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## RESPONSE

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### WHAT IS LOCALIST JUDGING AND WHY DOES IT MATTER?

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In response to Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013).

Judges are local officials too, Ethan Leib helpfully reminds us in his thought-provoking Article, *Localist Statutory Interpretation*.<sup>1</sup> Like state court judges in our federal system, local judges—a category defined by Leib to include only elected jurists<sup>2</sup>—may play a special role in interpreting both state and local law. Ultimately, Leib concludes that this role is a highly constrained one. He is comfortable endorsing local judges’ reliance on local values (though only “in a narrow band of hard cases”)<sup>3</sup> in large part because state courts and legislatures remain available to overrule decisions that unduly infringe on state interests.<sup>4</sup> As an endorsement of “localism,” Leib’s is most tepid.

But a tepid endorsement of localist judging is probably sufficient for even the most avid proponents of localism. After all, it is the process of local government itself—e.g., attending city council meetings, running for office—that matters most to communitarians, and, except for the occasional decision about local government *procedure*, it is likely that judges can do little to affect this process positively or negatively. While some communitarians focus on

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<sup>1</sup> Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013).

<sup>2</sup> See *id.* at 903-04 (listing the common characteristics of “local courts”).

<sup>3</sup> *Id.* at 929.

<sup>4</sup> *Id.* at 927-28.

local juries as a key institution for educating and involving citizens,<sup>5</sup> Leib's definition of local courts excludes lower trial courts of general jurisdiction,<sup>6</sup> and thereby largely excludes courts with juries from his prescriptions.

For advocates of local government who extol its innovative power, a tepid endorsement of localist judging is probably also fine. Key policy innovations are likely to come from either political actors (the city council and mayor) or their delegates (local administrative agencies).<sup>7</sup> To the extent that local judges might "innovate" within the context of statutes or ordinances, their interpretive room is likely to be fairly narrow. Local judges might find more interpretive room within the common law, but Leib devotes scant ink to that possibility.<sup>8</sup> Regardless, even an innovative common-law decision by a local judge can easily be reversed by a higher-level state judge, provided that an appeal is taken. When there is no appeal, which is more common in cases that receive little attention, it is hard to see how a local judge's decision matters much beyond the case in question. Of course, a litigant's life might be greatly affected, which is no small thing, but one would expect there to be little interpretive diffusion.<sup>9</sup>

Assuming, however, that local judges can find some interpretive room within which to import local concerns, serious questions remain about the prospect of localist judging. First, how much substantive difference can we expect to see between a local judge's viewpoint and that of a state judge? Little, Leib's examples suggest. He cites a municipal court judge in Lorain, Ohio, who takes "employability" issues into account when sentencing

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<sup>5</sup> Alexis de Tocqueville, a prominent forerunner of communitarian thought, extolled the American jury as a "free school" that educates citizens on the law and self-governance in a democracy. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252-53 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1848) ("I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal."). For a more recent incarnation of this view, see, for example, Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 345-50 (2003), which argues that "[t]he American jury is the quintessential deliberative democratic body."

<sup>6</sup> Leib, *supra* note 1, at 903; see also Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1157 n.247 (2012) (noting that municipal courts generally do not use juries).

<sup>7</sup> See generally Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. (forthcoming 2014) (manuscript at 7-25), available at <http://papers.ssrn.com/abstract=2240416> (providing examples of innovative public health regulation by large municipalities).

<sup>8</sup> See Leib, *supra* note 1, at 930 (noting that the focus of his Article is statutory interpretation by local courts, not local court cases involving the common law).

<sup>9</sup> As Leib notes, most local court decisions are not published. *Id.* at 899-900. It is hard for an innovative legal interpretation to catch on when other judges, lawyers, and scholars cannot easily access it. *Id.*

criminal defendants.<sup>10</sup> Are local employability concerns significantly different from statewide employability concerns? It is theoretically possible. One can imagine a state in which unemployment in a particular city is off the charts, far exceeding the statewide rate.<sup>11</sup> In such a situation, the state's primary goal may be ensuring public safety, while the city may be more concerned with reducing unemployment. But more common will be situations, like Ohio's, where unemployment is presumably both a state *and* local concern. The unemployment rate in the City of Lorain hovers over Ohio's statewide average by a percentage point or two.<sup>12</sup> Does this difference really affect how a local judge performs his job? Should it?

