judge's own policy preferences or the freedom to depart from constituent preferences.

[51] *Id.* at Part III. The raging empirical debate about which type of judicial election maximizes independence and which optimizes accountability is obviously relevant to those hydraulics, but these subtleties must be ignored here. *See* Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 52 (finding that "judges' votes in nonpartisan states are significantly more likely to be aligned with public opinion than judges' votes in partisan states"); Brandice Canes-Wrone et al., *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 211, 229 (2012) (finding that judges in states with retention elections are not more independent than judges in states with nonpartisan elections); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (finding that partisan judges are more likely to

I do not revisit these theses or offer proof for them in this context, but, assuming they are plausible conclusions, they can be applied to local judges here, as well. To wit, because local judges are elected by local constituents (by definitional design), they likely have some democratic credibility to interpret local laws with some attention to the good of their constituents. And because they can always be unseated during the next election cycle, judges can be held accountable for interpretive decisions that overreach. Even those who are skeptical about judicial elections as a selection mechanism for seating or retaining judges should appreciate that those design choices were made deliberately—more specifically, made for some reason relating to how institutional designers wanted judging to proceed.[52] For example, even those who oppose the Seventeenth Amendment to the U.S. Constitution and wish our U.S. Senators were still chosen by state legislatures rather than direct election probably do not think the office and role of the Senator perfectly supervenes over selection methods for picking Senators. As such, how we select those who serve in governmental offices reveals some of the normative structure of how they are supposed to perform their jobs. With respect to elective judiciaries, direct election structurally and normatively supports the case for judges pursuing the common good of constituents in close cases, when other clearly authoritative sources for interpretation run out.

Still, there is reason to doubt the meaningfulness of judicial elections at the local level. It is conventionally believed that the elections that seat, retain, or unseat local judges are not particularly salient with the electorate and do not inspire a great deal of deliberation.[53] Moreover, many of these elections are controlled by political party machines and are not contested.[54]

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vote for business interests when campaign contributions increase but that this relationship does not hold for nonpartisan elections).

52 *See generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 1-13 (2012) (discussing the evolution of judicial selection); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190-93 (1993).

53 *See* Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371, 374 (1978) (finding that only 2.5% of voters surveyed could name a single candidate in an uncontested county court election, while 14.5% of voters "could recall the name of one candidate for the state supreme court or court of criminal appeals"). We actually know very little about elections for local judges, however. Almost all of the empirical literature on judicial elections is about state supreme courts, and a very small subset of the literature is about appellate-level elections. *See* BONNEAU, *supra* note 3, at 10 (suggesting that voters "may not have enough information in intermediate appellate or trial court elections" but acknowledging that "[t]his is certainly an area in need of further research").

54 *See, e.g.*, Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 171-81 (2d Cir. 2006) (describing the vetting for New York trial court judges as dominated by local party bosses), *rev'd*,

And some of these elections may be financed by out-of-state groups and citizens, undermining the idea that the election reflects *local* opinion or that judges are accountable to local citizens.[55] Accordingly, it might seem that local judicial elections provide only the thinnest of invitations for localist interpretive freedom within local courts.

Nevertheless, the invitation does exist. There is some evidence that although local judicial elections are not especially salient with the general public, informed and attentive voters follow judicial elections and make meaningful decisions that hold judges accountable.[56] Other evidence indicates that lower-level elective courts are especially responsive to constituents.[57] Therefore, even if competition rates are low and voter indifference is high,[58] it is still possible to consider local judicial elections a mechanism for

552 U.S. 196 (2008). For evidence that trial court elections are not highly contested as a general matter (though there is much variation among states), see Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 209 (2011), which found that "over 75 percent of contestable judicial elections used to fill seats on general jurisdiction trial courts are uncontested." Again, very little information is available about courts that are not general jurisdiction trial courts, but one might draw inferences from the data nevertheless.

55 *See, e.g.*, Canes-Wrone et al., *supra* note 51, at 214 (describing how out-of-state groups contribute "enormous sums of money" to state judicial elections); David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90, 93-94 (2011), http://www.columbialawreview.org/wp-content/uploads/2011/06/90_Pozen.pdf (discussing the 2010 Iowa judicial election in which out-of-state groups spent more money on the elections than in-state groups); Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, CT. REV., nos. 1 & 2, 2011, 118, 120-21 (showing the importance of out-of-state funds to defeat judges in Iowa and Nebraska); Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT'L INST. ON MONEY IN STATE POL. (Jan. 10, 2011), http://www.followthemoney.org/press/PrintReportView.phtml?r=440 (noting that out-of-state groups spent over $900,000 on the 2010 election for Iowa Supreme Court justices).

56 *See* Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 30 (1989) (arguing that the people most likely to vote in judicial elections are "well-informed and active citizens [that] keep the politicians accountable to the public at large"); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23, 30, 31 tbl.1 (1984) (describing how participating voters in a 1982 Oregon election "possessed a relatively high level of knowledge about courts").

57 *See* Huber & Gordon, *supra* note 3, at 249 (stating that judges alter their behavior when elections approach even though the probability of losing is low).

58 Given how little we know, it is always possible that there might be *higher* voting rates (and less rolloff) in local judicial elections than in statewide judicial elections, even without large infusions of capital for campaign spending, because local judges often come from small, tight-knit communities and actually know their constituents. While one study suggests otherwise, *see* Johnson et al., *supra* note 53, at 374, it is outdated and has not been replicated. Nevertheless, some studies of appellate courts show evidence of increasing indifference down the hierarchical chain. *See* Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644, 647, 648 (2009) ("The average rolloff in [appellate court] elections is sizeable and greater than the average rolloff in supreme court elections but the difference is not as large as one might expect.").

meaningful accountability because voters are satisfied and judges are responsive.[59] Moreover, there is evidence—at least from the lower-level appellate courts—that incumbents face a real risk of losing.[60] Finally, while out-of-state interest groups have provided funding for campaigns in statewide judicial elections, there is little evidence that they similarly finance *local* court elections; the money is largely reserved for the highest level courts.[61]

Nothing about this limited argument requires local courts to take opinion polls in difficult statutory cases. But it provides local judges some measure of freedom to interpret statutes in a way that departs from faithfully serving the enacting legislature, and it gives them the ability to promote the interests of their constituents more directly. This result is recommended not only because judges are capable of being held accountable by an electorate, but also because of local political dynamics that make the local legislature itself a weak source of democratic authority.[62] Local city council members and county commissioners are rarely subject to vigorous democratic competition, so even if the democratic quality of elections for judicial officers is low,[63] those who are writing the statutory code for local ordinances are not necessarily subject to any greater democratic controls. If local legislative elections are also quite deficient as democratic control mechanisms, forcing elected judges to serve as their agents is not necessarily sound.

Statutory interpretation decisions should ultimately invite considerations of *comparative* democratic credentials, not embody a separation-of-powers formalism built for a different federal system with very different political cultures and sets of institutions and selection mechanisms.[64] Assuming there is essentially a tie between two sets of imperfect elections for two different branches of government, the norm of providing reasons for

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59 *See* BONNEAU, *supra* note 3, at 11.

60 *See* Matthew J. Streb et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70, 73 tbl.1 (2007) (finding that about 65% of incumbent state supreme court justices and 27% of incumbent intermediate appellate court judges were challenged between 2000 and 2006).

61 *See supra* note 55.

62 *See, e.g.*, David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 426 (2007) ("[L]ocal government does not meet the most basic definitions of democracy—it does not provide voters with the ability to replace incumbents with opponents with different views and to have their views represented in local policies.").

63 The democratic quality of local elections may decrease for several reasons, including no meaningful party heuristics available to voters in the class of nonpartisan races, little information available to voters because of low amounts of campaign spending associated with these races, and few alternatives offered.

64 *See* Bruhl & Leib, *supra* note †, at 1239-41 (arguing for a "comparative institutional analysis" that accounts for the resources and competencies of different branches of government).

decisions, prevalent in the courts[65] but not required of local legislatures,[66] could provide a tiebreaker to enable judges to use ambiguities and omissions within code schemes to pursue localist interests. In any case, the separation of powers—and related worries about the judiciary subsuming legislative functions—is quite likely not as central in understanding local governance as it is in understanding state and national governance.[67]

Although some studies have suggested that citizens are concerned more about procedural fairness than a judge's attention to public opinion,[68] there is substantial empirical evidence that voters have a more complex understanding of the role of judicial elections.[69] Survey evidence reveals that voters prefer a "delegate role" or "steward role" of judges subject to election rather than a "trustee role."[70] Those who agree with the "delegate role" believe that "[e]lections should tell the judges what the people want, and the judges *should follow* the people's desires."[71] Those who agree with the "steward role" believe that "[e]lections should only *inform* the judges of the general feelings of the people so that judges don't become too isolated."[72] Finally, those who agree with the "trustee role" believe that "[e]lections should support those judges who are independent of public opinion and remain *unaffected* by the people's demands."[73] The majority of survey respondents agrees with the first two roles and highly disagrees with the trusteeship model.[74] Even judges themselves, when asked, view themselves as "stewards" rather than as

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65 *See generally* Ethan J. Leib, David Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. (forthcoming 2013) (manuscript at 44-46) (on file with author) (describing the fiduciary duties of judges, including the dialogic imperative, as "an affirmative duty to engage in dialogue with those whose interests the public fiduciary representative[, the judge,] holds in trust").

