



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty Scholarship

2021

Courts Beyond Judging

Michael C. Pollack

Benjamin N. Cardozo School of Law, michael.pollack@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Fourteenth Amendment Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Medical Jurisprudence Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Michael C. Pollack, *Courts Beyond Judging*, 46 *BYU L. Rev.* 719 (2021).

<https://larc.cardozo.yu.edu/faculty-articles/521>

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

Courts Beyond Judging

Michael C. Pollack*

Across all fifty states, a woefully understudied institution of government is responsible for a broad range of administrative, legislative, law enforcement, and judicial functions. That important institution is the state courts. While the literature has examined the federal courts and federal judges from innumerable angles, study of the state courts as institutions of state government – and not merely as sources of doctrine and resolvers of disputes – has languished. This Article remedies that oversight by drawing attention for the first time to the wide array of roles state courts serve, and by evaluating the suitability of both the allocation of these tasks and the various procedures by which they are carried out across the country.

In every state, on top of the ordinary adversarial dispute-resolution function that we expect judges to serve, it is state court judges who are charged with administrative functions like approving applications to change one's name, to enter the legal profession, or to exercise constitutional rights like accessing abortion care without parental knowledge or consent. And it is often state court judges who are charged with or who have taken on a range of legislative and policymaking functions like redistricting and establishing specialized criminal courts for veterans, persons in need of drug treatment, and others. And in some states, it is state court judges who have the law enforcement power to decide whether a prosecutor's charging choice was a wise

* Associate Professor of Law, Benjamin N. Cardozo School of Law. I am grateful to Maureen Brady, Christopher Buccafusco, Zachary Clopton, Erin Collins, Andrew Crespo, Barry Friedman, Marie-Amélie George, Myriam Gilles, Ben Grunwald, Michael Herz, Aziz Huq, Matthew Lawrence, Kate Levine, Michael Morley, Deborah Pearlstein, Alexander Platt, David Rudenstine, Miriam Seifter, Colleen Shanahan, Katherine Shaw, Gregory Shill, Kellen Zale, and participants in the Cardozo Junior Faculty Workshop, Junior Faculty Forum at the University of Richmond Law School, NYU Law School Furman Scholars Workshop, Property Works-in-Progress Conference at Boston University Law School, and State & Local Government Works-in-Progress Conference at Fordham University Law School for their suggestions, comments, and critiques. I thank the Stephen B. Siegel Program in Real Estate Law for research support.

exercise of her discretion. These are not mere odds and ends of governing either; weighty interests hang in the balance across the board.

In addition to developing this more complete portrait of the state courts – and of important variation in how these roles are structured across the states – this Article examines whether the interests at stake in each context are appropriately served when state court judges handle them. In some arenas, they are, and this Article places these facets of state court practice on firmer theoretical footing. In others, however, there is cause for concern. With respect to these tasks, this Article argues that state court judges need to be better guided by statute and subject to reason-giving and record-developing requirements that would channel their discretion, improve their decisionmaking, and enable more rigorous appellate review. But most important of all, this Article calls for states to make more conscious choices about structuring the roles they assign to state courts, and for scholars to devote more careful attention to these powerful and nuanced institutions.

CONTENTS

INTRODUCTION	721
I. THE STATE JUDGE AS ADMINISTRATOR	730
A. Name Change Applications.....	732
B. Minors’ Access to Abortion	737
C. Attorney Admission and Discipline	743
II. THE STATE JUDGE AS ENFORCER	746
III. THE STATE JUDGE AS LEGISLATOR	750
A. Redistricting.....	751
B. Establishing Specialized Criminal Courts	753
IV. ASSESSING AND REFORMING THE ROLES OF THE STATE JUDICIARY	758
A. State Judges as Enforcers.....	759
B. State Judges as Legislators.....	763
1. Redistricting.....	763
2. Establishing specialized criminal courts	766
C. State Judges as Administrators.....	771
1. Name change applications	771
2. Minors’ access to abortion	781
3. Attorney admission and discipline	787
CONCLUSION	794

INTRODUCTION

In 1966, a twenty-three-year-old New Yorker named Robert Jama decided to change his name to Robert von Jama. He was not trying to escape warrants or creditors, nor was he doing anything else nefarious. Instead, he believed “von Jama” to have been his family name before his ancestors immigrated to the United States from Germany generations earlier. Evidently, he wished to honor that heritage. He also socialized primarily with friends of German origin and sought to fit in better with them.¹

Jama wanted this change to be official, and like every state, New York provides a process by which an adult can officially change his name. So, Jama made his request to the appropriate government entity, which is statutorily meant to grant the name change if it is “satisfied” that the representations made in the request are true “and that there is no reasonable objection to the change of name proposed.”² The government heard from no one in opposition, but it was nonetheless not satisfied with the request. Mr. Jama thus remained Mr. Jama. What was the “reasonable objection” to the proposed name change? “The moral guilt of the Germanic peoples in adopting the philosophies of a monstrosity and his cohorts has not yet been fully eradicated or been forgotten.”³ Having thus concluded what it means to be a “true” American and what it means to be German, the government denied Mr. Jama’s petition, declaring for good measure that his “reasons for a change are puerile, if not pathetic.”⁴

Consider another story. Much more recently, a young woman in Alabama desired an abortion. Because she lived in Alabama, she needed a parent’s consent; such parental involvement in a minor’s decision to have an abortion is required by law in forty-three states.⁵ But because “her father had told her that if she ever came home pregnant he would kill her,” and because “her mother was also violent and had beaten her older sister until she bled,” she believed her parents would “whip her and then kick her out of the

1. See JAY WEXLER, *THE ODD CLAUSES* 153–54 (2011).

2. N.Y. CIV. RIGHTS LAW § 63 (McKinney 2014).

3. *In re Jama*, 272 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1966).

4. *Id.*

5. See *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1284–85 nn.17–18 (M.D. Ala. 2017); *infra* Section I.B.

house if she told them she was pregnant.”⁶ Fortunately for this young woman, the U.S. Supreme Court has held that, while a state can permissibly make a minor’s decision to seek an abortion contingent on her parent’s consent, such a state “also must provide an alternative procedure whereby authorization for the abortion can be obtained.”⁷ Specifically, a minor seeking to bypass a parental consent requirement is “entitled” to a confidential, anonymous, and swift proceeding in which she can show either “that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes,” or “that even if she is not able to make [that] decision independently, the desired abortion would be in her best interests.”⁸

Alabama provides such a process, just like every other state, and this young woman availed herself of it. She sought relief from the appropriate government entity, explaining her reasons for wanting an abortion without her parents’ knowledge and offering factual support for her claim that she was sufficiently mature and informed to make this decision on her own. No one appeared in opposition, but the government nonetheless denied her request by issuing a “predrawn form” stating that she was “not mature and well informed enough to make the abortion decision” and that “the performance of the abortion is not in the best interest of the minor.”⁹

Take three more short stories. First, in Illinois, the state legislature could not agree on how to redraw the state legislative district maps after the decennial census of 2000—just like it could not agree after the censuses of 1980 and 1990.¹⁰ Many states provide for a backup decisionmaker,¹¹ so pursuant to Illinois law, the backup decisionmaker named one Republican and one Democrat and put those two names into a replica Lincoln stovepipe hat; the name that was selected was tasked with breaking the logjam.¹²

6. *In re Anonymous*, 782 So. 2d 791, 791–92 (Ala. Civ. App. 2000).

7. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643 (1979).

8. *Id.* at 643–44.

9. *In re Anonymous*, 782 So. 2d at 792.

10. Ray Long & Michelle Manchir, *Illinois Democrats, Republicans Offer Dueling Redistricting Plans*, CHI. TRIB. (Apr. 26, 2010), http://articles.chicagotribune.com/2010-04-26/news/ct-met-illinois-redistricting-20100426_1_new-electoral-map-republicans-league-of-women-voters.

11. *See infra* Section III.A.

12. ILL. CONST. art. IV, § 3(b).

Second, in New York, officials grew concerned that veterans struggling with post-traumatic stress disorder and traumatic brain injuries were not well-served by the traditional criminal justice system—and that society was not particularly well-served by processing such offending veterans through that system.¹³ As in numerous other instances, those government officials established a Veterans Court with a specialized docket, staff, and services designed to better achieve justice and rehabilitation for those offenders.¹⁴ Third and finally, when the COVID-19 pandemic made holding the traditional in-person bar exam in the summer and fall of 2020 a risky public health event for aspiring lawyers and their families, government officials in some states decided to proceed with the exam anyway, some to postpone the exam, some to move it online, and others to offer various accommodations.¹⁵

Despite the wide diversity of subject matter, the surprising yet common thread in all of these stories is that the government decisionmakers were state court judges. Nearly every state's process for adult name changes runs, not through some records office, but through a low-level state court.¹⁶ So it was Judge Maurice Wahl of the New York City Civil Court who turned Mr. Jama away.¹⁷ Nearly every state's process for parental bypass in the context of a minor seeking an abortion runs, not through the state's department of children and family services, but through the same low-level state court.¹⁸ So it was a trial court judge who signed the form declaring the young woman insufficiently mature to seek an abortion without her parents' involvement.¹⁹ Many states enlist state court judges or justices of the supreme court to assist in or to handle outright aspects of the legislative redistricting process,²⁰ so it has thrice been the Illinois Supreme Court that put the names in

13. See Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1492, 1495 (2017).

14. See *id.* at 1492–98, 1520–22.

15. See *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS (Sept. 1, 2020, 2:35 PM), <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information>.

16. See *infra* Section I.A. In Hawaii, this process runs through the Office of the Lieutenant Governor. HAW. REV. STAT. § 574-5(b).

17. *In re Jama*, 272 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1966); see N.Y. CIV. RIGHTS LAW § 63 (McKinney 2014).

18. See *infra* Section I.B.

19. See *In re Anonymous*, 782 So. 2d 791, 791 (Ala. Civ. App. 2000).

20. See *infra* Section III.A.

the stovepipe hat.²¹ Nearly all of the Veterans Courts—like a host of other specialized courts, for example, for drug treatment—have been established, not by state lawmakers, but by state court judges.²² And the decisions about whether and how to proceed with the bar exam during the pandemic were generally made, not by the states’ professional licensing bureaus, but by the high courts of the various states.²³

This Article explores, frames, and critiques this understudied and, indeed, largely unnoticed side of state court judging. To be sure, it has long been recognized that, in contrast to the federal government’s rigid, constitutionally rooted separation of powers, the states have taken a “varied, pragmatic approach in establishing governments” which often scrambles that traditional allocation.²⁴ But even so, we understand far too little about this simple fact of life in state courts: State court judges engage in decisionmaking in a whole host of non-adversarial settings outside of the traditional context of dispute resolution.²⁵

While scholars of criminal law have studied specialized courts and while scholars of abortion rights have studied the judicial bypass, for example, these disparate threads have not adequately been connected and used as a lens through which to better

21. ILL. CONST. art. IV, § 3(b).

22. See Collins, *supra* note 13, at 1492–98, 1520–22; *infra* Section III.B.

23. See, e.g., *In re* July 2020 Ala. Bar Examination, No. 19-20/118 (Ala. July 12, 2020); *In re* July 2020 Ind. Bar Examination, No. 20S-CB-300 (Ind. May 7, 2020); *In re* Petition for Waiver of the Bar Examination Requirement for Admission to the Bar and Provision of Emergency Diploma Privilege, No. S-20-0495 (Neb. July 13, 2020); *In re* July 2020 Nev. State Bar Examination, No. ADKT 0558 (Nev. May 20, 2020); *In re* Statewide Response by Wash. State Cts. to the Covid-19 Pub. Health Emergency, No. 25700-B-630 (Wash. June 12, 2020); see also NAT’L CONF. OF BAR EXAM’RS, *supra* note 15.

24. Avery v. Midland County, 390 U.S. 474, 482–83 (1968) (quoting ROBERT C. WOOD, POLITICS AND GOVERNMENT IN THE UNITED STATES 891–92 (1965)); see Dreyer v. Illinois, 187 U.S. 71, 84 (1902); Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 717 (2018).

25. By claiming that judging tends to bring to mind this notion of adversarial dispute resolution, I simply mean to capture the common conception of what it is that judges do—particularly federal judges. See, e.g., Forrester v. White, 484 U.S. 219, 227 (1988) (referring to the “paradigmatic judicial acts” as those “involved in resolving disputes between parties who have invoked the jurisdiction of a court”); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (describing the key “characteristic of the judicial process” as “the adjudication of controversies between adversaries”); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1357 (2015) (emphasizing that our conception of federal courts is that they “serve as tribunals for the resolution of concrete disputes between adverse parties”).

understand the state judiciary. A truly full picture of the state judiciary must account for these unique, pervasive, and underappreciated functions. Indeed, it is only by seeing state courts for all that they are that scholars, citizens, advocates, and even judges themselves can best engage with them, assess their work, and contemplate how they might be designed and reformed so as to best respect the full range of values and rights at stake.