The likelihood that any difference between the substantive interests imported by "local judges" and those imported by "state judges" will be negligible is further illuminated by horizontal comparison. The judges of a state's lowest-level courts of general jurisdiction are, according to Leib, "state judges,"<sup>13</sup> but the vast majority of these judges are elected<sup>14</sup> (and elected by an electorate that is a subset of the statewide voting pool). Should we expect much, if any, difference between the popular concerns that affect, say, a Lorain municipal court judge and those that influence his counterparts on the Ohio Court of Common Pleas (who sit less than nine miles away in Elyria)? The former is elected by the voters of Lorain city;<sup>15</sup> the latter are elected by the voters of Lorain County,<sup>16</sup> which includes Lorain city.<sup>17</sup> In other instances, the electoral overlap is more complete: the

<sup>10</sup> *Id.* at 908-09.

<sup>11</sup> *See, e.g.,* Mike Wilkinson, *Nearly Half of Detroit's Workers Are Unemployed*, DET. NEWS, Dec. 16, 2009, at 1A, 10A (noting that Detroit's official and "unofficial" unemployment rates were 27% and 44.8%, respectively, as compared to Michigan rates of 12.6% and 20.9%).

<sup>12</sup> *Compare, e.g.,* Letter from Ronald L. Mantini, Auditor, City of Lorain, to Lorain City Council (Feb. 15, 2011), available at [http://www.cityoflorain.org/files/documents/files/2-21-11pkt\\_1289.pdf](http://www.cityoflorain.org/files/documents/files/2-21-11pkt_1289.pdf) (showing City of Lorain unemployment rates between January 2009 and December 2010 based on statistics provided by the Ohio Department of Jobs and Family Services), *with* Ohio Unemployment Rate, Seasonally Adjusted, GOOGLE PUBLIC DATA, [http://www.google.com/publicdata/explore?ds=21ebjgk2654c1\\_](http://www.google.com/publicdata/explore?ds=21ebjgk2654c1_) (follow "Unemployment rate" hyperlink; then follow "Ohio" hyperlink; then adjust graph timespan to January 2009—December 2010).

<sup>13</sup> *See* Leib, *supra* note 1, at 904 (classifying lower trial courts of general jurisdiction as part of the "state, rather than the local, political system").

<sup>14</sup> *See* Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1, 16-17 n.102 (2007) (noting that of the 8500 state trial court judges nationwide, only 24% are appointed).

<sup>15</sup> *Court Officials*, CITYOFLORAIN.ORG, [http://www.cityoflorain.org/municipal\\_court/court\\_officials](http://www.cityoflorain.org/municipal_court/court_officials) (last visited June 28, 2013).

<sup>16</sup> *About the Court of Common Pleas*, LORAIN COUNTY COURT OF COMMON PLEAS, <http://courtofcommonpleas.loraincounty.us> (last updated June 3, 2013).

<sup>17</sup> The county's population is roughly five times that of Lorain city. *Compare State and County Quickfacts: Lorain County, Ohio*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/39/39093.html> (last revised Mar. 11, 2013) (noting a population of 301,356 as of April 2010), *with*

exact same pool of voters elects both “local” judges and “state” trial court judges.<sup>18</sup> While Leib hints that state court judges *should* serve state, rather than local, concerns,<sup>19</sup> to the extent that lower-level state court judges’ views are affected by electoral pressure, expecting fealty to the state alone seems unrealistic. The electoral pressures that influence local judges, therefore, are likely quite similar to those that influence their state court counterparts, at least at the trial court level.

A recent case illustrates this point: the legal challenge to New York City’s cap on the portion size of sugar-sweetened drinks, which is more popularly, and inaccurately, known as the “soda ban.”<sup>20</sup> The plaintiffs—a consortium of business owners, a labor union, and industry associations—alleged that the City’s Board of Health exceeded its delegated powers in promulgating a regulation that the Board lacked legal authority to adopt.<sup>21</sup> In raising their claims, the plaintiffs relied in part on the state constitution, but also invoked state and local law.<sup>22</sup> The suit was filed in the Supreme Court of New York, New York County—the trial court of general jurisdiction in Manhattan and, by Leib’s definition, a state court. Justice Milton Tingling invalidated the Board’s rule, largely agreeing with the plaintiffs’ claim that the Board had exceeded its delegated authority.<sup>23</sup> Given that

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*State and County Quickfacts: Lorain (City), Ohio*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/39/3944856.html> (last revised Jan. 10, 2013) (noting a population of 64,097 as of the same date).

<sup>18</sup> This is particularly so where the borders of a county, the usual unit upon which state trial court divisions are based, are coextensive with those of a large city, as in the case of Philadelphia. *See* PA. CONST. art. V, § 5 (“There shall be one court of common pleas for each judicial district . . .”); 42 PA. CONS. STAT. ANN. § 901(a) (West 2013) (declaring the first judicial district to consist of the “City and County of Philadelphia”); *see also* PA. CONST. art. V, § 6(c) (establishing a municipal court in Philadelphia).