66 *See* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (stating that legislators have the "prerogative of obscurantism").

67 *See, e.g.*, Moreau v. Flanders, 15 A.3d 565, 579 (R.I. 2011) ("After considering the arguments raised by the parties, we hold that the separation of powers doctrine is a concept foreign to municipal governance."). Thanks to Annie Decker and her paper for the pointers here. *See* Annie Decker, Local Common Law (2013) (unpublished manuscript) (on file with author).

68 *See generally* Singer, *supra* note 48, at 1456-57 (stating that the public supports appellate courts that make decisions using "competent, reasonable, and fair" procedures).

69 *See* Lovrich & Sheldon, *supra* note 56, at 36 tbl.4; *see also* Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Judicial Accountability vs. Responsibility: Balancing the Views of Voters and Judges*, 65 JUDICATURE 470, 476 tbl.3, 477 (1982) (finding that citizens who register to vote, though not necessarily those who actually vote in judicial elections, tend to prefer the "steward" or "delegate" view of judicial elections).

70 Lovrich & Sheldon, *supra* note 56, at 36 tbl.4.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

fully independent "trustees."[75] This suggests that both citizens and judges expect elections to have a meaningful input into elected judges' decisions.[76] Of course, one might want a different kind of legal system that does not give the people and the judges what they want. But, as suggested above, there are other normative reasons to allow local interests to affect hard statutory interpretation cases.[77]

The conclusion here—that local judges have some berth of discretion to pursue localist judging within statutory interpretation decisions about local ordinances—may be useful for scholars looking to promote autonomy at the local level. Although most "pro-localism" theorists have focused their attention on ways local legislatures and agencies can promote local goods within state and federal structures, local *judges* may advance this goal as well. Yet skeptics of local autonomy probably should not be too rankled by this underappreciated channel for localism because it is a modest power and

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75 *See* Sheldon & Lovrich, *supra* note 69, at 476 tbl.3 (finding that 56% of judges in Washington "agree" or "strongly agree" that judicial "[e]lections should only inform the judges of the general feelings of the people so that judges won't become too isolated") In addition, there is substantial evidence that elected judges are responsive to constituents. *E.g.*, Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 370 (2008) (concluding that elected judges are affected by their constituents' opinion on capital punishment); Gordon & Huber, *supra* note 3, at 109 ("Even those incumbents who do not share their constituents' preferences . . . may nonetheless behave faithfully . . . if their failure to do so will result in their subsequent punishment at the polls."); Huber & Gordon, *supra* note 3, at 249 ("[A]s election approaches, officials will moderate their behavior to more closely approximate the wishes of some pivotal constituent.").

76 The most recently available evidence suggests that elections confer a net benefit for perceptions of legitimacy. *See* James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. Q. 545, 553-54 (2011) (finding that judicial elections in Pennsylvania enhance legitimacy).

77 There are obviously many people who argue that elective judiciaries are normatively attractive precisely because they better reflect preferences of the polity. *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 7 (2009) ("Overall, we would expect judges chosen by democratic processes to reflect the political preferences of their states at the time they are chosen . . . ."); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 34 (1986) (arguing that "judges should be sensitive and responsive to the political, economic, social, moral, and ethical views held by a majority of citizens."); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 757 (2010) (positing that elected judges may take pains to satisfy the voters' preferences and to preemptively allay potential popular criticisms). Some even think elective judiciaries might perform better than appointive judiciaries on professional measures. *See* Stephen J. Choi, G. Mitu Gulati & Eric Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 326-27 (2010) (questioning the superiority of appointed judges by measuring how elected judges are more productive in resolving cases and, at least when elected through partisan elections, display a high degree of judicial independence). But I am not concerned here with the general desirability of judicial elections: they exist and the question is whether the fact of judicial elections should affect how judging ought to be done.

does not create any of the dangers of local autonomy they have traditionally feared. Local judges can be corrected by their judicial superiors at higher levels of the state judiciary—and state legislatures can always pre-empt local ordinances—if and when local judges' interpretations exceed what the state is willing to tolerate.[78] Accordingly, the risks associated with localist interpretive freedom surrounding local law are miniscule.

Further, minorities in homogeneous communities will generally face no greater risk under localist judging than they do when local judges serve as "faithful agents" of the local legislature. Interlocal problems must generally be resolved at a higher level of government anyway. And interlocal matters and multijurisdictional citizens might actually do better under the prevalent regime where the local judge is responsible for several adjacent localities and can better consider all her constituents' needs and interests. Allowing local judges to have regional jurisdictions that expand beyond the narrow reach of a town or city council, for example, enables a spirit of localism to prevail, all while vindicating the needs of a slightly broader constituency. In short, this way of thinking about the permissible scope of statutory interpretation seems to accommodate both the "pro-local" community and those skeptical of too much local autonomy.

C. *Is There a Case for Localist Readings of State Law?*

The case for localist readings of law does not translate perfectly when local judges are interpreting statutes that originate with the state legislature rather than a local legislature. When local courts are applying state statutory law—such as when they are hearing misdemeanor cases under state penal codes, contract cases under a state's version of the Uniform Commercial Code, cases under statewide consumer protection law, or other local applications of state statutes—may a local court infuse its statutory interpretation decisions with an effort to vindicate the interests of its locality, or must it serve as a "faithful agent" of the state legislature? Is there a case, in other words, for a kind of "intrastate judicial federalism" in the statutory interpretation of statewide laws? This Section reviews some of the justifications for and mechanics of judicial federalism on the national level and explores whether judicial federalism really can go all the way down to the intrastate level. It ultimately offers affirmative reasons for why we should be comfortable with localist judging against the background of state statutes.

The Supreme Court has explained that "[f]ederalism, central to the [federal] constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to

78 *See* Diller, *supra* note 8, at 1140-41 (comparing preemption at the state and federal levels).

respect."[79] And just as federalism has been used within the federal judicial system to justify state courts' speaking on matters of federal law,[80] might a similar principle be defensible *within* states? For example, if a state decides to outlaw low-waisted pants ("sagging"),[81] can localities fill in statutory gaps (about what qualifies as "sagging," for example) with the local courts' sense of local norms and the interests of the local population? Or should the local court endeavor only to pursue purely and with fidelity the state legislature's policy and intent?[82] Or, for example, may ambiguities in the meaning of "good faith" for the purposes of statutory contract law vary by locality until the highest state court issues an authoritative ruling?

1. Judicial Federalism

Although there remains debate about the optimal levels of autonomy to provide to localities, it is rare to think of local governments as truly sovereign.[83] But this difference does not necessarily destroy the utility of thinking about localities as analogous to states in the typical "reverse-*Erie*" scenario, in which states apply substantive federal law. Even in the environment of dual sovereignty on the national stage, federal law is uncontroversially supreme over state judges[84] just as state law is conventionally deemed supreme over local law.[85] In the federal context, the clear hierarchy might seem to compel a result that forces state courts to be extremely deferential to the federal legislature in the interpretation of federal statutory law[86]—just

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79 Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

80 *See generally* Clermont, *supra* note 17, at 30-31.

81 Lawmakers in Louisiana, for example, proposed such a law. See H.R. 1626, 2004 Leg., Reg. Sess. (La. 2004), *available at* http://www.legis.state.la.us/leg_docs/04RS/CVT6/OUT/0000LE3D.PDF.

82 Of course, for these purposes, we will have to leave to one side the difficulties with the concept of legislative intent. *See* Bellia, *supra* note 17, at 1528 (summarizing the problems with looking to legislative intent: "(1) that legislatures cannot have a real intent, (2) that individual legislators often lack real intent regarding specific statutory applications, and (3) that statutory purposes . . . can be multifarious and malleable").

83 *See, e.g.*, Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 269 (1968) (claiming that localities "are regarded legally as occupying a subordinate status within the state; and, as a rule, they derive their existence and all their powers from the state constitution and state legislative enactments").

84 *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

85 *See* Vanlandingham, *supra* note 83, at 269.