And while too many articles to list have been written about how judges operate, what pressures and constraints are imposed on them, what incentives they face, how their decisions are reviewed, and what their place is in a system of government, those articles have largely investigated the traditional context of dispute resolution and, more importantly, have focused on *federal* judges.²⁶ But scholars have largely overlooked the need for a systematic understanding of *state court* judges beyond traditional judging—that is, as distinct institutions of state government with an array of functions.²⁷ And because states are not bound by the separation of

26. A significant literature examines the scope and constitutional propriety of the roles that federal judges play outside of or adjacent to dispute resolution. *See, e.g.*, Pfander & Birk, *supra* note 25, at 1355 (reconciling such roles with Article III); Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 640–44 (2014) (arguing that “consent decrees raise serious Article III concerns”); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 410 (2019) (arguing in the multidistrict litigation context that “Article III courts . . . perform functions that are commonly thought to be the province of administrative agencies and executive departments”); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012) (discussing the Supreme Court’s role in setting civil procedure policy). Similar attention is warranted at the state level, and this Article contributes to filling that gap.

27. *Cf.* Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1034 (2020) (“Despite the[] massive stakes . . . [and] the compelling human stories that unfold in these [state and local] courts, we know very little about them.”); Anna E. Carpenter, Jessica Steinberg, Colleen F. Shanahan & Alyx Marx, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 250, 265–72 (2018) (observing that “we know very little about our state courts” and offering possible explanations); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 488 (2017) (observing the “unique and understudied institutional context of states”); Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 707, 708–09 (2015) (noting the dearth of attention paid by scholars to local courts and to state trial courts); Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129 (2014) (same); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207–08 (1983) (“A major focus of the study of state constitutional law . . . should be on the nonadjudicatory functions of state supreme courts.”).

Two important exceptions to the general scholarly inattention to state courts are Zachary Clopton’s study of the role that state courts play in the making of civil procedure rules in the states and Andrew Crespo’s evaluation of the role of state courts in making

powers constraints that exist at the federal level, they have the freedom to experiment with different allocations of roles. It is precisely that broad latitude, and its potential to be used in both beneficial and problematic ways, that cries out for closer attention.

This Article answers that call. It begins by describing three categories of state court functions that go beyond the typical context of resolving adversarial disputes. First are quasi-administrative roles like deciding name change applications, governing minors' access to abortions, and admitting and disciplining attorneys. These are generally *ex parte*, and they involve a citizen seeking a statutorily offered benefit or license from his or her government by demonstrating that he or she satisfies certain stated criteria. The analogy to the perhaps more familiar federal level would be a person applying for disability benefits from the Social Security Administration.²⁸ Second is the executive

criminal procedure rules in the states. See Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 3–4 (2018) (noting that, while “state procedure-making has been understudied,” “state courts matter” and play varied roles in making civil procedure); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1379–88 (2018) (observing that state courts are “frequently the primary and supreme enactors of the procedural codes” regulating prosecutorial power). These complementary pieces each zero in on a specific function of state courts beyond dispute resolution—ones that, albeit with some departures, characterize the federal judiciary as well. See Clopton, *supra*, at 19 (“The broad strokes of state procedure-making have much in common with the federal system.”); Crespo, *supra*, at 1383–84 (noting that federal courts likewise make rules of criminal procedure but that, in many states, courts have the additional power to “override legislatively enacted statutes”). This Article, by contrast, takes a cross-cutting perspective on state court functions without analog in the federal judiciary. Moreover, Clopton and Crespo aim their attention outwards, looking to the implications of these rulemaking roles for civil and criminal litigation, while this Article looks inwards, leveraging that synthetic analysis to improve our understanding of the state courts themselves as institutions of government.

Another exception is Helen Hershkoff's work on justiciability in the state courts. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001). Hershkoff makes tremendously important descriptive and normative claims about the doctrines governing access to state courts, *see id.* at 1838–41, but even the sustained attention she affords to the state courts likewise misses the functions beyond dispute resolution that this Article surfaces. That same focus on dispute resolution and litigation functions continues to animate more recent significant work about state and local courts. See, e.g., Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 130–31 (2019) (focusing on dispute resolution but observing that even resolving disputes necessarily pulls state courts into broader socioeconomic problems like inequality, tenant insecurity, domestic violence, mental illness, drug abuse, and more); Carpenter et al., *supra*, at 254; Weinstein-Tull, *supra*, at 1042–45; Leib, *supra*, at 734.

28. See SOC. SEC. ADMIN., DISABILITY BENEFITS (2019), <https://www.ssa.gov/pubs/EN-05-10029.pdf>.

law enforcement function of exercising discretion in choosing whether or not to prosecute someone. Third and finally are quasi-legislative roles like redistricting and establishing specialized criminal courts. These involve enacting the law, setting the ground rules under which citizens interact with government, and, again, doing so outside of the context of dispute resolution. For each function and category, this Article documents significant variation in how the fifty states structure their courts' roles, both to paint a more complete picture and, more importantly, to open our eyes to the spectrum of possible arrangements—and the good and bad in them.

Of course, there are absolutely other state court functions that fall into these categories. These examples are simply meant to illustrate the three hats that state court judges wear in addition, to mix sartorial metaphors, to the traditional black robes of dispute resolution. Two other caveats are worth emphasizing at this point, too. First, this sorting is not meant to suggest that any sort of separation of powers principle is violated by allocating these tasks to judges; recall that states are not bound by the same bright lines by which the federal government is bound under the U.S. Constitution. Rather, this sorting is meant to capture the *nature* of the task at issue. Second, the lines between these categories are certainly far from bright and I do not mean to suggest otherwise. All of these tasks share some qualities, so these groupings are meant primarily to distinguish between likes and *less*-likes, to facilitate comparison both within contexts—where shared features often drive shared analysis—and across contexts, and to guide the normative evaluation at the heart of the Article.

And that normative evaluation starts by recognizing that, more than being a mere curiosity of state law, these judicially allocated tasks carry great weight for the individuals and families in question. They also touch on rights and values of constitutional dimension. This nearly goes without saying in the context of minors' access to abortion.²⁹ But the impact does not stop there. When it comes to the regulation and discipline of attorneys, issues of privacy and due process may arise, and the practical import for

29. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Bellotti II*, 443 U.S. 622, 642–43 (1979).

the careers and finances of the attorneys themselves is substantial.³⁰ An adult's desire to change his or her name may implicate significant First Amendment self-expression values, LGBT rights issues, and a host of dignitary and practical consequences for identification cards, voting rolls, school records, and the like.³¹ Redistricting raises serious political association, equal protection, and voting rights concerns.³² And so on.

With these substantial impacts in mind—and with the foundation that the nature of these tasks means they could all coherently be said to belong just as logically, if not more so, in some other decisionmaker's wheelhouse—this Article turns to evaluate how they each ought to be understood and treated if one were writing on a clean slate. Drawing on the interests each task implicates, how much and what type of accountability we might want the decisionmaker to face, the breadth of the discretion we might want the decisionmaker to exercise in individual cases, and the need for expertise in each subject area, the Article assesses from an institutional design perspective what the architecture of decisionmaking ought to look like in each setting. This analysis embraces not only who the best *decisionmaker* might be, but what *procedural constraints* might be most appropriate for the decisionmaker in each setting. Should the interested individual be entitled to receive a decision supported by reasons rooted in the facts? Should the decisionmaker be bound to consider a set of externally defined criteria or should she have unfettered discretion?³³ Should the decisionmaker be democratically

30. See *Bell v. Burson*, 402 U.S. 535, 539 (1971) (“Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.”).

31. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“[Fundamental] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”); *In re Powell*, 945 N.Y.S.2d 789 (N.Y. App. Div. 2012) (name change application made by transgender person); *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002) (name change applications made by a same-sex couple).

32. See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring); *Voinovich v. Quilter*, 507 U.S. 146, 152–53 (1993); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

33. To analogize to the federal level, for example, administrative agencies have to justify their decisions by reference to statutory criteria and reasons rooted in a record of evidence. See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*,

accountable? Should the individual be entitled to some form of appellate review of a negative decision? What standard of review ought to apply?

For the law enforcement role studied here, this Article concludes that the state judiciary is indeed a fairly well-situated decisionmaker. Even though there is room to improve elements of the decisionmaking process, this conclusion puts this atypical facet of the state courts on a stronger theoretical footing. For the quasi-legislative roles, this Article offers a more mixed verdict, justifying state redistricting practices while arguing that the state courts are decidedly second-best decisionmakers with respect to establishing specialized criminal courts. But for all of the quasi-administrative roles examined here, this Article contends that state courts are poorly situated to do the jobs demanded of them, at least as those jobs are often currently framed. It is therefore critical to change how state court judges are instructed to perform these tasks, the procedures they employ in doing so, and the manner in which their decisions are reviewed—both by other state courts and, in the attorney admission and discipline context in particular, by federal courts.³⁴ Simply put, state court judges should, in these contexts, apply strict legislatively defined criteria and should act and be reviewed like other administrative decisionmakers making the same sorts of decisions. Failing that, these roles should be reassigned to other institutions better equipped to afford processes that respect the values at stake.

To be sure, one might reach a different conclusion about the particular processes that are owed or appropriate in some or all of the contexts; taking a firm line on those details is not this Article's ultimate aim. Rather, this Article endeavors to shine a light on the roles assigned to the state judiciary, to prompt a careful reevaluation of them, to provide a framework to structure that conversation, and to use that framework to generate a set of proposals that might improve these decisionmaking processes. But wherever this conversation leads, we must recognize the importance of the question, be open to finding that existing

463 U.S. 29, 43 (1983). Judges, by contrast, do not, at least not when their decisions are being reviewed for abuse of discretion. See *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1169 (2017).

34. See *infra* Section IV.C.3 (arguing that the Supreme Court's decision in the well-known federal jurisdiction case, *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), be overruled).

processes may fall short in some or all of these arenas, and be prepared either to offer process-based reforms within the judiciary or to conclude that another decisionmaker entirely is better situated to handle the task at issue.

This Article proceeds in four parts. The first three endeavor to get a handle on the scope of state court judging as it departs from the traditional dispute-resolution paradigm. Together, they dive deep into six of the tasks assigned to state court judges. In so doing, they explore variation across the fifty states, not only for descriptive purposes, but in order to draw on the so-called “laboratories” of democracy to enable the evaluation of what is possible.³⁵ That is, even once a state has chosen to entrust its judiciary with a particular task, it can choose to provide more or fewer or different fetters, or greater or lesser review, for that task. Understanding what has been done can inspire possible avenues for reform. Part I takes on three of the quasi-administrative tasks of the state court judge: deciding name change applications, governing minors’ access to abortions, and admitting and disciplining attorneys. Part II addresses the state court judge’s law enforcement power to decide whom to prosecute and whom not to prosecute. And Part III turns its sights on two newly salient quasi-legislative tasks of the state court judge: assisting with the redistricting process and establishing new criminal courts. Part IV then examines each from an institutional design perspective, comparing both within and across categories. Considering the interests each implicates, and the desirability of accountability, expertise, and discretion in each context, this final Part either defends the judge’s seemingly peculiar role or recommends a range of reforms.

I. THE STATE JUDGE AS ADMINISTRATOR

Suppose that you wanted to hold a parade down a town’s Main Street. Suppose further that you didn’t know anything specific about that town’s or that state’s law, but that you had some vague idea that such a thing would require some sort of permission

35. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1171 (1993) (“[T]he study of the structural features of state constitutions can enable us to consider alternative means of organizing representative democratic governments, assess the efficacy of different mechanisms for governing, and illuminate the implications and consequences of aspects of the federal government’s structure that we ordinarily take for granted.”).

from the government. Who would you go to in order to get permission to hold your parade? More likely than not, you would think that some government bureaucrat would be in charge of issuing or denying permits. You would probably expect there to be some Department of Parades that had responsibility for parade oversight, safety, and permission. In short, based on intuition if nothing else, you would expect there to be some kind of administrative agency charged with the parade portfolio.

And you would be correct. In New York City, for example, the Street Activity Permit Office issues permits for festivals, block parties, farmers' markets, and parades.³⁶ In addition, depending on the type of parade, the event organizer may also need a permit from the city's Police Department, Department of Transportation, and Department of Buildings, and the State Department of Health.³⁷ The same is true – albeit on a smaller scale – even in small towns like Grand Marais, Minnesota.³⁸

Applications of this sort – in which a citizen seeks a statutorily offered benefit or license from his or her government by demonstrating *ex parte* that he or she satisfies certain stated criteria – are the bread and butter of administrative decisionmaking. But upon closer inspection, to apply for a number of state government permissions or benefits, one must turn, not to a state or local administrative agency, but to a state or local judge. When it comes to these arenas, then, these judges are effectively the administrators of the Department of Parades.

Moreover, they serve this administrative function in a number of contexts, often not because of some careful legislative choice, but rather because, until relatively recently in the scale of the nation's history, the courts were the only game in town – the only organ of the state government that existed in communities throughout the

36. NYC CITYWIDE EVENT COORDINATION & MGMT., *Permit Types*, <https://www1.nyc.gov/site/cecm/permitting/permit-types.page>.

37. NYC CITYWIDE EVENT COORDINATION & MGMT., *Supporting Permitting Agencies*, <https://www1.nyc.gov/site/cecm/permitting/supporting-permitting-agencies.page>

38. In Grand Marais, population 1,351, the Parks Office requires the completion of a special event permit application before one uses park space for special events. CITY OF GRAND MARAIS, MINNESOTA, <https://www.ci.grand-marais.mn.us/>; GRAND MARAIS RECREATION AREA, *Grand Marais City Parks*, <https://www.grandmaraisrecreationarea.com/more-info>.

state.³⁹ With the maturation of the modern administrative state, it is past time to assess just what these functions are and to ask whether this vestige of history continues to make sense.