<sup>19</sup> *See* Leib, *supra* note 1, at 925 (arguing that more fully integrating local judiciaries into the state judiciary reduces the likelihood of localist judging, presumably because “state” judges are more likely to serve state interests).

<sup>20</sup> *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 653584/12 (N.Y. Sup. Ct. Mar. 11, 2013).

<sup>21</sup> Verified Article 78 & Declaratory Judgment Petition at 1, *N.Y. Statewide Coal.*, No. 653584/12 (Oct. 12, 2012) [hereinafter Portion Cap Petition].

<sup>22</sup> The prominent issues of local law in the portion-cap case are questions of charter, rather than ordinance, interpretation. *See id.* at 25-28 (arguing that the New York City Charter does not authorize the Board of Health to “engage in the unprecedented act of policy-making at issue here”). Presumably, Leib’s analysis would treat charter interpretation as similar to ordinance interpretation, although perhaps not, given that a charter, as a city’s foundational governing document, may be more analogous to a constitution than a statute.

<sup>23</sup> *N.Y. Statewide Coal.*, No. 653584/12, slip op. at 35-36. On July 30, 2013, just prior to the publication of this Response, the Appellate Division of the Supreme Court of New York affirmed the trial court’s order. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t*

Justice Tingling eventually faces an election before Manhattan voters,<sup>24</sup> his decision may have been just as influenced by “local” concerns as any local court’s decision would have been. Even if lower-level state court elections, especially in New York City, are notoriously uncompetitive,<sup>25</sup> it seems untenable to expect that they will function any differently from local court elections for the purpose of discerning local popular sentiment. And insofar as Justice Tingling credited local concerns in his decisionmaking,<sup>26</sup> how much should they differ from state concerns? The state, presumably, has a similar interest in reducing obesity. Indeed, given the amount of money New York state spends on Medicaid as compared to New York City,<sup>27</sup> the state might be said to have a greater interest than the city in combating obesity. Further, obesity rates are actually higher in New York state than in New York City.<sup>28</sup> On the other hand, the city is moving more aggressively on many fronts to fight obesity. Does this mean that obesity prevention is more of a New York City value than a New York state value?

Indeed, the litigation against New York City’s portion cap rule also illustrates the second major question raised by Leib’s invitation to local judges to heed local concerns: if elected judges depart from the “trustee” role, as envisioned by Leib,<sup>29</sup> how should they discern the local concerns

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of Health & Mental Hygiene, No. 653584/12, 2013 WL 3880139 (N.Y. App. Div., 1st Dep’t July 30, 2013).

<sup>24</sup> See N.Y. CONST. art. VI, § 6(c) (requiring justices of the supreme court to be chosen by the electors of their judicial district, and setting their terms at fourteen years). To be sure, New York Supreme Court justices’ fourteen-year terms are very long, even by judicial term standards. See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2013), available at [http://www.judicialselection.com/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.com/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf) (listing term lengths for judges of state general jurisdiction courts).

<sup>25</sup> See *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 198-200 (2d Cir. 2006) (noting the lack of competition in New York Supreme Court races), *rev’d*, 552 U.S. 196 (2008).

<sup>26</sup> Justice Tingling recognized the city’s interest in fighting obesity, but did not distinguish systematically the obesity-related harm to the city from that inflicted upon the state and nation as a whole. See *N.Y. Statewide Coal.*, No. 653584/12, slip op. at 7-9 (“The health of its residents affects the economics of a town, village, city, state and nation.”).

<sup>27</sup> See CITIZENS BUDGET COMM’N, A POOR WAY TO PAY FOR MEDICAID: WHY NEW YORK SHOULD ELIMINATE LOCAL FUNDING FOR MEDICAID 5 (Dec. 2011), available at [http://www.cbcny.org/sites/default/files/REPORT\\_Medicaid\\_12122012.pdf](http://www.cbcny.org/sites/default/files/REPORT_Medicaid_12122012.pdf) (noting that for fiscal year 2012, New York’s counties—five of which constitute New York City—would pay 13% of the state’s total contribution to Medicaid, while the state government would fund the remainder).

<sup>28</sup> See Sewell Chan, *Data Say Manhattan’s Slim; But the Bronx? A Bit Chubby*, N.Y. TIMES, July 22, 2009, at A18 (noting that Manhattan’s obesity rate was significantly below the state average, and that obesity rates in three of the other four New York City boroughs were just below the state average).