86 *See* Bellia, *supra* note 17, at 1529-52 (finding historically that state judges felt less free to engage in equitable interpretation when interpreting federal statutes than when interpreting state statutes).

as we might conclude that localities are subordinate to states when interpreting state law. When states interpret and apply federal law, state court decisional freedom may lead to disuniformity and forum-shopping, which are presumptively disfavored.[87] By analogy, we might similarly worry about intrastate disuniformity and forum-shopping if localities were permitted to infuse state law with the preferences of local constituencies rather than more aggressively pursuing statewide policies.

However, perhaps surprisingly, in so-called "reverse-*Erie*" cases in which state courts—the "local" courts for these purposes—apply federal law, most courts do not feel constrained to adopt constructions of federal law announced by any federal court below the Supreme Court.[88] And the sky has not fallen, notwithstanding the disuniformity that has invariably resulted.[89] No one, for example, thinks federal law is quite the same in Texas as it is in the Massachusetts.[90] Indeed, this patchwork of applications of federal law might actually be celebrated as "dialectical federalism"[91] or "polyphonic

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87 *See* Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938); Bellia, *supra* note 17, at 1557 (discussing "constitutional limitations" that require state courts to serve as "faithful agents of Congress"); Clermont, *supra* note 17, at 36 (suggesting that federal courts "lean toward applying state law when necessary" to avoid forum shopping or disuniformity). Bellia argues that states did not (in the years 1787 to 1840) and should not see themselves as anything but faithful agents of the federal legislature. *See* Bellia, *supra* note 17, at 1547-52.

88 *See* Hall v. Pa. Bd. of Prob. & Parole, 851 A.2d 859, 863-64 (Pa. 2004) (collecting cases and finding that a "vast majority of state supreme courts" do not hold lower federal court pronouncements on federal law to be binding); Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1173-76 (1999) (noting the structural and practical reasons that state courts cite in declining to be bound by lower federal court decisions).

89 *See generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1584-1606, 1612 (2008) (challenging the traditional notion that uniformity is a proper or practical goal of the federal judiciary and arguing for regional deference).

90 *But see* John Jay, Address Before the Continental Congress (Apr. 13, 1787) (arguing that it would be "irrational" for "the same Article of the same treaty" to be "made to mean one thing in New Hampshire, another thing in New York, and neither the one nor the other of them in Georgia"), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 589, 590 (Philip B. Kurland & Ralph Lerner eds., 1987). Putting to one side whether this is irrational or suboptimal for treaties, it is not at all clear that all average statutes—with their ambiguities, gaps, and omissions—need to carry precisely the same meaning in New Hampshire, New York, and Georgia. Indeed, I doubt very much anyone thinks they do prior to final adjudication at the Supreme Court. One Southern District of New York judge's pronouncement on federal law is not even binding on other judges in the Southern District, to say nothing of judges in the Eastern District of New York or the Northern District of California. And the Republic still stands. In fact, the Republic may actually be improved by this disuniformity, for reasons I explain presently.

91 Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046 (1977).

federalism."[92] Even if some were to criticize the resultant disuniformity on formalistic federal supremacy grounds or a more practical aversion to chaos, there are reasons not to be too persnickety about state courts applying federal law in a local way, at least interstitially as ambiguous or vague federal statutes are litigated on their way to the Supreme Court.

After all, there are several plausible ways of making sense of the principle of supremacy. Even if one concedes that the Supreme Court has the final word on the interpretation of federal statutes and federal law,[93] it is not obvious that federal supremacy requires that lower federal court constructions control state courts.[94] Accordingly, it is consistent with a credible vision of supremacy that state courts may diverge from lower federal court interpretations of federal law without running afoul of the principle.[95] Federal supremacy surely entails that no federal jurisdiction is bound by a state interpretation of a federal law, but it does not obviously disable the state interpretation from controlling within the state courts until the Supreme Court declares what federal law means. Yet just because this type of supremacy would *permit* a level of disuniformity does not make it desirable. Proving the desirability of this model requires a more sustained argument.

The key to the desirability of this mode of judicial federalism—moderate amounts of "chaos" notwithstanding—is that state-level judges can provide valuable information to federal officials about how state residents would prefer federal law to be implemented when federal law otherwise does not provide clear text or reconstructions of legislative intent. Because there is a symbiotic and relational dimension to state implementation of federal law,[96]

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92 Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005). *See generally* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409 (1999).

93 This is not a universally conceded point. *See, e.g.*, Ashutosh Bhagwat, Cooper v. Aaron *and the Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087, 1096-97 (2008) (arguing that state governments do not have an obligation to implement Supreme Court decisions on federal law).

94 *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1998) (Thomas, J., concurring) ("An Arkansas trial court is bound by this Court's (and by the Arkansas Supreme Court's and Arkansas Court of Appeals') interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must."); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 45, at 294 n.25 (6th ed. 2002).

95 *But see* Bellia, *supra* note 17, at 1552-57 (suggesting a different vision of supremacy that renders state court control over federal law and its application very limited).

96 *Cf.* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 125 (1995) ("In sum, the states in our federal system serve not only as a countervailing force to federal power, but as an additional moderator of their own internal conflicts."); Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 531 (2011) (arguing in favor of enforcing federalism through a conception of relational federalism). Obviously, some have a quite different view that emphasizes a more dominant role of federal law over state courts. *See* Redish & Sklaver, *supra* note 18, at 73 (concluding that "the enormous federal deference to

there is an affirmative reason to allow and encourage state courts to pursue "local" preferences when federal law is unclear. After all, the citizens of states—who often directly elect their state judges but have virtually nothing to do with the federal judiciary—are also citizens of the nation. Meeting citizens' interests and preferences contributes to federal legitimacy, even if it does not promote interstate uniformity.

True enough, federal lawmaking is ostensibly controlled by the bicameralism and presentment provisions of Article I, Section 7 in the U.S. Constitution, which does not think of state courts as partners in federal lawmaking.[97] But state courts are generally thought to have "inherent authority" and are "presumptively competent[] to adjudicate claims arising under" federal law[98] with the understanding that this fact can lead to disuniformity. If uniformity had been the Constitution's primary value, exclusive rather than concurrent jurisdiction for federal claims would have been a more natural choice, and lower federal courts would have been required to follow one another. Instead, in the current system—which gives state courts a berth of interpretive freedom—the federal government can learn about state preferences, and that input improves legitimacy and informs federal judges and other federal officials about how the law works or does not work on the ground. If states fall too far out of line, federal review is generally possible, at least in theory,[99] and federal lawmakers and bureaucrats can close the legal gaps that create opportunities for disuniformity in the first place by passing new laws and implementing new regulations. This vision respects hierarchy, supremacy, and a modicum of uniformity on the one hand, all while generating the benefits of better information, policy experimentation, and regime legitimacy on the other.

There are still other practical reasons not to prohibit state courts from speaking with some interpretive freedom when deciding hard cases under federal law. To wit, because many state judges are elected or find themselves within a very different political climate than their federal counterparts, it

state judiciaries that the Supreme Court currently requires from the lower federal courts actually stands the governing theory of judicial federalism on its head").

97 *See* Bellia, *supra* note 17, at 1548-52 ("[F]or state courts to self-consciously interpret federal statutes to make new federal law in forward-looking ways would jettison the specific procedures by which the Constitution provides that new federal law may be made." (citing Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001))).

98 Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

99 *See* 28 U.S.C. § 1257 (2006) (authorizing Supreme Court review of state court judgments on federal law). Practically speaking, the Supreme Court can only review a small fraction of state interpretations of federal law.

might be quite difficult for them to remove their "judico-cultural vestment"[100] just for a class of federal cases; indeed, state courts are often hearing federal claims appended to state claims. Therefore, if state elections free state judges to function less as "faithful agents" in state law, perhaps we should not worry if that interpretive disposition bleeds into the interpretation of federal law; that is again a product of constitutional design. For structural reasons, state judges are not easily characterized as "faithful agents"[101] of the federal legislature.[102] The faithful-agent principle was largely developed as a model of statutory interpretation within the federal system—at least in part owing to judges' appointive status and life tenure. The principle is more attenuated as applied to state judges, who have other important fidelities, such as constituents, if a judge is elected, and the state constitution more generally.[103]

Ultimately, normative and practical reasons align to permit and encourage state judges to have some interpretive freedom in their understanding of federal law, arguably to promote concerns at the state level.[104] Asking state courts to predict how the Supreme Court would rule rather than how their own jurisdiction wants federal law to be implemented may be asking them to do something well outside their competence.[105] They often have more credible democratic authority to interpret law in a manner favorable to their own localities. This authority does not imply that state judges may

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100 Thanks to Jim Brudney for the turn of phrase. The core of the idea is that judges routinely subject to popular election may be responsive to their constituents as a cultural matter; it would be hard to have those very same judges switch cultural affinities when interpreting federal law.

101 *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991-92, 1099-1105 (2001) (exploring the "faithful agent" view of the judge in statutory interpretation cases).