A. Name Change Applications

Much like hosting a parade, when a person wants to officially change his name, he must ask the government for permission. If he simply wants to assume the surname of his spouse, all he generally has to do is indicate as much on the couple's marriage license and then inform other relevant federal and state agencies after the marriage.⁴⁰ Marriage licenses are usually issued by state or local government agencies—in New York City, for example, the Marriage Bureau in the Office of the City Clerk does so—as a matter of course.⁴¹ Like getting a driver's license—or a parade permit—all one needs to do is bring the necessary documentation, check off boxes on a form, and wait for a bureaucratic actor to affix a rubber stamp. This process is simple for the applicant and nondiscretionary for the government administrator.

One might therefore assume that a similar process is implicated if a person wishes to change his or her first or middle name. Of course, one might replace the Marriage Bureau with the Department of Records or perhaps even the Department of Motor Vehicles, but what likely leaps to mind is a government agency of that sort. In forty-nine states and the District of Columbia, however, that would be wrong.

39. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 76 (1994) (noting that eighteenth-century courts “handled matters that today would be within the executive branch, not primarily because of some principled reason,” but because of the “administrative ease in relying upon the existing court structures”); see also Hershkoff, *supra* note 27, at 1871; Pfander & Birk, *supra* note 25, at 1412–13; Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 282–87 (1976); cf. Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 912 n.208 (2019) (noting that colonial judges “resolved disputes and serious criminal allegations but ‘combined judicial, legislative, and executive functions’”); Peterson, *supra* note 24, at 717 (showing “state judges in power-sharing arrangements with their legislatures” throughout the early 1800s). The state courts' role in attorney admission and discipline, however, has been the subject of more recent contestation and concerted choice. See *infra* notes 110–122 and accompanying text.

40. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 817–19 (2007).

41. *Marriage License*, OFF. OF THE CITY CLERK, N.Y.C., <https://www.cityclerk.nyc.gov/html/marriage/license.shtml> (last visited Oct. 7, 2020).

In nearly every jurisdiction, a person who wants to officially change his or her name in circumstances other than a change of surname due to marriage must file a petition before a state court judge.⁴² This judge is often a probate judge, family court judge, general jurisdiction county judge, or some other non-appellate judge.⁴³ And as the following discussion illustrates, nearly all employ a functionally non-adversarial process: The judge will make the decision based entirely on the representations in the applicant's petition in light of the rules (or lack thereof) imposed by state law. That petition generally must state the reasons for the desired change—either because state law requires as much,⁴⁴ or because form petitions include a place for the applicant to provide reasons.⁴⁵ Finally, once the judge reaches a decision, a dissatisfied applicant can appeal to a higher state court that will generally review the judge's initial decision under a highly deferential "abuse of discretion" standard.⁴⁶

Beyond these commonalities, though, the states diverge into what we might call shall-issue jurisdictions, may-issue jurisdictions, and a grab bag of other approaches. Let us begin with the jurisdictions—running the gamut from blue to red, big to small, eastern to western, and everywhere in between—that use the seemingly discretion-limiting word "shall" in their name change statutes. About half of those provide that the judge shall grant the name change if there are no good reasons *not* to do so.⁴⁷ Some of these leave it up to the judge to determine what those reasons might

42. I say "officially" because a person is generally permitted to "go by" any name he or she chooses as a matter of custom or informal social choice. I am therefore discussing here only the steps necessary to have one's name changed as a matter of law and public record. The Hawaii exception is discussed *infra* p. 737.

43. See, e.g., ME. REV. STAT. tit. 18-C, § 1-701(1) (2020); N.H. REV. STAT. ANN. § 547:3-i(I) (2003); S.C. CODE ANN. § 15-49-10(A) (1990); W. VA. CODE § 48-25-101(a) (2013).

44. See, e.g., ARIZ. REV. STAT. § 12-601(A) (2011); GA. CODE ANN. § 19-12-1(b) (2017); KAN. STAT. ANN. § 60-1402(a) (1990); NEV. REV. STAT. § 41.270 (2017); TENN. CODE ANN. § 29-8-102 (1978).

45. Alabama, for example, offers a form requesting, among other things, "*why you want to change your name.*" ALA. STATE BAR, PS-12: REQUEST TO CHANGE NAME (FOR AN ADULT) (Aug. 2008), <https://eforms.alacourt.gov/media/jtzbncuw/request-to-change-name.pdf>.

46. See, e.g., *In re Mayol*, 137 S.W.3d 103, 105 (Tex. Ct. App. 2004); *In re Parrott*, 392 S.E.2d 48, 48 (Ga. Ct. App. 1990); *In re Reed*, 584 S.W.2d 103, 104 (Mo. Ct. App. 1979); *In re Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974).

47. See, e.g., MASS. GEN. LAWS ch. 210, § 12 (1977); MINN. STAT. § 259.11(a) (2005); OR. REV. STAT. § 33.410 (1975); VA. CODE ANN. § 8.01-217(C) (2015).

be. For example, New York's statute provides, "If the court to which the petition is presented is satisfied thereby, . . . that there is *no reasonable objection* to the change of name proposed, . . . the court *shall* make an order authorizing the petitioner to assume the name proposed."⁴⁸ Others of these go further and explicitly define what objections might be reasonable. Oklahoma's statute, for example, says that "the prayer of the petition shall be granted unless the court or judge finds that the change is sought for an illegal or fraudulent purpose, or that a material allegation in the petition is false."⁴⁹

But while the statutes in these states share a presumption that a requested change be granted unless the judge finds reasons not to grant it,⁵⁰ the other half of the "shall-issue" jurisdictions flip the presumption: the name change shall be granted *only if* the judge finds good cause to do so.⁵¹ For example, Colorado's statute states that a court in receipt of a petition for a name change "shall order the name change . . . if the court is satisfied that the desired change would be proper and not detrimental to the interests of any other person."⁵² Likewise, the statute in Kansas provides that "[if] there is reasonable cause for changing the name of the petitioner the judge shall so order."⁵³ These states thus appear to place a burden of persuasion on the petitioner in a way that the states in the first group do not.⁵⁴

To be sure, practice sometimes matches statutory text and sometimes does not. When it does, courts either tightly enforce the limited grounds for denial in that state's statute or embrace the statute's broader latitude.⁵⁵ When it does not, courts sometimes

48. N.Y. CIV. RIGHTS LAW § 63 (2014) (emphasis added).

49. OKLA. STAT. tit. 12, § 1634 (1953).

50. See *In re* Bacharach, 780 A.2d 579, 583 (N.J. Super. A.D. 2001) ("[T]he exercise of discretion to deny change of name is contrary to the common law and statutory policy in favor of granting such relief.").

51. See, e.g., MO. REV. STAT. § 527.270 (1939); NEB. REV. STAT. § 25-21,271(3) (2018); S.D. CODIFIED LAWS § 21-37-5 (1960); WYO. STAT. ANN. § 1-25-101 (2013).

52. COLO. REV. STAT. § 13-15-101(2)(a) (2016).

53. KAN. STAT. ANN. § 60-1402(c) (1990).

54. This is not to say that the burden is particularly weighty. For example, Kansas courts have indicated that "[t]he name change provisions do not require a demonstration of some compelling reason for the change," but instead simply demand a showing of reasonable cause. *In re* Morehead, 706 P.2d 480, 481-82 (Kan. Ct. App. 1985).

55. See Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 614 n.80 (2010) (observing that, in New York,

conclude that, notwithstanding narrow statutory language, they have “inherent authority to deny” a name change petition if the chosen name is “racist, obscene, or otherwise likely to provoke violence, arouse passions, or inflame hatred,” even though none of those conditions are present in the state’s statute.⁵⁶ Or they conclude, even in the face of fairly open-ended language, that there are “very limited bases for denying a statutory name change application” and that “policy-based or philosophical objections to individual name changes” are not proper grounds for denial.⁵⁷ These ambiguities in application would matter more if one were trying to strictly categorize the states. They matter less for present purposes, which are instead to get a handle on the categories of existing approaches.

Putting these “shall-issue” states to the side, we can turn to the jurisdictions that use the more discretionary word “may” in their statutes. About half of these leave matters entirely open-ended and simply provide that the judge “may” grant the name change, full stop.⁵⁸ For example, Indiana provides that the courts “may change the names of natural persons on application by petition,”⁵⁹ and its supreme court has explicitly held that “[t]here is no statutory requirement in Indiana that the petitioner establish any particular reason other than his personal desire for [a] change of name.”⁶⁰ A handful go a step further and provide that the judge “may” grant

“the judicial procedure vests significant discretion in judges to limit access to name changes”). Compare *In re Harvey*, 293 P.3d 224, 225 (Okla. Civ. App. 2012) (reversing a trial court’s denial of a name change petition filed by a transgender person, in a state with a narrow-discretion statute, because the statute provides that the only permissible bases for such a denial are fraud or illegality, neither of which is present when one simply wishes to “identify[] oneself by a traditionally male or female name while having the DNA of the other sex”), with *In re Bobrowich*, No. 159/02, 2003 WL 230701, at *3 (N.Y.C. Civ. Ct. Jan. 6, 2003) (rejecting a petition to change one’s name to “Steffi Owned Slave” in a state that does not tightly define what makes an application unreasonable because the judge feared that granting the petition would “attach the imprimatur of the court to that individual’s political philosophy”).

56. *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979).

57. *In re Zhan*, 37 A.3d 521, 524 (N.J. Super. Ct. App. Div. 2012).

58. See, e.g., CONN. GEN. STAT. § 52-11(a) (2014); KY. REV. STAT. § 401.010 (2013); N.H. REV. STAT. § 547:3-i(I) (2003); TENN. CODE ANN. § 29-8-104 (1978). Maine adds a slight twist, providing that a judge “may not” change a person’s name if the judge concludes that the person’s motives are “contrary to the public interest.” ME. REV. STAT. ANN. tit. 18-C, § 1-701(6) (2020).

59. IND. CODE § 34-28-2-1 (2017).

60. *In re Hauptly*, 312 N.E.2d 857, 859 (Ind. 1974).

the change upon a showing by the applicant of good cause.⁶¹ And another handful provide that the judge “may” grant the change if there is no good reason *not* to do so.⁶²

Finally, there are the states that do not fit neatly in either the shall-issue or may-issue camps. Most still place judges at the center of the process, though. Two states grant judges authority to decide whether a name change application should be granted but defy easy categorization.⁶³ Another state provides that a judge “may” change a person’s name, but its statute also lists a narrow set of specific criteria the judge “shall” consider.⁶⁴ A few states are silent as to how the judge’s authority should be exercised.⁶⁵ And in Louisiana, the judge has the discretion to render a decision on a name change application as she sees fit,⁶⁶ but the process is actually *adversarial*—the statute provides that the proceedings “shall be carried on contradictorily with the district attorney,” whose role is to “represent the state” and who “shall be served with a copy of the petition and citation to answer the same.”⁶⁷ Finally, on the other end of the spectrum, in Vermont, an applicant must appear before a judge, but simply to sign a form before the judge which “shall” thereafter be filed.⁶⁸ The judge is given no power to deny the application.

61. See, e.g., D.C. CODE § 16-2503(a) (2018); MICH. COMP. LAWS § 711.1(1) (2020); OHIO REV. CODE § 2717.01(A)(3) (2013); UTAH CODE ANN. § 42-1-2 (1953); W. VA. CODE § 48-25-103(a) (2007). Here, too, some state courts interpret these statutes more strictly than the wording may suggest. See, e.g., *In re Porter*, 31 P.3d 519, 521 (Utah 2001) (ordering trial court to grant a name change to Santa Claus and holding that applications under the state’s “may”-issue statute should “generally be granted unless sought for a wrongful or fraudulent purpose” (internal quotation marks omitted)).

62. See, e.g., DEL. CODE ANN. tit. 10 § 5904(a) (2018); 735 ILL. COMP. STAT. 5/21-101(d) (2018); N.M. STAT. ANN. § 40-8-1 (1989); WIS. STAT. § 786.36(1) (2018).

63. See S.C. CODE § 15-49-20(C) (2006) (“[T]he judge must determine and grant or refuse the name change as the judge considers proper, having a due regard to the true interest of the petitioner and protection of the public.”). Compare ALASKA STAT. § 09.55.010 (1986) (providing that a name change “may not be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interest”), with ALASKA R. CIV. P. 84(c) (2014) (“If satisfied that there is no reasonable objection to the assumption of another name by petitioner, the court shall by judgment authorize petitioner to assume such other name”).

64. ARIZ. REV. STAT. §§ 12-601(A), (C) (2011).

65. See, e.g., FLA. STAT. § 68.07 (2016); R.I. GEN. LAWS § 33-22-28 (1991).

66. LA. REV. STAT. § 13:4753 (2019).

67. *Id.* § 13:4752.