<sup>29</sup> See Leib, *supra* note 1, at 916-17 (explaining the “trustee” model of judging as one where judges “are independent of public opinion and remain *unaffected* by the people’s demands”

that Leib thinks may appropriately inform their decisionmaking? The literature on the subject of elected judges acting as something other than trustees has generally focused on state courts and, more specifically, on judges using popular sentiment to interpret state constitutions.<sup>30</sup> Leib recognizes that lower-level judicial elections are likely to be poor vehicles for discerning popular sentiment, given that they are notoriously uncompetitive affairs that attract little voter interest.<sup>31</sup> Despite this fact, and although Leib disavows judges “tak[ing] opinion polls” to decide “difficult statutory cases,”<sup>32</sup> he still endorses the notion that elections provide “meaningful input” into local judges’ decisionmaking.<sup>33</sup> But Leib appears to be thinking mostly of cases in which local concerns stand in contrast to some potentially contradictory state goal. Yet local concerns themselves may be quite conflicting, as the New York City portion-cap case demonstrates.

If Justice Tingling had looked to poll numbers to discern the relevant local concerns, he would have seen that most residents of New York City (even Manhattan) opposed the portion cap rule.<sup>34</sup> If, however, he had looked to the views of local officials like Mayor Michael Bloomberg, who championed the rule, he would have heard very different concerns: the toll obesity exacts on city residents’ health, particularly in lower-income communities and communities of color; the billions of dollars New York City spends on Medicaid and on public hospitals; and the fact that soda exacerbates obesity, which adds to this financial strain.<sup>35</sup> If Justice Tingling had credited the views of certain city council members, he might have heard different local opinions, such as how the rule would hurt certain businesses.<sup>36</sup> In

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(quoting Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23, 36 tbl.4 (1984))).

<sup>30</sup> See, e.g., Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1655, 1659-74 (2010) (assessing how “backlash risks and the capacity of state justices to assess in-state consequences” affect state constitutional decisions).

<sup>31</sup> Leib, *supra* note 1, at 913-15.

<sup>32</sup> *Id.* at 915.

<sup>33</sup> *Id.* at 917.

<sup>34</sup> Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Soda Ban, Calling It an Overreach by Bloomberg, a Poll Finds*, N.Y. TIMES, Aug. 23, 2012, at A19.

<sup>35</sup> See Casey Neistat, Op-Docs, *Soda Ban Explained*, N.Y. TIMES, Sept. 9, 2012, <http://www.nytimes.com/2012/09/10/opinion/soda-ban-explained.html?ref=nyregion> (describing the “soda ban” as a “small step toward a solution” to curbing obesity and its medical costs); see also CITIZENS BUDGET COMM’N, *supra* note 27, at 12, 13 tbl.2 (noting that New York City spent \$4.6 billion on Medicaid in fiscal year 2008).

<sup>36</sup> See Portion Cap Petition, *supra* note 21, at 16-19 (citing objections to the rule from city council members, local businesses, and consumer advocates). In assessing whether the Board had exceeded its delegated powers, Justice Tingling briefly discussed the city council’s action—or,

other words, an answer to the epistemic question of which local concerns are relevant and may legitimately inform statutory (or ordinance, or charter) interpretation is far from clear.<sup>37</sup> Leib has invited elected judges to enter this thicket, but he has not yet provided a clear way through the brush.

That Leib's analysis provokes as many questions as it answers proves that he has drawn attention to an area ripe for further exploration. By calling attention to localist judging, Leib has introduced broader questions about how and from whom judges ought to discern community values.<sup>38</sup> This is an issue that also plays out in the context of judicial elections at the state level, as well as in the context of deciding preemption cases, in which judges must determine whether a local ordinance conflicts with a statewide concern.<sup>39</sup> In shifting the focus of intrastate power struggles to local courts, Leib has drawn our attention to a heretofore under-appreciated actor. Continued attention to local judges—and localist judging—can only enrich the broader debate about vertical distribution of power in state and local government law.

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more aptly, inaction—with respect to regulating sugar-sweetened beverages. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 653584/12, slip op. at 30 (N.Y. Sup. Ct. Mar. 11, 2013) (“The New York City Council and New York Legislature have continuously decided *not* to pass legislation targeting the consumption of sugar-sweetened beverages . . .”).

<sup>37</sup> With respect to state judges, Leib has wrestled with this issue in some depth in prior work. See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1237-54 (2012) (discussing how methods of judicial selection influence judges' approach to statutory interpretation).

<sup>38</sup> As noted earlier, *supra* note 5, there is a connection here to the literature that looks to local juries as fonts of community values. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 408-14 (2009) (characterizing the right to a jury trial as a community right); Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1375-87 (2012) (arguing that juries “inject community norms into the legal system”).

<sup>39</sup> See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1140-57 (2007) (examining the intrastate preemption doctrine).