102 Bellia presents evidence that he believes shows that founding-era state judges saw themselves as faithful agents. *See generally* Bellia, *supra* note 17, at 1529-52 ("[S]tate courts [in the thirty years following ratification] generally understood their proper role in interpreting federal statutes to be that of discerning and enforcing the directives of Congress."). But with the rise of state judicial selection mechanisms that were unknown in the period Bellia studied, it is very hard to draw any clean conclusions about what state judges can plausibly be expected to do today.

103 *See generally* Bruhl & Leib, *supra* note †, at 1272 ("[T]he [state judges'] decisional freedom's best justification derives from features of state constitutional structure and pragmatic knowledge about state politics, state legislatures, and constituent preference.").

104 *But see* Bellia, *supra* note 17, at 1548-50 (suggesting that the Supremacy Clause encourages state courts to enforce legislative objectives when interpreting federal statutes, rather than their own "equitable interpretations"); Clermont, *supra* note 17, at 30-32 (arguing that, while state courts should make decisions "in accordance with existing federal law by trying to discern what the federal courts would decide is the law," state courts should not consider themselves "actually bound, rather than merely informed, by the local federal courts' rulings").

105 *But see* Clermont, *supra* note 17, at 31-32 ("The better view . . . is that the state court should try to determine what the U.S. Supreme Court would rule. . . . This is no place to let a thousand flowers bloom.").

completely ignore the risks of interjurisdictional disuniformity, but uniformity is just one relevant value to weigh against others.

2. Judicial Federalism All the Way Down?

These arguments may not apply in the intrastate context, however, for a few reasons. First, because municipalities are not conventionally viewed as legally sovereign,[106] providing their judges with the perquisites of sovereignty is necessarily less justified. Similarly, notwithstanding their oath to uphold the federal Constitution, state judges are generally allegiant to the state rather than the federal government in the "reverse-*Erie*" context. This state allegiance makes it very difficult to view state courts as "faithful agents" of the federal legislature or the federal court system. By contrast, when local judges apply state law, they are much more likely to acknowledge the reach of the state into the locality.[107] Finally, although it was possible in the purely local context when comparing the democratic credibility of local judicial elections with local legislative elections to reject a "faithful agent" model, the state legislature likely has more substantial democratic merits relative to local judicial elections, making it much more attractive to see local judges as "faithful agents" of the state legislature. None of these arguments distinguishing intrastate judicial federalism, however, is dispositive.

In considering whether locally elected judges should decide difficult state statutory cases with some interpretive freedom to pursue localist agendas, there cannot be a singular answer for all local judges. Each state's legal culture is potentially sui generis, and each state's relationship with its local governments is regulated by a patchwork of constitutional and statutory provisions that could help determine the degree to which local interpretation of statewide law may be tolerated.[108] Furthermore, different subject areas likely carry different mandates for state uniformity: for example, it might be more important to have consistent rulings on employees' rights than on how much "sag" constitutes indecent exposure. And good faith standards in

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106 *See supra* note 83 and accompanying text.

107 Most county court judges in Nebraska are unequivocal that they are part of the state judiciary—even though they hear cases under local law. They do not see themselves as local, most likely because of their original appointment by the governor rather than local election (though they stand for retention elections), the local legal culture, and the lack of local home rule. *See supra* note 21. Judges in Ohio, by contrast, tend to think of themselves as part of the local government (with some exceptions). Nevertheless, they recognize the reach of the state into their jurisdictions, especially when they are adjudicating cases under state law. *See supra* note 34.

108 Perhaps when home-rule provisions extended to localities are more generous, the local judge may fairly think of herself as having been granted some local legal autonomy over state law.

contract law might affect primary behavior in a way that militates in favor of requiring intrastate uniformity.

Moreover, how a local court is created should influence a judge's interpretation of state law. When state law creates the local courts directly, a faithful agency relationship is more likely to exist between the state legislature and the local court, such that it is easier to dismiss a local judge's ability to pursue a localist agenda. When state law delegates to localities the ability to establish their own courts, however, there is a clear disruption of the principal–agent relationship between state legislature and local court. This distance should perhaps enable a local judge to see her local population as her primary principal.

Addressing the first significant difference between the federal system and the intrastate system, it is important to remember that sovereignty is not an essential part of the argument for allowing states leeway in their interpretation of federal law in reverse-*Erie* contexts absent an authoritative reading from the Supreme Court.[109] Sovereignty does much more work in the plain vanilla *Erie* context in which federal courts are bound—supremacy notwithstanding—to apply state substantive law to disputes arising under diversity jurisdiction.[110] Thus, the fact that local courts do not necessarily represent a dueling sovereignty does not decide the question. If the same benefits that accrue interstate apply in the picture of intrastate judicial federalism sketched above, the same regime could be adopted within a state: local courts may apply statewide law with local flavor, balancing the need for uniformity, but not feeling bound until an authoritative case emerges from the state's highest court.

The second difference in the intrastate context is the fact that local judges may feel just as bound to the state as to the locality. This dual allegiance, however, does not vitiate the possibility for localist interpretations of state laws. Indeed, the state can choose not to have any intrastate diversity in readings of statewide statutes by more directly controlling local judiciaries and integrating them more fully into the state system. For example, in Nebraska's county courts, district-based judging can still be neatly woven into a state judicial system with very little invitation for localist judging; Nebraska

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109 *But see* Clermont, *supra* note 17, at 43 ("[T]he same notion of cooperative federalism applies in both [*Erie* and reverse-*Erie*] situations, calling for comity when one sovereign is enforcing the other's law. The problem is the same.").

110 *See* 28 U.S.C. § 1652 (2006) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

uses gubernatorial appointment prior to retention elections.[111] Ultimately, however, the very choice to make judges locally accountable through elections underwrites a certain interpretive freedom. And even if local judges freely interpret state law, there is no danger that important disuniformities will remain unchecked through the litigation process, because local court decisions are appealable into the state system.[112] This interpretive freedom is not tantamount to an invitation to ignore clear state law; the discretion to promote local interests through localist judging works interstitially (just as in the reverse-*Erie* context above), which is exactly what makes it so useful as a feedback mechanism to state courts and state legislatures. Indeed, it works better intrastate because appeals to higher courts within the states can be taken as of right, which is a better supremacy mechanism than discretionary Supreme Court review of highest state courts.

But why isn't the local judge required to be a faithful agent of the state legislature? A municipality's relationship with the state government is not similar to the state's relationship to the federal government, because the state may disband and control the municipality at will.[113] It might seem like a natural outgrowth of this dominance that local judges are instrumentalities of the state, at least when interpreting state law.

Yet this conclusion is not necessary, precisely because of the ambiguity in what *dominance* means. Just as there are different ways of thinking about the hierarchical nature of judicial federalism, which flows from a constitutional commitment to federal *supremacy*, dominance does not have one unambiguous meaning. Ultimately, even if it is true that local judges should be faithful agents of the state legislature as a general matter, dominance as such might be triggered only when local needs directly conflict with state law. But nothing about dominance (and the looming threat of dissolution by the state) undermines the design choice of local elections for local judges, which all but ensures that these judges are serving two different masters: the state constituency and the local constituency. (This, indeed, may be the state's intention.) The local constituency influences the local judge's interstitial

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111 Nebraska's judges were nearly uniform in their self-conscious allegiance to state over locality, even though they are subject to local retention elections. *See* sources cited *supra* note 21.

112 *See infra* Appendix.

113 This is, after all, the most canonical of interpretations of the most recognized local government case, *Hunter v. City of Pittsburgh*, which stated,

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . [T]he powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.

207 U.S. 161, 178 (1907).

decisionmaking, because the judge risks losing her job otherwise. These institutional dynamics cannot be wished away, and they undermine the claim of faithful agency to a singular principal—the State.

In contexts where the state's policy preferences are clear within the statutory scheme, there is little doubt that the local court has an obligation to follow the state's authoritative interpretation. This obligation gives due respect to dominance, too. Interpretive freedom should not apply to this set of cases. But when state judicial and statutory pronouncements are ambiguous or vague, localist judging may be permissible. Contentious issues may be susceptible to diverse interpretations. The most foundational work in local government law rightly highlights that different localities have different environments, which are attractive to different kinds of residents that might prefer different kinds of local conditions.[114] Those conditions can be pursued by local legislatures and local judges, not just by states. Dominance requires that state high courts and the state legislature have the final say within the state. But in the interstices—conceptually and temporally—local courts may be localist in orientation, garnering some of the benefits of interjurisdictional competition for the hearts and minds of citizens, without needing to hinder statewide solutions to genuinely larger and interlocal policy problems.