68. VT. STAT. tit. 15, § 811 (2011).

One state keeps the power in the courts but shifts it away from the judge. In North Carolina, the clerk of the court – not the judge herself – is designated as the initial recipient of a name change application, and the clerk has the “duty” *not* to grant the application if he finds that good reasons exist for denying it.⁶⁹ The clerk must, however, afford the applicant with reasons for a denial, at which point the applicant may appeal the clerk’s decision to the local judge, whose decision on the matter is “final” and not appealable any further.⁷⁰

Finally, in Hawaii, the power resides entirely outside the courts. There, a person who wishes to change his name must petition the Office of the Lieutenant Governor.⁷¹ The Lieutenant Governor has promulgated regulations setting out the information an applicant must provide – including the reasons for the requested change – and allowing for the possibility that the Lieutenant Governor will deny the petition.⁷² Those regulations, however, are silent about the bases on which such a denial may be grounded and about the breadth of discretion available on that score. Rather, they simply state that a denial will be accompanied by reasons and that an unsuccessful applicant has the right to seek rehearing.⁷³

B. Minors’ Access to Abortion

Of the forty-three states with statutes on the books that require parental involvement – either consent or notification – in a minor’s decision to seek an abortion, forty-two provide for that parental involvement to be “bypassed” if a particular governmental actor approves of the decision being made without the requisite parental involvement.⁷⁴ Just as with name changes, if one did not know

69. N.C. GEN. STAT. §§ 101-2(a), 101-5(f) (2014–15).

70. *Id.* § 101-5(f). The statute also provides that an unsuccessful applicant is not permitted to reapply for another year, *id.*, and that a successful applicant is not permitted to reapply for another name change ever again. *Id.* § 101-6(a) (“No person shall be allowed to change his name under this Chapter but once . . .”).

71. HAW. REV. STAT. § 574-5(a)(1), (b) (2014). That Office provides a simple online portal and instructional video to guide applicants through the process. See *Name Change Application*, LT. GOVERNOR OF THE STATE OF HAW.: JOSH GREEN, <https://namechange.ehawaii.gov/public/welcome.html> (last visited Oct. 7, 2020).

72. HAW. CODE R. §§ 2-2-2, 2-2-6 (1987).

73. *Id.* § 2-2-6.

74. Maryland law provides that a physician may perform an abortion on a minor without notice to the minor’s parent if, in the physician’s judgment, (a) notice “may lead to

better, one might think this government actor would be an administrator from, say, the state's health department or child and family welfare department. The thing being sought by the minor is, after all, akin to a permit. But, just as with name changes, the statutorily authorized government actor here is uniformly a state court judge.

This regime of parental involvement coupled with judge-controlled bypass is best reflected in the U.S. Supreme Court's 1979 decision in *Bellotti v. Baird*. In that case, a challenge to a Massachusetts abortion regulation statute, the Court held that a state can permissibly make a minor's decision to seek an abortion contingent on her parent's consent. However, the Court held that if a state does so, it "also must provide an alternative procedure whereby authorization for the abortion can be obtained."⁷⁵ Specifically, a minor seeking to bypass a parental consent requirement is "entitled" to a confidential, anonymous, and swift proceeding in which she can show either "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes," or "that even if she is not able to make [that] decision independently, the desired abortion would be in her best interests."⁷⁶

While the Court thus made explicit that a minor is entitled to an opportunity to convince the state government to waive the parental consent that would otherwise be required, and while it set out the standards to which a state can permissibly hold a minor attempting to make that showing, it did not say *which* component of state government must serve as the decisionmaker. Because Massachusetts law already involved state superior court judges in minors' abortion decisions—albeit in ways the Court ultimately found to inadequately safeguard a pregnant minor's rights—the Court framed this bypass procedure by reference to a proceeding

physical or emotional abuse of the minor," (b) the minor is "mature and capable of giving informed consent to an abortion," or (c) notice would not be in the minor's "best interest." MD. CODE ANN., HEALTH-GEN. § 20-103(c)(1) (1991). The jurisdictions that do not require any form of parental involvement are Connecticut, the District of Columbia, Hawaii, New Mexico, New York, Oregon, Vermont, and Washington. See *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1271, 1284–85 n.17 (M.D. Ala. 2017).

75. *Bellotti II*, 443 U.S. 622, 643 (1979).

76. *Id.* at 643–44.

before a judge.⁷⁷ The Court made clear, however, “that a State choosing to require parental consent” is entitled to “delegate the alternative procedure to a juvenile court or an administrative agency or officer.”⁷⁸ In fact, the Court recognized that it could be beneficial if a state were to “employ[] procedures and a forum less formal than those associated with a court of general jurisdiction.”⁷⁹

Nearly every state has nonetheless chosen to entrust this procedure to its judges, and everywhere but Alabama, the proceedings are structured in approximately the same way.⁸⁰ Rather than fill out a form and meet with a counselor at the state’s health department, a minor wishing to pursue an abortion without the notification or consent of her parent must take the “daunting” and “intimidating” step of filing a petition with a state court judge that sets out her desire to bypass her parents.⁸¹ The petition is filed anonymously or pseudonymously,⁸² and minors are to be informed that they have the right to court-appointed counsel (and sometimes guardians ad litem as well) upon request.⁸³ The petition will be

77. *Id.* at 643 n.22.

78. *Id.*

79. *Id.*

80. While a number of states require parental *consent* to a minor’s abortion, see, for example, ARIZ. REV. STAT. § 36-2152(A) (2014); KAN. STAT. ANN. § 65-6705(a) (2014); LA. STAT. ANN. § 40:1061.14(A) (2017); S.C. CODE ANN. § 44-41-31(A) (1990), some require only parental *notification*, see, for example, DEL. CODE ANN. tit. 24, § 1783(1) (1995); MINN. STAT. § 144.343(2) (2020); NEV. REV. STAT. § 442.255(1) (1985); OHIO REV. CODE § 2151.85(A) (2013). But this distinction has no apparent effect on the ways in which states structure their bypass proceedings. Moreover, while the Supreme Court has “not decided whether parental notice statutes must contain” the same bypass opportunities that parental consent statutes do, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510 (1990), every state in this category in fact provides an opportunity for bypass of a notification requirement. See *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1271, 1285 n.18 (M.D. Ala. 2017).

81. Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, *Young Women’s Experiences Obtaining Judicial Bypass for Abortion in Texas*, 64 J. ADOLESCENT HEALTH 20 (2019); Molly Redden, *This is How Judges Humiliate Pregnant Teens Who Want Abortions*, MOTHER JONES (Sept. 2014), <https://www.motherjones.com/politics/2014/10/teen-abortion-judicial-bypass-parental-notification/> (“‘“Daunting” doesn’t begin to cover it,’ says Jennifer Dalven, who runs the reproductive rights arm of the American Civil Liberties Union. ‘Imagine it: You’re 17 years old. You’re already struggling with this unplanned pregnancy. You may be afraid of your parents. And now you’re told, “Go to court?”’”).

82. See, e.g., KAN. STAT. ANN. § 65-6705(c) (2014); LA. STAT. ANN. § 40:1061.14(B)(3)(a) (2017); MISS. CODE ANN. § 41-41-55(3) (2007).

83. See, e.g., ARK. CODE ANN. § 20-16-809(b)(1)(B), (C) (2016); N.H. REV. STAT. ANN. § 132:34(II)(a) (2012); OKLA. STAT. tit. 63, § 1-740.3(B) (2013); TENN. CODE ANN. § 37-10-304(c)(1) (2020).

considered and ruled upon by the judge *ex parte* within a statutorily set and very short period of time (typically a few days at most), and if the judge fails to do so, the petition is often deemed granted.⁸⁴ If the judge wishes to hold a hearing before issuing a decision, the minor is entitled to appear at that hearing in a closed setting and with her attorney.⁸⁵ With specific allowances for the time-sensitive and confidentiality-sensitive context, then, this structure is similar to that which attends a name change request in that both involve the judge acting as the decisionmaker on a one-sided petition that is entirely removed from any pending or imminent litigation.

But whereas many state court judges enjoy fairly wide discretion with respect to name change requests, their discretion tends to be somewhat more cabined in this context—at least formally, according to the terms of the relevant statutes. When it comes to the judge’s decisionmaking authority to bypass parental involvement in a minor’s abortion decision, many of the states instruct their judges in similar fashions. Echoing the language of *Bellotti*, these states provide—to take Colorado as an example—that “any judge of a court of competent jurisdiction shall” order that the requisite parental involvement be waived “if the judge determines that [such involvement] will not be in the best interest of the minor, or if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to have an abortion.”⁸⁶ That is, the factors to be considered are explicit, as is the judge’s duty to grant. Further, mirroring the reason-giving requirements and demands for supporting evidence that are the bread and butter of administrative law,⁸⁷ nearly all of these states

84. See, e.g., DEL. CODE ANN. tit. 24, § 1784(c) (1995); GA. CODE ANN. § 15-11-683 (2014); 750 ILL. COMP. STAT. 70/25(c) (1995).

85. See, e.g., IOWA CODE § 135L.3(3)(c) (2015); KAN. STAT. ANN. § 65-6705(c) (2014); ME. STAT. tit. 22, § 1597-A(6)(C) (2020).

86. COLO. REV. STAT. §13-22-707(1)(a) (2018); see, e.g., GA. CODE ANN. § 15-11-684(c) (2014); IOWA CODE ANN. § 135L.3(3)(e) (2015); MISS. CODE ANN. § 41-41-55(4) (2007); TENN. CODE ANN. § 37-10-304(e) (2020).

87. See, e.g., *T-Mobile S. LLC v. City of Roswell*, 135 S. Ct. 808, 819 (2015) (Alito, J., concurring) (“One such [administrative law] principle, as the Court explains, is the requirement that agencies give reasons.”); 5 U.S.C. § 557(c)(A) (“All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”); see also COLO. REV. STAT. § 24-4-104(8), (10) (2018) (requiring any state agency making a decision to deny, revoke, or

go on to require the judge to include in the order “specific factual findings and legal conclusions in support thereof.”⁸⁸

For the remaining states, this statutory structuring of the judges’ decisionmaking is even more involved. Rather than just set out a standard that judges must find a minor to satisfy in order to be freed from the applicable parental involvement requirement, these legislatures have listed specific factors that the judge must consider. In Florida, for example, a judge is required to consider the minor’s age, intelligence, “emotional development and stability,” “credibility and demeanor as a witness,” “ability to accept responsibility,” “ability to assess both the immediate and long-range consequences of the minor’s choices,” and “ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.”⁸⁹ The judge is also required to consider “[w]hether there may be any undue influence by another on the minor’s decision to have an abortion.”⁹⁰ The other states in this category have statutes which largely mirror that language.⁹¹ But in Kansas, which imposes the most elaborate instructions, the judge “shall take into account the minor’s experience level, perspective and judgment,” along with her “age, experience working outside the home, living away from home, traveling on her own, handling personal finances, and making other significant decisions.”⁹² And in so doing, the judge “shall consider . . . what steps the minor has taken to explore her options and the extent to which she considered and weighed the potential consequences of each option,” “[the minor’s] conduct since learning of her pregnancy,” and “her intellectual ability to understand her options and to make informed decisions.”⁹³

suspend a license to provide written notice along with “the grounds therefor”); *id.* § 24-4-105(14)(a) (requiring agency decisions be rooted in a factual record).

88. COLO. REV. STAT. §13-22-707(1)(a) (2018); *see also* IOWA CODE § 135L.3(3)(f) (2015); MISS. CODE ANN. § 41-41-55(5) (2007); TENN. CODE ANN. § 37-10-304(f) (2020).

89. FLA. STAT. § 390.01114(4)(c)(1) (2020).

90. *Id.* § 390.01114(4)(c)(2).

91. *See, e.g.*, KY. REV. STAT. ANN. § 311.732(3)(e) (2005); MO. REV. STAT. § 188.028(2)(2) (2019); 18 PA. CONS. STAT. § 3206(f)(4) (1992). A few other states list factors that a judge “may” consider. *See, e.g.*, ARIZ. REV. STAT. § 36-2152(C) (2014). And Oklahoma actually forbids a judge from considering “the potential financial impact on the pregnant unemancipated minor or the family of the pregnant unemancipated minor if she does not have an abortion.” 63 OKLA. STAT. § 1-740.3(A) (2013).

92. KAN. STAT. ANN. § 65-6705(n) (2014).

93. *Id.*

Finally, Alabama employs a notably distinct procedure.⁹⁴ Unlike all the other states,⁹⁵ the court is required upon receipt of a minor's petition to "immediately notify the district attorney's office of the county in which the minor is a resident, or the county where the petition was filed of the filing of the petition on the day of such filing" so that the district attorney "shall participate as an advocate for the state to examine the petitioner and any witnesses, and to present evidence for the purpose of providing the court with a sufficient record upon which to make an informed decision and to do substantial justice."⁹⁶ Alabama is thus the only state in the nation in which these proceedings are not *ex parte*. Moreover, the court is also permitted by statute to appoint a guardian ad litem, not merely for the minor petitioner, but "for the interests of the unborn child," and that guardian ad litem "shall have the same rights and obligations of participation in the proceeding as given to the district attorney's office."⁹⁷ And while the minor's parents are not to be contacted by the court—for that would defeat the purpose of the hearing's confidential nature⁹⁸—the statute provides that, if the minor's parents are already aware of the proceeding, they "shall be given notice of and be permitted to participate" in the proceeding "with all of the rights and obligations of any party to the proceeding."⁹⁹ And finally, any party in the proceeding—which can include the district attorney, the guardian ad litem for the fetus, and the minor's parents—can request and receive a delay in the proceedings for up to one business day, "unless justice requires an extension thereof."¹⁰⁰

Whatever the merits or demerits of Alabama's unique framework—and many of the components highlighted above have

94. It does not appear that Alabama's recently enacted near-ban on abortion amends the procedure applicable to minors seeking abortions, though its existence dramatically changes the landscape for those young women. *See* H.B. 314 § 4 (Ala. 2019) (criminalizing abortion except where "necessary in order to prevent a serious health risk to the unborn child's mother").