This position is ultimately both "pro-local" and conscious of the pathologies of excessive localism. It allows narrow local policy experimentation,[115] while retaining direct state supervision on a case-by-case basis. This case-by-case oversight is not possible through the blunt mechanisms of one-size-fits-all home rule and preemption decisions at the state legislative or constitutional level. Those wholesale decisions are less easily calibrated to optimal governance than a specific judicial application of a statewide statute at the retail level. State judges hearing appeals—a class of judges seen somewhat more easily as serving the state directly (even when elected by a larger constituency)—can vindicate state interests when necessary. Structural state dominance over localities also means that state *legislatures* and executives are able to close gaps in their earlier statutes. But these other

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114 *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) ("[A]t the local level . . . the consumer-voter moves to that community whose local government best satisfies his set of preferences."); *see also* Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332, 382 (2003) ("[H]orizontal competition among states and localities helps to ensure that citizens will have an array of governmental options from which to choose and that governments will have a marketlike incentive to satisfy citizens' demands in increasingly different ways.").

115 *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1135 (2012) (exploring the role of local policy experimentation in the debates about municipal legislative freedom). The Diller discussion could be expanded to support a measure of "intrastate judicial federalism," embedded in a hierarchical and supervised system of localist activism.

state institutions can reserve their curtailment of localist judging for matters of more substantial import to the health of the state and statewide goals.

Yet it remains important to note that state judges and state legislatures need not always pursue uniformity when they design statewide schemes. State legislatures and state-level judiciaries may ultimately prefer the "new governance" model—rather than preemption[116]—which reinforces localist activism through enactment of broader state laws that "increase flexibility, improve participation, foster experimentation and deliberation, and accommodate regulation by multiple levels of government."[117] Even with only modest and statutory—rather than constitutional—home-rule provisions, localities have retained autonomy in the face of state authority, moderate conflicts with state law notwithstanding, because states have appreciated the role of local self-determination in governance.[118] Even when the state apparatus decides to pull rank and flash its dominance, the vision of intrastate judicial federalism suggested here gives those state-level actors the benefit of more local knowledge about how to plan ahead.[119] If, with respect to a particular policy, a state prefers uniformity and preemption, it will at least benefit from the learning made possible through interstitial localist judging.

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116 For evidence that states do not always opt for preemption, their dominance notwithstanding, see Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 17-27 (2006).

117 David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 539 (2006).

118 Local self-determination plays a positive role so long as there are no harmful external effects. *See* Briffault, *supra* note 116, at 19 ("[I]f it is a question of local political structure and there are no external effects and no state harm from intrastate variations, local innovations can prevail notwithstanding the conflict with state law.").

119 These ideas are indebted in part to the kind of governance studied and promoted in the work of Chuck Sabel. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 428 (1998) (identifying a new form of decentralized government in which local knowledge is harnessed to inform individual, regional, and national decisions through information pooling allocated according to policy problems rather than formal hierarchy); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 841-52 (2000) (arguing that drug courts, as "experimentalist institutions," efficiently pool information, which better informs remedial plans at both individual and aggregate levels); Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1297-1300 (2012) (reviewing the structure of new contextualizing regimes that blur public and private distinctions while still utilizing normative output from stakeholders); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 82 (2011) ("Experimentalism emphasizes stake-holder participation to elicit and reconcile the diverse views and interests of people distinctively affected by and knowledgeable about the matters in issue."). Although Sabel saw how drug courts could fit into the picture, he has not generalized to see all local courts as "experimentalist" actors within state systems.

D. *Questions for Further Study*

The argument for localist judging in a narrow band of hard cases seems to work for both local ordinances and state statutes. If it works, it works as a result of at least three characteristics of local courts, which I have treated as essential to their design, but which are, in fact, not true of every court judges or citizens perceive as a local court. Local courts, for the purposes of the inquiry here, are presumptively staffed by professional lawyers, are directly supervised by the state judiciary through a system of appeals, and have elected judges. Without these features, the argument for localist judging is less clearly persuasive.

If local courts are staffed with laypeople, the basic conditions for the rule of law may not be met.[120] And with such inadequate rule of law in the courtroom, giving more discretion to laypeople within our legal system is treacherous. Moreover, much of the argument for localist judging in this Article is predicated on state oversight; therefore, if a local court is not reviewable within the state system, this paper does not provide the same support for interpretive freedom.[121] In such cases, the communication dynamics could more easily break down between state and locality. And it is that communicative relationship that makes localist judging productive in experimentalist policymaking. Without direct supervision, the dominance of the state also recedes, inviting too many of the pathologies of excessive localism already identified by critics of localism.

Finally, much of the argument for localist judging here is predicated on the elective status of the judges in the local courts. This argument primarily relies on observations made elsewhere.[122] Direct judicial election accounts for much of what disrupts the faithful agent account of judging in statutory interpretation cases. Back-end accountability and specific state design choices to make local judges accountable to their communities invites interpretive discretion in a manner that a state-centered appointment system for selecting local judges without accountability may not. Whether appointed local judges deserve similar interpretive freedom has not been explored here, though the fact that many appointed judges desire reappointment

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120 In this vein, see the several *New York Times* articles on New York's village and town courts, *supra* note 2.

121 On the other hand, a lack of state oversight or review mechanisms may actually provide additional justification for localist judging. As Professor Bruhl suggested to me in his comments reviewing this manuscript, it may be that a constitutional design allowing for less review could be seen as a state choice to allow for local variation. Still, the dangers of this design may outweigh the benefits of local experimentation.

122 *See* Bruhl & Leib, *supra* note †, at Part III.B.

from local political actors, whose preferences they may try to estimate in their decisionmaking, may support a form of interpretative freedom, too.[123]

The argument supporting localist judging also raises a few other questions that cannot be explored in this context. For example, there are cases of statutory interpretation in which state judges have a plain-vanilla corollary to the *Erie* problem: they may need to apply local law even though they are quite clearly state judges. What ought they do in such circumstances? Does their appointive or elective status have any bearing on whether they should pursue statewide preferences, the preferences of their own constituents, or the preferences of the local community that passed the law itself? A more comprehensive articulation of a vision for "intrastate judicial federalism" would need to address those issues.

There are also difficult questions about whether the argument for localist judging works at higher level courts constituted through district-based electoral systems. Examples include Louisiana and Oklahoma, whose highest court judges are subject to elections within districts rather than statewide.[124] Do those judges have any obligation or permission to pursue the interests of their districts rather than their states? This Article does not provide an answer to this question, but it at least provides some analytics to evaluate likely possibilities.

It might also be possible to use the analytics surrounding professionalism, supervision, and elective status to assess whether any similar interpretive freedom is permissible or desirable in cases involving the common law and/or constitutional law. I have focused on statutory interpretation here, in part because the bulk of these courts' workloads involves statutory application. It is also much clearer to see how the "faithful agent" model associated with statutory interpretation in the federal courts is disrupted in the state and local environment. Theories of judging within the common-law and constitutional-adjudication traditions may reveal fewer places to root such arguments for interpretive discretion.[125]

CONCLUSION

We know too little about how citizens experience law in their local courts and how judges think of their roles when they are elected by local constituencies. Much more research is necessary to understand these courts'

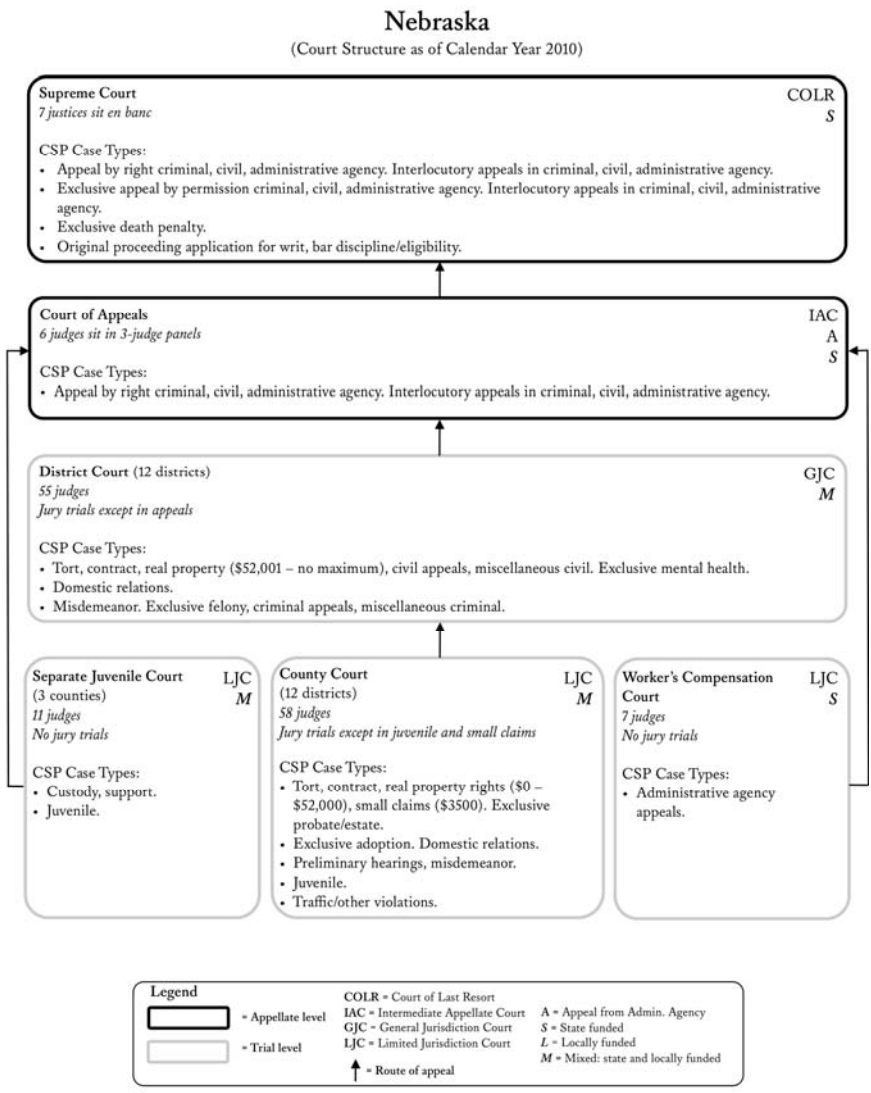
123 Thanks to Professor Richard Briffault for the suggestion.

124 *See* LA. CONST. art. V, § 4; OKLA. CONST. art. VII, § 3.

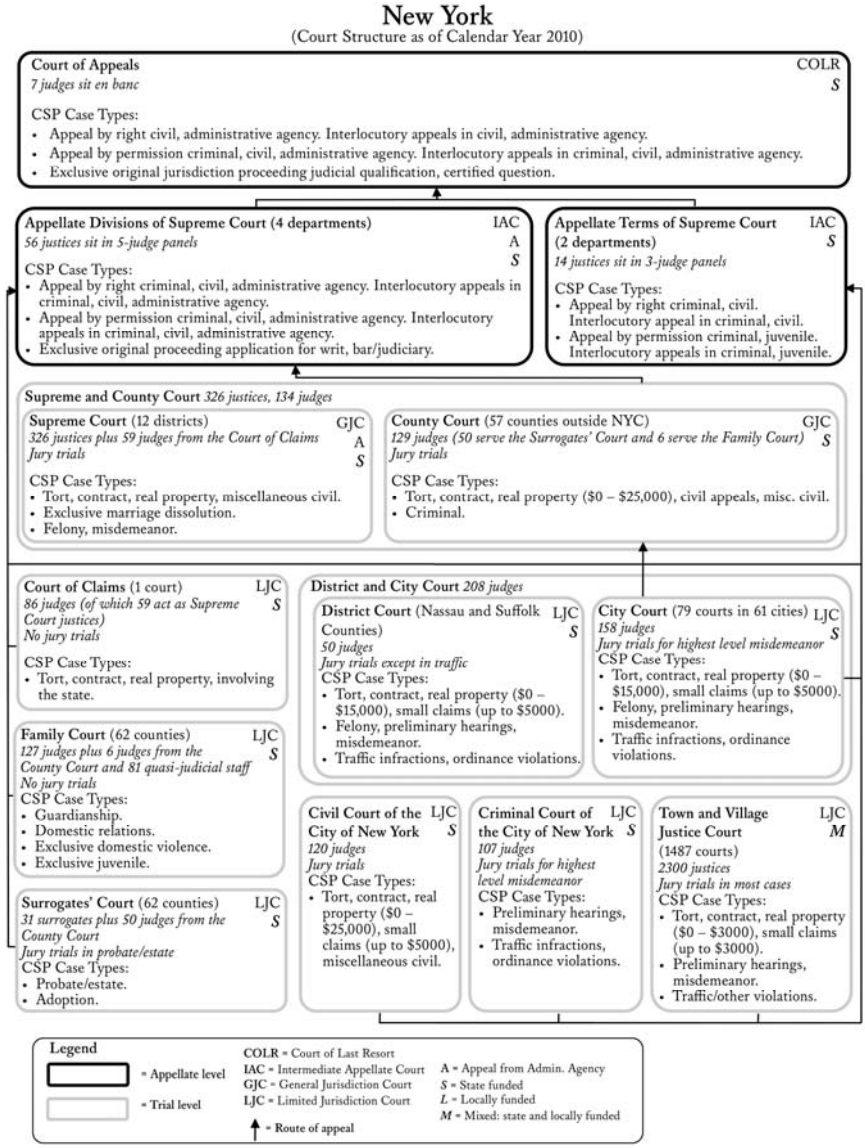
125 My first effort to think through the roles of the judge in these three classes of cases can be found in Leib, Ponet & Serota, *supra* note 65.

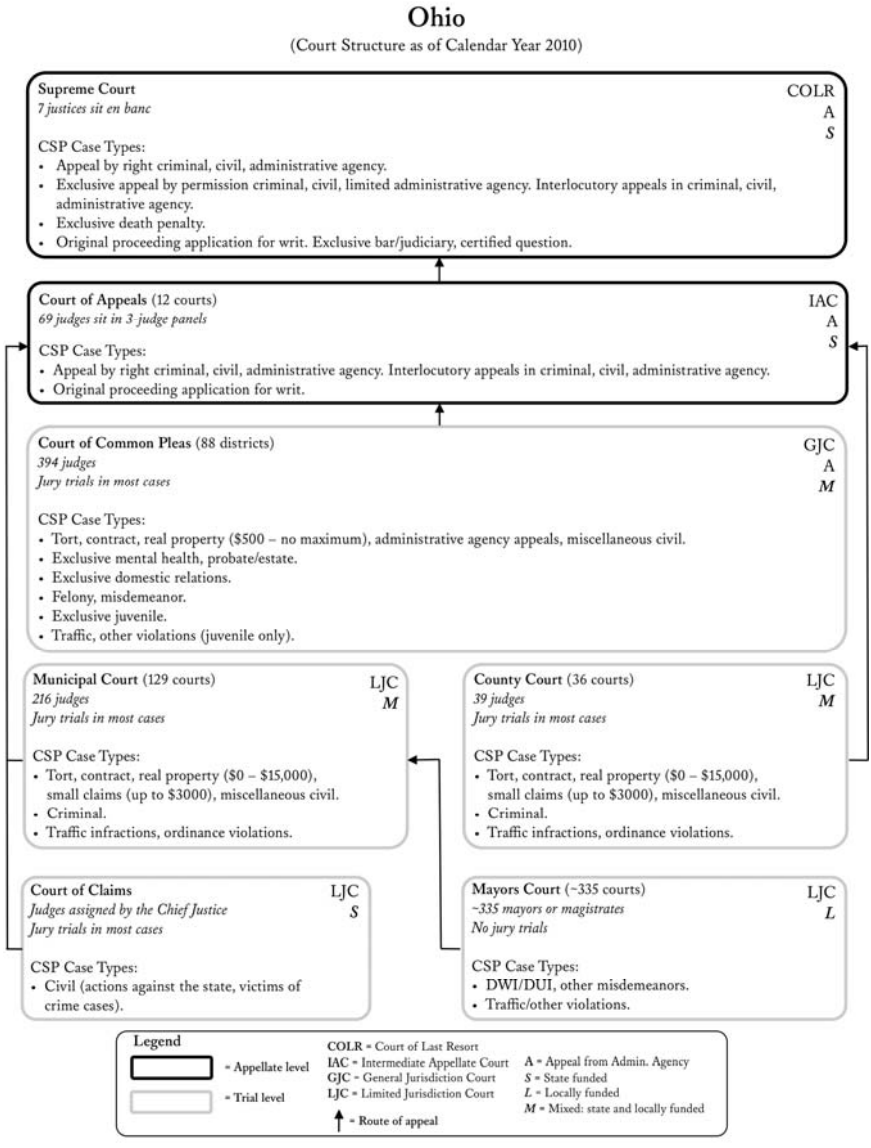
roles in sustaining the legitimacy of our legal system and how judges in these courts perceive their complex roles within their communities. This Article posits that local courts are often closely tied up with the structures of local government and may—accordingly but perhaps counter-intuitively—have some interpretive freedom in how they read ordinances that emerge from local governments and laws that emerge from state legislatures. In short, local courts may sometimes pursue localist statutory interpretation in a class of hard cases, and it can be normatively attractive that they do.