95. *See* *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1284 (M.D. Ala. 2017) (observing that Alabama's framework is matched by "*no other state*").

96. ALA. CODE § 26-21-4(i) (2014).

97. *Id.* § 26-21-4(j).

98. *Id.* § 26-21-4(c), (o).

99. *Id.* § 26-21-4(l).

100. *Id.* § 26-21-4(k).

been permanently enjoined by a district court¹⁰¹—that framework comes closest to putting state court judges in an ordinary judicial capacity resolving adversarial disputes. It therefore serves to illustrate how different the judge’s role in this arena is in every other state.

C. Attorney Admission and Discipline

The entrance to many professions—some argue too many¹⁰²—is regulated by state law. People wishing to engage in those occupations must receive licenses from the state to do so. For all but one of those professions, the licensing entity is an administrative agency of the state government. In New York, for example, the Division of Licensing Services of the Department of State boasts on its website that it regulates “35 occupations throughout the state” and “licenses over 800,000 individuals and businesses.”¹⁰³ These occupations range from cosmetology to home inspection, barbering to hearing aid dispensing, pet cremation to coin processing, and waxing to ticket reselling.¹⁰⁴ Other professions in New York—like doctors and dentists—are regulated by their own state administrative agencies.¹⁰⁵ The same is true across the country, whether the subject is the practice of dentistry regulated by the North Carolina State Board of Dental Examiners,¹⁰⁶ one of the over forty professions regulated by the Texas Department of Licensing

101. See *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1296–97 (M.D. Ala. 2017). The court did not, however, reach the plaintiffs’ argument that *any* adversarial procedure would necessarily be unconstitutional. *Id.* at 1286 n.19, 1295 n.24. *But see* *Zbaraz v. Hartigan*, 776 F. Supp. 375, 382–84 (N.D. Ill. 1991) (concluding that the Court in *Bellotti II* “did not contemplate that [a bypass] procedure would be . . . adversarial” and enjoining a rule that would have allowed “[a]ny respondent that desires to do so” to file a response to the minor’s petition).

102. See, e.g., *Economic Liberty*, INST. FOR JUST., https://ij.org/pillar/economic-liberty/?post_type=case (last visited Sept. 10, 2020) (cataloging litigation aimed at reducing government regulation of occupations).

103. *Department of State, Division of Licensing Services*, N.Y. STATE, <https://www.dos.ny.gov/licensing/> (last visited Sept. 10, 2020).

104. *Id.*

105. See *Office of Professional Medical Conduct*, N.Y. STATE DEP’T OF HEALTH, <https://www.health.ny.gov/professionals/doctors/conduct/> (last visited Sept. 10, 2020) (regulating doctors); *Office of the Professions*, N.Y. STATE EDUC. DEP’T, <http://www.op.nysed.gov/prof/dent/dentic.htm> (last visited Sept. 10, 2020) (regulating dentists).

106. N.C. GEN. STAT. § 90-22(b) (1981).

and Regulation,¹⁰⁷ one of the fields of medicine regulated by the Florida Department of Health's Board of Medicine,¹⁰⁸ or one of the many hair, skin, and nail beautification occupations regulated by the Iowa Board of Cosmetology Arts & Sciences.¹⁰⁹

The exception is attorneys. In every state, the admission and discipline of attorneys is governed, not by some Department of Attorney Licensing, but by the state courts.¹¹⁰ In some states, this responsibility and this power are allocated to the state courts in the constitution,¹¹¹ in others, by statute;¹¹² and in others by judicial decision.¹¹³ No matter the basis, the rationales have been the same.¹¹⁴ First and foremost, lawyers are "officers" of the court. And whether this entails something akin to a principal-agent frame in which the court's need to control its "officers" means that it *must* be the entity which regulates admission into the practice,¹¹⁵ or whether it means that considerations of efficiency or expertise suggest the

107. *Programs Licensed and Regulated by TDLR*, TEX. DEP'T OF LICENSING & REGUL., <https://www.tdlr.texas.gov/licenses.htm> (last visited Sept. 10, 2020).

108. *Licensing and Registration*, FLA. BD. OF MED., <https://flboardofmedicine.gov/licensing/> (last visited Sept. 10, 2020) (regulating medical professions).

109. *Board of Cosmetology Arts & Sciences*, IOWA DEP'T OF PUB. HEALTH, <https://idph.iowa.gov/Licensure/Iowa-Board-of-Cosmetology-Arts-and-Sciences> (last visited Sept. 10, 2020); *see also* IOWA CODE § 157.1(5), (6) (2015) (listing covered practices).

110. *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 933 (1994); Michael C. Dorf, *Disbarment in the United States: Who Shall Do the Noisome Work?*, 12 COLUM. J.L. & SOC. PROBS. 1, 8 (1975). The regulation of attorney admission by state court judges received recent and sustained public attention—and, in many corners, criticism—as these judges were frequently the officials to make decisions about the administration of the bar exam for aspiring attorneys amidst the COVID-19 pandemic. *See supra* note 23 and accompanying text.

111. *E.g.*, N.J. CONST. art. VI, § 2 cl. 3; FLA. CONST. art. V, § 15; UTAH CONST. art. VIII, § 4; ARK. CONST. amend. 28.

112. *E.g.*, OKLA. STAT. tit. 5, § 13 (1939); TEX. GOV'T CODE § 82.021 (1987); N.M. STAT. ANN. § 36-2-1 (1941); D.C. CODE § 11-2501 (1970); MICH. COMP. LAWS § 600.910 (2020).

113. *E.g.*, *State v. Cook*, 525 P.2d 761, 763-64 (Wash. 1974).

114. In the earliest days of the United States, the practice of law was inconsistently if ever regulated. *See* Dorf, *supra* note 110, at 6; Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 531-32 (1983). But by the late-1800s, state courts began to regulate it. *See* Dorf, *supra* note 110, at 6-8.

115. *See, e.g., Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1866); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824); *People ex rel. Karlin v. Culkun*, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, C.J.); *Ruckenbrod v. Mullins*, 133 P.2d 325, 330 (Utah 1943); *see also* Hershkoff, *supra* note 27, at 1873-74 (discussing state courts which claim the regulation of the bar to be "an inherent aspect of their institutional role").

court *ought* to be that entity which does so,¹¹⁶ courts have long since reached the conclusion that they have the “exclusive[]” power to admit and discipline attorneys.¹¹⁷ Second, the courts’ power to license lawyers is often justified by the claim that only the courts can adequately preserve the independence of lawyers and the legal profession from undue regulation or pressure from the more political branches of government, particularly the legislature.¹¹⁸ Indeed, the American Bar Association even suggests that the Sixth Amendment to the U.S. Constitution all but requires that courts be the entities to license lawyers.¹¹⁹

Of course, these claims are contestable. For one thing, at the same time as the courts were articulating this vision of their inherent power to govern admission to the bar, much of the practice of law was moving “out of the courtroom and into the law office.”¹²⁰ The claim that attorneys are notionally officers of the court is thus a thin reed on which to rest such a sweeping argument when one considers that many lawyers will never interact with a judge in their entire careers. But they are all but guaranteed to interact with clients, and critics charge that courts are not necessarily best situated to regulate in the interests of those clients.¹²¹ Rather, they say, it is the coordinate branches of government—contrary to the

116. See, e.g., *Karlin*, 162 N.E. at 493 (“[If] the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.”); *In re Integration of Neb. State Bar Ass’n*, 275 N.W. 265, 268 (Neb. 1937) (“The practice of law is so intimately connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate its practice naturally and logically belongs in the judicial department of our state government.”).

117. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1857). Of course, as noted above, this statement and its claim to historical practice were questionable in 1857. See *supra* note 114; Alpert, *supra* note 114, at 535 (observing that this statement in *Secombe* about “well-settled judicial power” is “misleading history”).

118. See *Lawyer Regulation for a New Century*, AM. BAR ASS’N (Sept. 18, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ (“From the Alien and Sedition Acts of 1798 to the McCarthy era of the 1950s, history has shown that the people’s respect for individual rights can sink dangerously low. Legislatures act accordingly. During such times, an independent judiciary and legal profession are necessary to protect those rights.”).

119. *Id.* (invoking the rights guaranteed by the Sixth Amendment as “another reason why the judiciary must regulate the legal profession”).

120. Alpert, *supra* note 114, at 546; see also *id.* at 543 (discussing efforts by state legislatures to recapture authority over the bar).

121. See *id.* at 548 (observing that critics “regard the interests of the client, who is the consumer of legal services, as paramount to those of the professional” and noting that such critics “did not trust lawyers to clean their own house”).

ABA's drumbeat—that are best situated to protect people from predatory or unscrupulous lawyers. In other words, perhaps the bar could stand to have its independence threatened a bit.¹²²

But even setting that aside for the moment, none of the courts' or the ABA's arguments suggest that the nature of licensing and discipline is—just as with any other licensed profession—anything other than fundamentally administrative in nature. Indeed, it is precisely because these tasks *are* qualitatively administrative that it is even plausible to explore or suggest reallocating them away from the state courts and into the same sorts of entities that regulate other professions. That is, no one would suggest—perhaps least of all the ABA—that the Iowa Board of Cosmetology Arts & Sciences serves a traditionally judicial function when it decides whether to grant an applicant a license to style hair.¹²³ The courts' insistence that the practice of law is special does not make it so.

To be sure, the practice of law might be special. The courts might be right that it makes sense to assign the role of attorney regulation to those courts. But that conclusion cannot rest on vague appeals to lawyers' status as officers of the court or on the asserted need for independence—which the argument suggests no other profession deserves. Rather, it must rest on an analysis of the interests at stake, the processes owed to protect those interests, and the institutions best equipped to offer those processes. As with the other quasi-administrative tasks explored in this Part, the final Part takes up that charge.

II. THE STATE JUDGE AS ENFORCER

State court judges play another executive role distinct from the quasi-administrative functions discussed in Part I. They exercise enforcement discretion in precisely the area which the popular conception perhaps most associates with the executive: the choice whether to prosecute an individual. Specifically, a number of states afford their judges the power to dismiss charges on the judge's own initiative and based on the judge's own belief that it was a mistake

122. See *id.* at 554–56 (discussing arguments in favor of transferring the power over the legal profession to state legislatures, noting that legislatures might be helpfully “less sympathetic toward the bar than are the courts,” and pointing out that questions of how best to regulate lawyers “are political and should be viewed as such”).

123. See *infra* Section IV.C.3 (discussing and criticizing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

for the prosecutor to have commenced those charges in the first place.

In the common conception, prosecutors choose whether to file charges, which charges to file, and what penalties to seek. State court judges preside over the ensuing criminal trials (or accept pleas in the vastly more common circumstance¹²⁴) and sentence convicted individuals. That is, common law criminal justice systems like the ones throughout the United States familiarly place the judge in the role of arbiter with respect to charges that are filed by an actor independent of the court, namely the local district attorney or state attorney general. And that actor performs a qualitatively executive law enforcement function: she enforces the criminal law.¹²⁵ As Justice Scalia put it, the power to investigate and prosecute “has always and everywhere—if conducted by government at all—been conducted never by the legislature, *never by the courts*, and always by the executive.”¹²⁶ And the power to refrain from prosecuting likewise “has long been regarded as the special province of the Executive Branch.”¹²⁷ On the same logic, the power to terminate a prosecution once it has begun was also historically the province of the prosecutor herself. Indeed, at common law, it was only the prosecutor who could enter the writ of *nolle prosequi* and voluntarily dismiss a prosecution.¹²⁸

But in nineteen states, judges in the trial courts have the explicit law enforcement power to unilaterally dismiss prosecutions on the judge’s own initiative.¹²⁹ The judges in these states are not

124. See, e.g., *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (noting that 97% of federal convictions and 94% of state convictions are the result of guilty pleas, and then concluding that “plea bargaining . . . is the criminal justice system” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992))).

125. See *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“There is no real dispute that the [investigative and prosecutorial] functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”); *id.* at 706 (Scalia, J., dissenting) (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”).

126. *Id.* (Scalia, J., dissenting) (emphasis added).

127. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

128. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 *BUFF. L. REV.* 829, 846 (1999) (“Seen from an historical point of view, then, the writ appears to have been lodged solely in the hands of the prosecutor . . .”).