APPENDIX: STATE JUDICIAL ORGANIZATIONAL CHARTS[126]



126 A useful application for reviewing state court structures is available at the Court Statistics Project. *See State Court Structure Charts*, CT. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (last visited Feb. 8, 2013). I have adapted a few graphical hierarchies here to enable readers to see where "local courts" appear within the tapestry of state judicial systems.


New York
(Court Structure as of Calendar Year 2010)
Court of Appeals
7 judges sit en banc
COLR
S
CSP Case Types:
• Appeal by right civil, administrative agency. Interlocutory appeals in civil, administrative agency.
• Appeal by permission criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive original jurisdiction proceeding judicial qualification, certified question.
Appellate Divisions of Supreme Court (4 departments)
56 justices sit in 5-judge panels
IAC
A
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Appeal by permission criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive original proceeding application for writ, bar/judiciary.
Appellate Terms of Supreme Court (2 departments)
14 justices sit in 3-judge panels
IAC
S
CSP Case Types:
• Appeal by right criminal, civil. Interlocutory appeal in criminal, civil.
• Appeal by permission criminal, juvenile. Interlocutory appeals in criminal, juvenile.
Supreme and County Court 326 justices, 134 judges
Supreme Court (12 districts)
326 justices plus 59 judges from the Court of Claims
Jury trials
GJC
A
S
CSP Case Types:
• Tort, contract, real property, miscellaneous civil.
• Exclusive marriage dissolution.
• Felony, misdemeanor.
County Court (57 counties outside NYC)
129 judges (50 serve the Surrogates' Court and 6 serve the Family Court)
Jury trials
GJC
S
CSP Case Types:
• Tort, contract, real property ($0 – $25,000), civil appeals, misc. civil.
• Criminal.
Court of Claims (1 court)
86 judges (of which 59 act as Supreme Court justices)
No jury trials
LJC
S
CSP Case Types:
• Tort, contract, real property, involving the state.
Family Court (62 counties)
127 judges plus 6 judges from the County Court and 81 quasi-judicial staff
No jury trials
LJC
S
CSP Case Types:
• Guardianship.
• Domestic relations.
• Exclusive domestic violence.
• Exclusive juvenile.
Surrogates' Court (62 counties)
31 surrogates plus 50 judges from the County Court
Jury trials in probate/estate
LJC
S
CSP Case Types:
• Probate/estate.
• Adoption.
District and City Court 208 judges
District Court (Nassau and Suffolk Counties)
50 judges
Jury trials except in traffic
LJC
S
CSP Case Types:
• Tort, contract, real property ($0 – $15,000), small claims (up to $5000).
• Felony, preliminary hearings, misdemeanor.
• Traffic infractions, ordinance violations.
City Court (79 courts in 61 cities)
158 judges
Jury trials for highest level misdemeanor
LJC
S
CSP Case Types:
• Tort, contract, real property ($0 – $15,000), small claims (up to $5000).
• Felony, preliminary hearings, misdemeanor.
• Traffic infractions, ordinance violations.
Civil Court of the City of New York
120 judges
Jury trials
LJC
S
CSP Case Types:
• Tort, contract, real property ($0 – $25,000), small claims (up to $5000), miscellaneous civil.
Criminal Court of the City of New York
107 judges
Jury trials for highest level misdemeanor
LJC
S
CSP Case Types:
• Preliminary hearings, misdemeanor.
• Traffic infractions, ordinance violations.
Town and Village Justice Court
(1487 courts)
2300 justices
Jury trials in most cases
LJC
M
CSP Case Types:
• Tort, contract, real property ($0 – $3000), small claims (up to $3000).
• Preliminary hearings, misdemeanor.
• Traffic/other violations.
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
L = Locally funded
M = Mixed: state and locally funded


Ohio
(Court Structure as of Calendar Year 2010)
Supreme Court
7 justices sit en banc
COLR
A
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency.
• Exclusive appeal by permission criminal, civil, limited administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive death penalty.
• Original proceeding application for writ. Exclusive bar/judiciary, certified question.
Court of Appeals (12 courts)
69 judges sit in 3-judge panels
IAC
A
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Original proceeding application for writ.
Court of Common Pleas (88 districts)
394 judges
Jury trials in most cases
GJC
A
M
CSP Case Types:
• Tort, contract, real property ($500 – no maximum), administrative agency appeals, miscellaneous civil.
• Exclusive mental health, probate/estate.
• Exclusive domestic relations.
• Felony, misdemeanor.
• Exclusive juvenile.
• Traffic, other violations (juvenile only).
Municipal Court (129 courts)
216 judges
Jury trials in most cases
LJC
M
CSP Case Types:
• Tort, contract, real property ($0 – $15,000), small claims (up to $3000), miscellaneous civil.
• Criminal.
• Traffic infractions, ordinance violations.
County Court (36 courts)
39 judges
Jury trials in most cases
LJC
M
CSP Case Types:
• Tort, contract, real property ($0 – $15,000), small claims (up to $3000), miscellaneous civil.
• Criminal.
• Traffic infractions, ordinance violations.
Court of Claims
Judges assigned by the Chief Justice
Jury trials in most cases
LJC
S
CSP Case Types:
• Civil (actions against the state, victims of crime cases).
Mayors Court (~335 courts)
~335 mayors or magistrates
No jury trials
LJC
L
CSP Case Types:
• DWI/DUI, other misdemeanors.
• Traffic/other violations.
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
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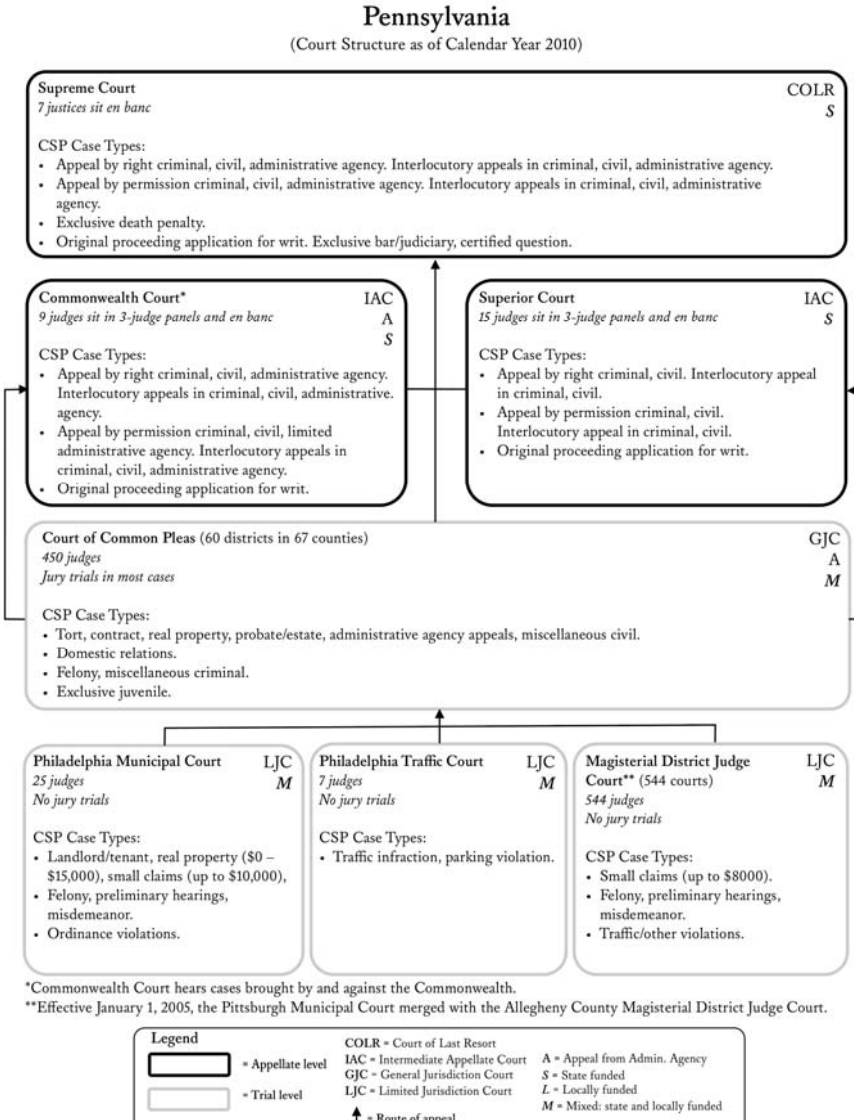
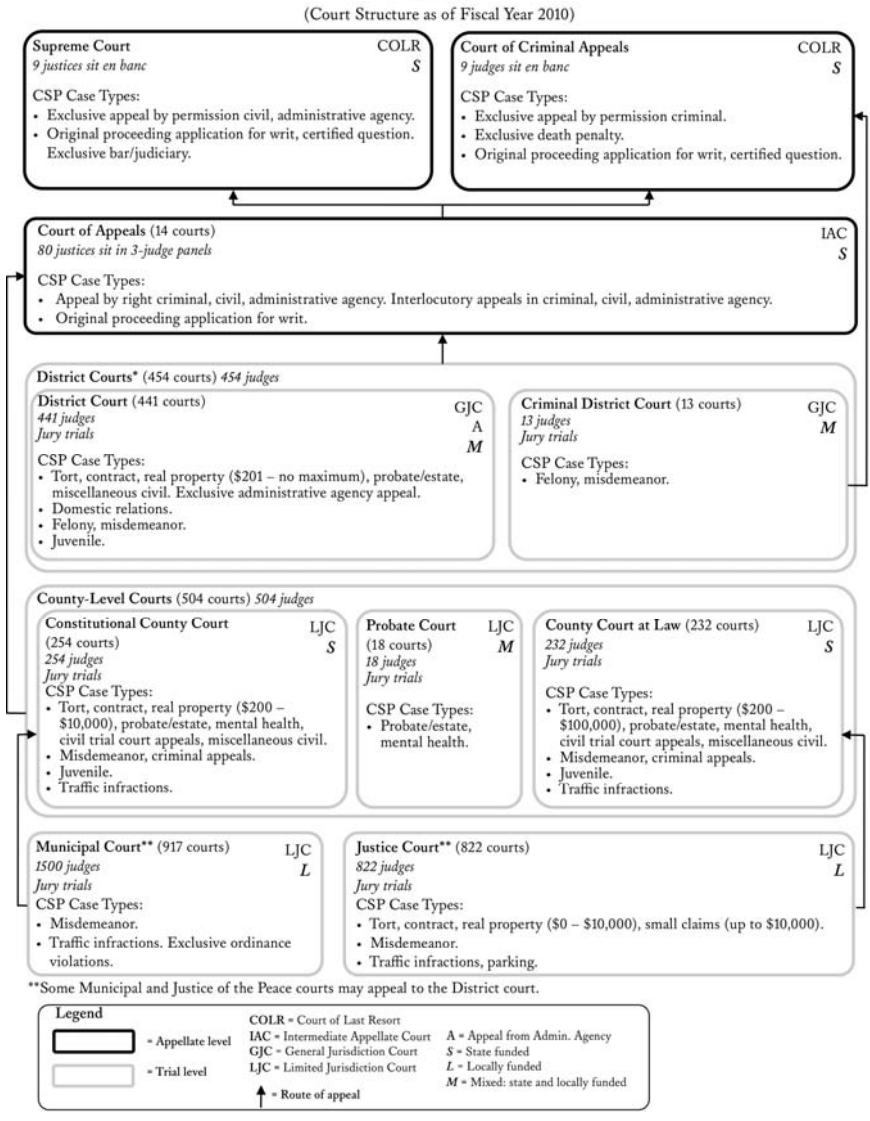
M = Mixed: state and locally funded


Pennsylvania
(Court Structure as of Calendar Year 2010)
Supreme Court
7 justices sit en banc
COLR
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Appeal by permission criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive death penalty.
• Original proceeding application for writ. Exclusive bar/judiciary, certified question.
Commonwealth Court*
9 judges sit in 3-judge panels and en banc
IAC
A
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative. agency.
• Appeal by permission criminal, civil, limited administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Original proceeding application for writ.
Superior Court
15 judges sit in 3-judge panels and en banc
IAC
S
CSP Case Types:
• Appeal by right criminal, civil. Interlocutory appeal in criminal, civil.
• Appeal by permission criminal, civil. Interlocutory appeal in criminal, civil.
• Original proceeding application for writ.
Court of Common Pleas (60 districts in 67 counties)
450 judges
Jury trials in most cases
GJC
A
M
CSP Case Types:
• Tort, contract, real property, probate/estate, administrative agency appeals, miscellaneous civil.
• Domestic relations.
• Felony, miscellaneous criminal.
• Exclusive juvenile.
Philadelphia Municipal Court
25 judges
No jury trials
LJC
M
CSP Case Types:
• Landlord/tenant, real property ($0 – $15,000), small claims (up to $10,000),
• Felony, preliminary hearings, misdemeanor.
• Ordinance violations.
Philadelphia Traffic Court
7 judges
No jury trials
LJC
M
CSP Case Types:
• Traffic infraction, parking violation.
Magisterial District Judge Court** (544 courts)
544 judges
No jury trials
LJC
M
CSP Case Types:
• Small claims (up to $8000).
• Felony, preliminary hearings, misdemeanor.
• Traffic/other violations.
*Commonwealth Court hears cases brought by and against the Commonwealth.
**Effective January 1, 2005, the Pittsburgh Municipal Court merged with the Allegheny County Magisterial District Judge Court.
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
L = Locally funded
M = Mixed: state and locally funded


Texas
(Court Structure as of Fiscal Year 2010)
Supreme Court
9 justices sit en banc
COLR
S
CSP Case Types:
• Exclusive appeal by permission civil, administrative agency.
• Original proceeding application for writ, certified question. Exclusive bar/judiciary.
Court of Criminal Appeals
9 judges sit en banc
COLR
S
CSP Case Types:
• Exclusive appeal by permission criminal.
• Exclusive death penalty.
• Original proceeding application for writ, certified question.
Court of Appeals (14 courts)
80 justices sit in 3-judge panels
IAC
S
CSP Case Types:
• Appeal by right criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Original proceeding application for writ.
District Courts* (454 courts) 454 judges
District Court (441 courts)
441 judges
Jury trials
GJC
A
M
CSP Case Types:
• Tort, contract, real property ($201 – no maximum), probate/estate, miscellaneous civil. Exclusive administrative agency appeal.
• Domestic relations.
• Felony, misdemeanor.
• Juvenile.
Criminal District Court (13 courts)
13 judges
Jury trials
GJC
M
CSP Case Types:
• Felony, misdemeanor.
County-Level Courts (504 courts) 504 judges
Constitutional County Court
(254 courts)
254 judges
Jury trials
LJC
S
CSP Case Types:
• Tort, contract, real property ($200 – $10,000), probate/estate, mental health, civil trial court appeals, miscellaneous civil.
• Misdemeanor, criminal appeals.
• Juvenile.
• Traffic infractions.
Probate Court
(18 courts)
18 judges
Jury trials
LJC
M
CSP Case Types:
• Probate/estate, mental health.
County Court at Law (232 courts)
232 judges
Jury trials
LJC
S
CSP Case Types:
• Tort, contract, real property ($200 – $100,000), probate/estate, mental health, civil trial court appeals, miscellaneous civil.
• Misdemeanor, criminal appeals.
• Juvenile.
• Traffic infractions.
Municipal Court** (917 courts)
1500 judges
Jury trials
LJC
L
CSP Case Types:
• Misdemeanor.
• Traffic infractions. Exclusive ordinance violations.
Justice Court** (822 courts)
822 judges
Jury trials
LJC
L
CSP Case Types:
• Tort, contract, real property ($0 – $10,000), small claims (up to $10,000).
• Misdemeanor.
• Traffic infractions, parking.
**Some Municipal and Justice of the Peace courts may appeal to the District court.
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
L = Locally funded
M = Mixed: state and locally funded


West Virginia
(Court Structure as of Calendar Year 2010)
Supreme Court of Appeals
5 justices sit en banc
COLR
S
CSP Case Types:
• Exclusive appeal by permission criminal, civil, administrative agency. Interlocutory appeals in criminal, civil, administrative agency.
• Exclusive original jurisdiction application for writ, bar/judiciary, certified question.
Circuit Court (55 counties, 31 circuits)
70 judges
Jury trials
GJC
A
M
CSP Case Types:
• Tort, contract, real property ($300 – no maximum). Exclusive probate/estate, mental health, civil appeals.
• Domestic relations.
• Misdemeanor. Exclusive felony, criminal appeals.
• Juvenile.
Magistrate Court (55 counties)
158 magistrates
Jury trials
LJC
S
CSP Case Types:
• Small claims ($0 – $5000), mental health.
• Emergency civil protection/restraining orders.
• Preliminary hearings, misdemeanor.
• Juvenile.
• Traffic infractions.
Family Court (27 circuits)
45 judges
No jury trials
LJC
M
CSP Case Types:
• Domestic relations.
• Domestic violence.
Municipal Court (122 courts)
122 judges
Jury trials
LJC
L
CSP Case Types:
• DWI/DUI.
• Traffic infractions. Exclusive parking, ordinance violations.
Legend
= Appellate level
= Trial level
COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
= Route of appeal
A = Appeal from Admin. Agency
S = State funded
L = Locally funded
M = Mixed: state and locally funded