129. Anna Roberts, *Dismissals as Justice*, 69 *ALA. L. REV.* 327, 330 (2017).

evaluating the sufficiency of evidence, but are instead making normative judgments about whether a case *ought* to be pursued even if there is ample evidence of guilt—and concluding that it ought not be.¹³⁰

In the majority of these states, the judge's power is capaciously framed as the power to dismiss prosecutions "in furtherance of justice."¹³¹ Nearly all of them leave this determination to the judge's open-ended discretion and permit the judge to make that determination on her own motion; some even *forbid* the defendant from invoking the judicial dismissal statute and asking the judge to exercise her discretion in this manner.¹³² New York was the first state to give judges this power,¹³³ and it imposed some bounds on the judge's discretion by requiring her to consider ten specific factors before concluding that a dismissal is warranted.¹³⁴ The states that followed, however, have opted not to do so. Instead, they simply require the judge to place on the record her reasons, whatever they are, for ordering the dismissal.¹³⁵

A small minority of the states with judicial dismissal statutes instead permit the judge to dismiss a prosecution if the judge concludes that the defendant's conduct was relatively unimportant or "too trivial to warrant the condemnation of conviction."¹³⁶ This can be the case with respect to any crime; even defendants accused of serious crimes can see their charges dismissed by a state court judge pursuant to this sort of statute.¹³⁷ These "de minimis" dismissal statutes, while shaped slightly differently, still mirror the more open-ended dismissal statutes in the power they afford to

130. See *People v. Rickert*, 446 N.E.2d 419, 420 (N.Y. 1983) (noting that the purpose of this power is, "even to the disregard of legal or factual merit, . . . 'to allow the letter of the law gracefully and charitably to succumb to the spirit of justice'").

131. MINN. STAT. ANN. § 631.21 (West 2017); see also Roberts, *supra* note 129, at 332, 333 n.21 (collecting statutes).

132. Roberts, *supra* note 129, at 352 n.158.

133. *Id.* at 333–34.

134. N.Y. CRIM. PROC. LAW §§ 170.40 (misdemeanors), 210.40 (felonies).

135. See Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 656 (2015).

136. HAW. REV. STAT. § 702-236(1)(b) (2019); ME. REV. STAT. ANN. tit. 17A, § 12(1)(b) (2019); N.J. STAT. ANN. § 2C:2-11(b) (West 2020); 18 PA. CONS. STAT. ANN. § 312(a)(2) (2020); see Roberts, *supra* note 129, at 334–35 (discussing same).

137. See *State v. Zarrilli*, 523 A.2d 284, 287 (N.J. Super. Ct. Law Div. 1987) ("The *de minimis* statute applies to *all* prohibited conduct."); Roberts, *supra* note 129, at 336.

judges with respect to the management and continuation of charges against defendants in their courtrooms.

Across all of these states, the allocation of this power to the state judiciary reflects a conscious choice to vest judges with an enforcement power typically wielded by executive officials. Indeed, when New York adopted its judicial dismissal statute, it was motivated to do so specifically in order to weaken the prosecutor's enforcement discretion and distribute it to the courts.¹³⁸ The New York legislature found it problematic that the judge was "unable, no matter how unjust may be the continuance of the indictment against the defendant, to relieve him from that injustice, until the district attorney chooses to consent that it do so."¹³⁹ Other states went on to frame the power as one that the prosecutors and the judges would exercise in "parallel."¹⁴⁰ And judges, for their parts, have gotten the message. As Anna Roberts has explained, judges tend to justify their decisions to dismiss prosecutions by reference to their conclusion that the prosecutor made a "wrong" choice based on the defendant's mitigating circumstances, or that the prosecutor's resources could have been better used focusing on other defendants or other crimes, or that the prosecutor has over-charged or otherwise been unduly harsh towards a given individual.¹⁴¹ All of these necessarily entail replacing *the prosecutor's* enforcement discretion with the judge's.¹⁴²

This concern on the part of judges that other actors in the criminal justice system (here, prosecutors) are doing their jobs incorrectly—or, indeed, that the criminal justice system is altogether broken—might well be a valid one, and the judges'

138. *People v. Rickert*, 446 N.E.2d 419, 423 (N.Y. 1983) ("[O]ne of the reforms effected through the years in the procedure to dismiss accusatory instruments in the interest of justice was to remove the power to do so from the offices of District Attorney and Attorney-General and lodge it, instead, in the courts alone.").

139. Roberts, *supra* note 129, at 334 (citing COMM'RS ON PRAC. & PLEADING, REPORT ON THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK 343 (1850), <https://ia800202.us.archive.org/13/items/codecriminalpro00pleagoog/codecriminalpro00pleagoog.pdf>).

140. *Id.* at 335–36.

141. *Id.* at 340–44 (collecting cases).

142. *See id.* (noting that, while "[p]rosecutors can decline to charge" or can move to dismiss charges, judges are frustrated by the culture in prosecutors' offices that minimizes the exercise of this power and so step in to exercise it themselves); *id.* at 366 ("One sees judges dismissing cases in favor of a range of mechanisms that *they* find as suitable as—or more suitable than—the criminal law to achieve the relevant priorities." (emphasis added)).

efforts to step into the breach might well be laudable from that perspective.¹⁴³ But that does not make it any less a step into an executive law enforcement role, albeit one authorized and encouraged by state law.¹⁴⁴ The final Part of this Article evaluates whether that step may be justifiable.

III. THE STATE JUDGE AS LEGISLATOR

This last descriptive Part highlights two of the quasi-legislative functions of state court judges. By calling them quasi-legislative, I mean to draw attention to the fact that, when carrying out these roles, judges are making law and setting policy. Of course, judges also “make law” in the context of common law decisionmaking, but common law judging is nonetheless rooted in the resolution of adversarial disputes.¹⁴⁵ This Part is about arenas in which state court judges set policy *outside of* resolving any adversarial dispute. That is, the judges choose to articulate new law in these contexts in the same way that legislators do so: because an event in the world triggers some obligation to act (like the depletion of a budget at the end of a budgeting cycle), or simply because they believe it to be wise policy.¹⁴⁶

First, this Part discusses the roles that state court judges play in apportioning legislative districts in response to the decennial census. Second, it explores the roles that state court judges play in creating specialized criminal courts because they think such courts are a good idea.

143. *See id.* at 341–44, 348–49.

144. Indeed, some judges see themselves as courageously “tak[ing] charge of the prosecution.” *People v. More*, 12 P. 631, 632 (Cal. 1887); *see Roberts, supra* note 129, at 348–49 (collecting cases).

145. The same can be said to describe, depending on one’s jurisprudential priors, judicial activity in constitutional cases. *See, e.g.,* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (contrasting textualism and originalism with a “common law approach to constitutional interpretation”).

146. One more widely appreciated example of a way in which state court judges “act[] not in their familiar capacity as adjudicators deciding cases” but instead in a “quasi-legislative role” is the drafting and promulgation of rules of civil and criminal procedure. Crespo, *supra* note 27, at 1380 (rules of criminal procedure); *see Clopton, supra* note 27 (rules of civil procedure). But as noted above, *see* explanation and sources cited at *supra* note 27, this is a role served by federal court judges as well, at least in some fashion. And a robust normative debate surrounds that practice. *See* sources cited at *supra* note 26 for additional support. What has been lacking, however, is a more systematic evaluation of the array of similar functions explored in this Article.

A. Redistricting

In roughly half the states, judges play important roles in redistricting—both with respect to congressional districts and state legislative districts—that operate wholly outside the context of dispute resolution. To be sure, individuals or groups file lawsuits from time to time to challenge a given map, and judges will necessarily resolve that dispute by issuing a judgment holding that a particular map does or does not run afoul of constitutional or statutory provisions.¹⁴⁷ But that is decidedly not the full extent of the state judge’s role in redistricting. Rather, many states ask their judges to draw the district lines themselves. And others might begin moving in that direction if concerns about partisan gerrymandering sufficiently move the public to reallocate the districting power away from the legislatures that traditionally and typically take the laboring oar.¹⁴⁸

Meanwhile, not only is redistricting an activity wholly removed from dispute resolution, but it is an activity that is qualitatively legislative. First, the activity entails the making of law: district maps are statutes,¹⁴⁹ and they reflect policy choices about the structure of political representation.¹⁵⁰ Second, the Elections Clause of the U.S. Constitution suggests as much by providing that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”¹⁵¹ Third, the Supreme Court has likewise characterized redistricting as a “legislative function.”¹⁵² And when the Supreme Court recently held that citizens can draw district lines by referendum consistent with the terms of the Elections Clause, it

147. See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

148. Cf. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are not justiciable under the U.S. Constitution).

149. See, e.g., S.B. 2, 2016 Gen. Assemb., Extra Sess. (N.C. 2016), <https://www.ncleg.net/Sessions/2015E1/Bills/Senate/PDF/S2v4.pdf>.

150. See *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (observing that redistricting “involves choices about the nature of representation”).

151. U.S. CONST. art. I, § 4, cl. 1.

152. *Ariz. State Legislature v. Ariz. Indep. Redistricting Cmm’n*, 135 S. Ct. 2652, 2668 (2015) (“[O]ur precedent teaches that redistricting is a legislative function”); see also *id.* at 2687 (Roberts, C.J., dissenting) (agreeing that redistricting is a legislative function).

explained that this was so because the citizens were thereby engaged in a lawmaking function.¹⁵³

And yet, state court judges perform, or at least participate in, that function.¹⁵⁴ In a number of states, members of the state's highest court – often but not only the Chief Justice – are part of the process by which a map is created in the first instance. In Alaska and Vermont, for example, state legislative districts are drawn by an independent commission with at least one member chosen by the state's Chief Justice.¹⁵⁵ In Illinois, Hawaii, Montana, New Jersey, Pennsylvania, and Washington, those districts are likewise drawn by independent commissions, and while their members are not regularly chosen by the state courts, the courts serve a tiebreaking function: An even number of commissioners are chosen by other (ostensibly partisan) officials, and if those commissioners cannot agree on a tiebreaking (ostensibly nonpartisan) last member, the state high court chooses that last member.¹⁵⁶ But California, Maine, Mississippi, New Jersey, and Washington all go even a step further: state court judges themselves serve as backup mapmakers. That is, if the legislature or independent commission cannot agree on a map, the map is either drawn by a group of officials which includes a judge or by a panel of judges entirely on their own.¹⁵⁷ This means a court will create the district map *even in the absence of a party seeking a judgment*. And like the legislature itself, it can do so without many constraints beyond those required to respect constitutional rights.¹⁵⁸

153. *Id.* at 2667 (majority opinion) (“[R]edistricting ‘involves lawmaking in its essential features and most important aspect.’” (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *id.* at 2676 (referring to “lawmaking by initiative to direct a State’s method of apportioning congressional districts”).

154. See *Grove v. Emison*, 507 U.S. 25, 33 (1993) (“[S]tate courts have a significant role in redistricting.”).

155. See ALASKA CONST. art. VI § 8(b); VT. STAT. ANN. tit. 17 § 1904(a) (2019). In addition, Colorado’s Constitution provides that every map created by the state’s independent redistricting commission is automatically submitted to the state’s Supreme Court for review. COLO. CONST. art. V § 48(2).

156. See ILL. CONST. art. IV § 3(b); HAW. CONST. art. IV § 2; MONT. CONST. art. V § 14(2); N.J. CONST. art. II §§ 2(1)(c), (3)(2); PA. CONST. art. II § 17(b); WASH. CONST. art. II § 43(2).

157. See CAL. CONST. art. XXI § 2(j); ME. CONST. art. IV pt. 1 § 3, pt. 2 § 2; MISS. CONST. art. XIII § 254; N.J. CONST. art. II § 2(3); WASH. REV. CODE § 44.05.100.

158. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (discussing equal protection limitations on districting).

But even if one considers circumstances in which a party has invoked the jurisdiction of the court in the dispute-resolution context, some states instruct their courts to do more than issue a judgment and leave its resolution to legislative actors. In six states, the courts are required to create remedial redistricting maps on their own upon finding that a map created by legislative actors is unlawful. In Arkansas, Florida, Iowa, Louisiana, and Michigan, the state high court either is permitted (in Arkansas and Michigan) or required (in Florida, Iowa, and Louisiana) to create its own map in that circumstance.¹⁵⁹ In North Carolina, the same is true, although that role is served by a special three-judge appellate court.¹⁶⁰

B. Establishing Specialized Criminal Courts

While the redistricting function is arguably cabined, it is not the only quasi-legislative function that state court judges serve. Increasingly, and without the imprimatur or even guidance of state law, state court judges have taken upon themselves the initiative to establish specialized courts for particular offenses or particular classes of defendants.

As many actors in the criminal justice system reexamine some of the assumptions or theories of punishment at its core—whether due to concerns about overcrowded jails, the incidence of recidivism, racial and other biases, and much more—one frequently suggested reform is the creation of specialized courts.¹⁶¹ One form of specialized court is the “problem-solving court”: a diversion of defendants away from the ordinary criminal courts and into a venue geared towards treatment, monitoring, community service, and prevention rather than incarceration.¹⁶² These have appeared in a host of contexts: drug courts, domestic violence courts, gun courts, truancy courts, homelessness courts, and others.¹⁶³ The through-line in these problem-solving courts is

159. See ARK. CONST. art. VIII § 5; FLA. CONST. art. III § 16(c)–(f); IOWA CONST. art. III § 36; LA. CONST. art. III § 6(B); MICH. COMP. LAWS §§ 3.72, 4.262(3) (2020).

160. See N.C. GEN. STAT. §§ 1-267.1; 120-2.4(a) (2016).

161. See, e.g., Collins, *supra* note 13, at 1482; James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541 (2003).

162. Collins, *supra* note 13, at 1483.

163. *Id.*; see *Problem Solving Courts: Addressing a Spectrum of Issues*, NAT'L ASS'N OF DRUG CT. PROFS., <https://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/home> [<https://perma.cc/RL2B-3A88>].

that they take a more active role in the rehabilitation of offenders by bringing together judges, court staff, and subject-area professionals to develop treatment plans, offer education (about, say, gun safety), point the way towards supportive social services, address underlying issues in the lives of those who come before the court, and preserve peace and safety (as in the domestic violence context, for example).¹⁶⁴ So, to take the example of drug courts, the idea is that treating a defendant's drug addiction is more likely than traditional incarceration to reduce his propensity for recidivism and to therefore "solve" the defendant's (and, in turn, society's) "problem."¹⁶⁵

A second and more recent trend in the world of specialized courts is the creation of what Erin Collins has called "status courts" – courts specialized, not along the lines of a particular class of offense, but a particular class of offender.¹⁶⁶ The most common thus far are veterans courts and girls courts, both based on the idea that the relevant populations are "'niche' groups with 'unique' needs the system does not, but should, address."¹⁶⁷ In fact, many of these status courts are presided over by judges who are members of the same status group and, the story goes, are therefore better able to relate to and serve as mentors for the offenders who appear in their specialized courts.¹⁶⁸ Notably, and in contrast to the problem-solving courts discussed above, advocates for status courts typically do not ground their advocacy only on the claim that such courts lead to better outcomes. Rather, they contend that

164. See *Problem Solving Courts*, *supra* note 163; *Collaborative Courts*, SUPERIOR CT. OF CAL., COUNTY OF ORANGE, <https://www.occourts.org/directory/collaborative-courts/> [<https://perma.cc/ATF2-HLDU>].

165. See Collins, *supra* note 13, at 1488–89.

166. See generally Collins, *supra* note 13 (studying status courts).

167. *Id.* at 1483–84; see also Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009); *Hawaii Girls Court*, HAW. ST. JUDICIARY, <https://www.girlscourthawaii.org/>.

168. Collins, *supra* note 13, at 1484, 1498, 1522. As Judge Patrick Dugan, a veteran and judge on the Philadelphia Municipal Veterans Court, put it, he can relate to the defendants who appear before him because he has "been there, done that, walked in their boots." Ines Novacic, *For Veterans in Legal Trouble, Special Courts Can Help*, CBS NEWS (Nov. 10, 2014, 2:32 PM), <https://www.cbsnews.com/news/for-veterans-legal-trouble-special-courts-can-help> [<https://perma.cc/PPY7-KCV5>].

creating such courts is “morally the right thing to do” for the sake of the offender.¹⁶⁹

This Article does not intend to explore whether or not establishing these specialized courts is normatively desirable,¹⁷⁰ but rather focuses on who makes the decision to establish them. The foregoing discussion—like so much of the academic and popular literature on specialized courts—was framed in the passive voice because there is in fact little in the way of a sustained or empirical account of the process by which these courts come into being or, critically, of who initiates that process. What evidence does exist, however, points towards *judges themselves* as the creators and decisionmakers.¹⁷¹

That judges are generally the driving force here is reflected throughout the stories that are held up as emblematic of the best or most inspirational of the system. The first drug court in the United States was created in Dade County, Florida in 1989 “by administrative order of the chief judge of Florida’s 11th Judicial Circuit.”¹⁷² The availability of funding incentives *followed* the judge’s lead, with the 1994 federal Crime Act authorizing the U.S. Department of Justice to make grants to fund such courts throughout the country.¹⁷³ And state government efforts to

169. Ari Melber, *For Vets, Rehab Rather than Prison*, MSNBC (Jan. 29, 2014, 5:57 PM), <https://www.msnbc.com/the-cycle/vets-rehab-rather-prison-msna257666> [https://perma.cc/U3NB-EC9Z] (quoting then-Attorney General Eric Holder); see Collins, *supra* note 13, at 1509–10.

170. Collins, for her part, makes compelling arguments that the verdict is decidedly mixed. Collins, *supra* note 13, at 1500–27.

171. See Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CAL. INTERDISC. L.J. 67, 67, 91–96 (2014) (noting that, in many states, “judges create these courts without legislative authorization” and therefore “have almost unlimited power to establish” them and “to determine their structures, rules, and procedures”); Leib, *supra* note 27, at 723 (discussing a local judge who was so interested in setting up a drug court despite the objections of his local legislature that, “[a]lthough he was unable to convince his locality to pay its drug council to sit with his criminal docket, he was active in getting a nearby locality’s council to come help his court”). More recently, some states have taken the step of authorizing judges to create these courts and have prescribed “basic requirements and policies,” but even in those states, it is often (though not always) the judges themselves who are empowered to make the creation decisions. Shah, *supra*, at 69–70, 84–91.

172. *Drug Court’s Holistic Approach*, MIAMI DADE COUNTY https://www.miamidrugcourt.com/index.php?option=com_content&view=article&id=44&Itemid=54 (last visited Oct. 7, 2020).

173. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL’Y 125, 127 (2001).

centralize and organize these ad hoc judge-driven creation decisions followed the money (and, of course, the arguable success of the drug courts themselves).¹⁷⁴ Similarly, the first veterans court in the United States was opened in 2008 by Robert Russell, a judge on the City Court in Buffalo, New York.¹⁷⁵ Judge Russell took that step based on *his* belief that it was warranted. And while he drew on guidelines that the U.S. Department of Justice had already prepared for earlier generations of drug courts, that choice was seemingly his to make, as were the “slight modifications” he made.¹⁷⁶ The same was true when Judge Jo Ann Ferdinand chose to create New York City’s first veterans court after a particularly moving interaction with a Vietnam veteran defendant in her courtroom.¹⁷⁷ Once again, federal attention and encouragement followed the ad hoc efforts of these individual judges.¹⁷⁸ And the first girls court in the country was opened in 2004 in Oahu, Hawaii by the judges on the Family Court of the First Judicial Circuit in that state.¹⁷⁹ Those judges appear to have crafted the program and procedures from scratch themselves.¹⁸⁰

This is not to say that all are sanguine about the role judges play here.¹⁸¹ A number of commentators and judges wish that circumstances were different and that state legislatures and executive branch officials would play a larger role in managing and

174. *Id.* at 126–27.

175. Collins, *supra* note 13, at 1492; Russell, *supra* note 167, at 357 n.†. City courts are part of the New York State court system. See *Courts Outside New York City*, NYCOURTS.GOV (Oct. 10, 2013), <https://www.nycourts.gov/courts/cts-outside-nyc-CITY.shtml>.

176. Russell, *supra* note 167, at 364–65.

177. Kristen Meriwether, *Veterans Treatment Courts Offer Hope, but Only in Three Boroughs*, GOTHAM GAZETTE, <https://www.gothamgazette.com/index.%20php%20government/5279-veterans-treatment-courts-offer-hope-but-only-in-three-boroughs> [https://perma.cc/DV8Q4M6F] (last visited Oct. 7, 2020).

178. See EXEC. OFF. OF THE PRESIDENT, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT 12 (2011), http://www.defense.gov/home/features/2011/0111_initiative/strengthening-our-military_january_2011.pdf [https://perma.cc/79K2-U8JL] (announcing a commitment to provide federal support for further development of the “Veterans Treatment Court concept”).

179. HAW. ST. JUDICIARY, *supra* note 167.

180. *Id.*

181. *But see* Janet DiFiore, *The Excellence Initiative and the Rule of Law*, 93 N.Y.U. L. REV. 1053, 1061 (2018) (lauding new opioid courts in New York as examples of “how state court systems are laboratories of reform, with judges and court staff increasingly taking on leadership roles” that “gain [them] credibility with the public and [with] partner branches of government” and that “advance the rule of law”).

reforming these aspects of the criminal justice system. But they feel that “the courts have no choice but to step into the void.”¹⁸² Then-Chief Judge of the New York Court of Appeals, Judith Kaye, sounded a similar note in a 2000 roundtable conversation with other judges and scholars, arguing that “[t]he political branches are choosing to put more and more cases into the courts” and that judges are “simply trying to do the best job that [they] can” to “improve the system.”¹⁸³

Some judges have expressed even greater consternation about taking on the mantle of court-creation.¹⁸⁴ Truman Morrison, a judge on the District of Columbia Superior Court,¹⁸⁵ has called it “terribly odd that America is looking to the judicial branch to solve these problems,” and he places the blame with the “abject failure of the other branches of government.”¹⁸⁶ Taking it a step further, Judge Morrison has noted that he is “concerned about the power that judges have” to create new courts and that he does not think that judges should be free “to leave their traditional role and be informed only by their own personal definition of what justice is.”¹⁸⁷ “When you try and channel the energies of social change into the judicial branch,” he cautioned, “it’s not a good fit.”¹⁸⁸ Judge Cindy Lederman of the Florida courts’ Judicial Division has likewise observed that “the public is now coming to the courts and asking for solutions to problems like crime, domestic violence, and substance abuse,” and has cautioned that, if judges “accept this challenge, we’re no longer the referee or the spectator.

182. Nolan, *supra* note 161, at 1541–42.

183. Greg Berman, “What is a Traditional Judge Anyway?” *Problem Solving in the State Courts*, 84 JUDICATURE 78, 85 (2000).

184. Some commentators share this concern. See Shah, *supra* note 171, at 82 (arguing that “[c]onstitutional issues arise when judges act in roles traditionally associated with the executive or legislature” and observing that “problem-solving court judges have exceeded their delegated authority in the past”).

185. The District of Columbia Superior Court is the general jurisdiction state-equivalent trial court in the District. See *Superior Court*, D.C. CTS., <https://www.dccourts.gov/superior-court> (last visited Oct. 7, 2020).

186. Berman, *supra* note 183, at 80; see *id.* at 83 (quoting Professor Ellen Schall as saying that “the system from which the problem-solving courts have emerged was a failure on any count”).

187. *Id.* at 81.

188. *Id.* at 82.

We're a participant in the process [which is] quite a leap. It's not traditional."¹⁸⁹

Whether one approves or disapproves of the move, then, the fact remains that the establishment of new courts to solve problems that some perceive in the criminal justice system—as apt and urgent as those perceptions might be—is not the ordinary job of a judge. Indeed, it is the ordinary job of a legislature. The next and final Part of this Article evaluates the propriety of state court judges serving such a function.

IV. ASSESSING AND REFORMING THE ROLES OF THE STATE JUDICIARY

Given the breadth of the roles played by state court judges, and also given the weight of those functions and the interests at stake for the citizens who encounter state court judges in these capacities, it is crucial not only to recognize these roles but to evaluate how they ought to be conceived and treated.¹⁹⁰ The mere fact that they depart from the classic conception of the judge is, of course, not itself a cause for concern.¹⁹¹ But on their merits, these roles might raise significant concerns. This Part examines the interests implicated in each of the roles discussed in this Article, evaluates the degree to which the status quo respects those interests, and explores whether and how those interests might be better served. While there might be many different ways in which a process can be said to respect or not respect the interests at stake, I follow a well-worn path in administrative law and institutional design scholarship and focus here on the desirability and presence of decisionmaker accountability, decisionmaker expertise, and decisionmaker discretion—that is, how much we might want that feature to exist with respect to each function, and how much it does exist in the existing allocation of that function.¹⁹² Accountability

189. *Id.* at 80.

190. As noted at the outset, this Article does not claim to capture the full universe of these roles. The examples described, however, shed light on how large that universe is and motivate the normative analysis in this Part.

191. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999) (arguing that “[p]articular institutions serve complex functions in each constitutional system” and that each should be assessed on its own terms).

192. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255, 2331–38 (2001); see also Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 481–82, 488–91, 496–501 (2014); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1770–76 (2012); Eric Berger, *Individual Rights, Judicial*

speaks to whether the decisionmaker is or should be electorally or politically responsive when making a particular decision; expertise to whether the decisionmaker might require specific knowledge in order to be good at making the decision; and discretion to the amount of freedom to maneuver we might want the decisionmaker to have to make individualized determinations and judgment calls.

This Part takes the three rough categories set out above in order of increasing concern – starting with the executive law enforcement role and moving first to the quasi-legislative and then to the quasi-administrative roles. This last category raises the most significant problems, at least as currently structured, and therefore warrants the most fulsome discussion about the paths for possible reform.

A. State Judges as Enforcers

The law enforcement role played by state court judges explored in this Article is the judge's power to terminate a prosecution *sua sponte* by ordering its dismissal because the judge thinks the prosecution unwise or unjust.¹⁹³ To an observer schooled in the more rigid separation of powers doctrine applicable at the federal level under the U.S. Constitution, this allocation might seem odd, at a minimum, and perhaps even inappropriate. But the relative pliability of the separation of powers in the states allows for more experimentation with alternative arrangements¹⁹⁴ – and, in turn, demands a normative rather than doctrinal evaluation of that arrangement.

Here, the threatened interests are primarily those of the prosecution (and, in turn, the public on whose behalf she purportedly acts).¹⁹⁵ Because we are considering here not the judge who rules on a defense motion to dismiss a prosecution but rather the judge who makes that decision on her own motion, the party whose authority is most potentially inappropriately displaced by the judge's decision is the prosecutor who is deprived of the

Deference, and Administrative Norms in Constitutional Decision Making, 91 B.U. L. REV. 2029, 2059 (2011); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–91 (2003).

193. See *supra* Part II.

194. See *supra* note 24 and accompanying text.

195. For a more nuanced understanding of where the interests of the public truly fall in criminal prosecutions, see Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

opportunity to prosecute the case. Put another way, the judge's choice not to dismiss a prosecution leaves both prosecution and defense in exactly the same position they were in before the judge made her choice not to act: the prosecution can continue with its case, the defense can move for dismissal, both parties can engage in plea bargaining, and so on. But the judge's choice to dismiss a prosecution benefits the defendant and displaces the prosecutor. It is in this specific sense that I speak of the prosecution's interests in advancing a case being those primarily at stake in this context.

With that in mind, we can proceed to evaluate whether the prosecution's interests are adequately protected. There are a few ways in which they might not be. The first has to do with the allocation of discretion. Here, an entity entirely outside of the prosecutor's chain of authority—wholly unaccountable to the District Attorney or the state's Attorney General—has the power to reverse a decision made by and otherwise entrusted to the prosecutor. Of course, judges routinely reverse decisions made by executive officials, but when they do so, it is because the adversarial process has revealed the executive's decision to have been unlawful.¹⁹⁶ It is another thing entirely for the judge to substitute her choice of wise executive action for the executive's discretionary choice—to replace the prosecutor's discretion with her own. And, as discussed above, that is precisely what at least some judges seem to think they are doing when they exert this particular sort of enforcement authority.¹⁹⁷ If the prosecutor's interests are legitimately worth protecting—and more on that below—it would be fair to worry that the judge's discretionary authority is problematic because it threatens those interests.

Second, insofar as one thinks that prosecutorial discretion is generally a wise allocation of power which reflects a prosecutor's superior expertise with respect to the full range of crimes being committed in a jurisdiction and the charging choices made across the board, it might be worrisome for a judge—who most likely sees only a slice of the cases the prosecutor charges and who necessarily sees none of the cases the prosecutor does not charge—to be able to

196. *See, e.g.*, 5 U.S.C. § 706(2) (providing that federal judges shall “hold unlawful and set aside agency action, findings, and conclusions” of law that are, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

197. *See supra* notes 142 & 144 and accompanying text.

displace the prosecutor's more expert decision with her own less expert one.

Third, the prosecution might reasonably worry that the general public, to which prosecutors are ultimately accountable (by election, by perceived mission, or both), would place the blame on the *prosecutor* for "dropping" otherwise publicly desired charges when it was in fact the *judge* who did so through a comparatively more obscure provision of state law. This potential scrambling of responsibility in the eyes of the public is a perennial concern whenever one entity has the power to displace the decision of another entity; the anti-commandeering doctrine of the Tenth Amendment, for example, is premised in part on the concern that a local official will be blamed by her constituents for what was in reality a decision forced on her by federal law.¹⁹⁸ As the Supreme Court has put it, "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . ." ¹⁹⁹ By the same token, one might argue that prosecutorial accountability is diminished when, due to a judge's exercise of this enforcement power, the prosecutor cannot prosecute in accordance with the views of the local electorate.

On the other hand, it is not the case that prosecutors are entirely without recourse. On the public accountability front, for example, elected district attorneys or attorneys general who worry about being unfairly punished by voters have strong incentives to defend their records and to deploy campaign resources to shift the blame back to the meddling judge. The dissenters in one of the Supreme Court's anti-commandeering cases made the same point, and further argued that the idea that voters will be confused about whom to blame "reflects a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government."²⁰⁰

But there nonetheless remain legitimate objections rooted in expertise and discretion: the idea that prosecutors are better

198. See *Printz v. United States*, 521 U.S. 898, 930 (1997) (noting, in the context of a federal law requiring state and local law enforcement to conduct background checks on handgun purchasers, that "it will likely be the [local official], not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected").

199. *New York v. United States*, 505 U.S. 144, 169 (1992).

200. *Printz*, 521 U.S. at 957 n.18 (Stevens, J., dissenting).

situated than judges to make inherently discretionary charging decisions. For that reason, and in light of the fact that the judge is already taking on a function not ordinarily associated with dispute resolution, it seems appropriate to ensure that the judge exercises this function with care and in limited circumstances. As discussed in Part II, New York takes important steps in the right direction by bounding the judge's power and requiring her to consider ten specific factors before concluding that a dismissal is warranted.²⁰¹ The other states that do not impose such limits might do well to consider them. The fact that many of those states require the judge to articulate on the record her reasons for ordering the dismissal is an important feature, given that it is widely understood that reason-giving requirements tend of their own accord to improve the quality of discretionary decisionmaking.²⁰² But explicitly indicating what those reasons ought to be would represent an improvement.²⁰³ Finally, it could be worth considering whether to explicitly afford prosecutors an avenue to appeal a judge's dismissal decision if the prosecution feels strongly that it was an error or a poor discretionary judgment.

Of course, one might also feel that prosecutors already have too much power in the criminal justice system (or further still, that they exercise that power poorly). If you feel that way, then your heart probably does not go out to the prosecutor who has her judgment displaced by the judge and your hackles are likely not raised by the accountability, expertise, and discretion-based analysis offered above. That is not unreasonable; among the problems raised by the many-hatted state court judge, this is hardly the gravest. But even so, the reforms just outlined could result in a more coherent system that better reflects the interests of all of the participants.

201. See *supra* note 134 and accompanying text.

202. See, e.g., Nestor M. Davidson & Ethan J. Leib, *Regleprudence – at OIRA and Beyond*, 103 GEO. L.J. 259, 303 (2015); Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1233 (2014); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1280–82 (2009).

203. Indeed, one might say that New York's approach not only mitigates the problem but neutralizes it by placing the judge in a somewhat more classically "judicial" role. That is, it asks the judge to apply legislatively mandated criteria to evaluate executive action in a way that is closer to typical administrative law practice.

B. State Judges as Legislators

This Article described two of the unique quasi-legislative roles that state judges serve: redistricting and establishing specialized criminal courts. As a categorical matter, these operate at the level of broad policymaking rather than individualized determinations. So, the discretion question is not implicated here in the same way that it is in the other two contexts. But the freedom to act based largely on the decisionmaker's sense of good policy only raises the stakes of the accountability and expertise questions. And on that score, the judges' role in establishing specialized criminal courts raises more serious concerns than their role in redistricting.

1. Redistricting

When it comes to redistricting – where judges participate in the process in a number of ways including serving as tiebreaking or backup mapmakers²⁰⁴ – the interests at stake are both dramatic and of a few different types. First, there is the interest of the voters to “band together in promoting among the electorate candidates who espouse their political views.”²⁰⁵ The drawing of district lines can either facilitate that interest by preserving coherent communities of interest or interfere with that interest by splitting such communities.²⁰⁶ Whether one understands this interest as finding voice in the First Amendment,²⁰⁷ in the Fourteenth and Fifteenth Amendments,²⁰⁸ or elsewhere, the important point for present purposes is that the power to draw district lines implicates interests of constitutional moment for voters. Second, there is the related interest of each voter in being treated equally vis-à-vis other voters

204. See *supra* Section III.A.

205. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (Kagan, J., dissenting) (referring to “the most fundamental of [citizens’] constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives”).

206. See *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (“Dividing [a] minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice.”).

207. See *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring).

208. See, e.g., *Voinovich*, 507 U.S. at 152–53 (applying the Voting Rights Act of 1965, which was enacted “to help effectuate the Fifteenth Amendment’s guarantee”); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (holding that political gerrymandering claims are justiciable under the Equal Protection Clause of the Fourteenth Amendment).

by the line-drawer.²⁰⁹ Third, both of these personal interests are matched by broader societal interests in a functioning democracy in which all of the voters have faith in the system.²¹⁰ And in turn, because the drawing of district lines determines the people to whom a particular elected official is responsible, the power to draw those lines carries with it the power to shape or distort channels of accountability, or even to direct that accountability away from the electorate and to the line-drawer himself instead.²¹¹ A distorted electorate is, as the Supreme Court has put it, “altogether antithetical to our system of representative democracy,”²¹² so it ought to be beyond much dispute that the redistricting power implicates voters’ fundamental interests in a functional democratic form of government.

We must turn, then, to consider whether these interests are well-protected when state court judges are charged with drawing these district lines—either in absolute terms or relative to when legislatures do it. As discussed above, this function has long been understood as a “legislative function,”²¹³ with the implicit ideal being that the line-drawers themselves would be electorally accountable. This, after all, is the argument that is often made by opponents of independent redistricting commissions: we ought not want an “unelected, unaccountable institution” to “permanently and totally displace[]” the legislature—and through them, the

209. See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (“Classifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’” (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))); *Reynolds v. Sims*, 377 U.S. 533, 566 (“[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”).

210. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511–12 (Kagan, J., dissenting) (discussing districting’s impact on democracy).

211. *Id.* at 2509 (Kagan, J., dissenting) (“[T]he partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences.”); *Vieth v. Jubelirer*, 541 U.S. 267, 330 (Stevens, J., dissenting).

212. *Shaw*, 509 U.S. at 648; see *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting). Even as a majority of the Court recently found partisan gerrymandering claims to be nonjusticiable, it conceded that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust” and that “such gerrymandering is ‘incompatible with democratic principles.’” *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

213. See *supra* note 183 and accompanying text; *Ariz. State Legislature*, 135 S. Ct. at 2668.

voters – from the redistricting process.²¹⁴ Precisely because so much is at stake, there could be real danger in allowing an unaccountable entity to exercise that much power. On this theory, the fact that state court judges might be thought to be less electorally accountable than the legislators themselves makes it problematic to shift this role to those judges.

The problem with this theory is that, as just discussed, experience has revealed that the supposedly accountable legislature can use its power to draw district lines in ways that minimize that very accountability. It therefore becomes difficult to argue that the legislature is the best home for this task when the legislators instead use their power to insulate themselves from the voters. Of course, one could still believe that legislators are the wrong people to trust to draw their own district lines and also believe that the officials doing so ought to be electorally accountable. But it must be emphasized that many state court judges *are* in fact elected.²¹⁵ In contrast to appointed federal judges, then, state court judges straddle the line between accountable and unaccountable. Sometimes this fact raises serious concerns about the judge's discretion when it comes to dispute resolution or some of the quasi-administrative functions further evaluated below,²¹⁶ but in this particular arena, this accountability helps *justify* the judge's quasi-legislative role and helps temper concerns about what otherwise might look like too much power vested in too secure an official.²¹⁷ Moreover, recall that, at least for now, in no state are the judges alone the first-choice line-drawer. Rather, they always serve either in a backup or tiebreaking capacity – to take

214. *Ariz. State Legislature*, 135 S. Ct. at 2691 (Roberts, C.J., dissenting).

215. See 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, 71 (2011) (noting that “89% of all state court judges face the voters in some type of election”).

216. E.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696–97 (1995) (“[T]o the extent majoritarian pressures influence judicial decisions because of judges’ electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying constitutionalism.”); *infra* notes 243, 287 and accompanying text. See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012).

217. By the same token, this particular feature of state court judging might help justify the fact that those judges are so often elected.

charge once the legislature has failed to do its job—or in a commission capacity along with other accountable officials.²¹⁸

Finally, the concern that judges might lack subject-matter expertise (say, on population statistics and mapmaking) is not as important here as it is in other contexts discussed in this Article because, while redistricting can be technical, the judges—just like the legislatures—can and do employ the services of technical experts.²¹⁹ Armed with that assistance, the judges are likely just as capable as any decisionmaker of making smart choices. Indeed, they might be more expert than legislators when it comes to the limits on redistricting discretion imposed by constitutional and statutory law.

In sum, notwithstanding the fact that the role calls upon them to do something beyond traditional dispute resolution, state court judges are fairly well-situated to participate in the redistricting process in the ways in which they currently do. By virtue of their blend of electoral accountability and separation from the legislature, judges can manage and adequately serve the important individual and systemic interests at stake. And given the rampant—and now unchecked by federal courts²²⁰—practice of partisan gerrymandering by state legislatures, more citizens in more states might well conclude that state court judges ought to play this role.

2. *Establishing specialized criminal courts*

Once we turn to the judges' establishment of specialized courts, however, the practice is harder to defend. There are a number of decisions that these judges are making—whether to have specialized courts, which ones to establish, what procedures to adopt, and what remedial schemes to offer all come to mind—and, in all of them, the interests at stake are not only important, but numerous and pointing in (at least potentially) different directions. There are, of course, the interests of the accused individuals.

218. See *supra* Section III.A.

219. See *League of Women Voters v. Commonwealth*, 181 A.3d 1083, 1085–86 (Pa. 2018) (noting appointment of Professor Nathaniel Persily “as advisor to assist the Court in adopting, if necessary, a remedial congressional redistricting plan”).

220. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts”).

Remember that the most notable of these courts have thus far been created for veterans, girls, and individuals struggling with drug addiction, so the accused individuals' interests would center on seeing structures that offer a fair hearing that respects their arguably unique needs, affords just resolutions, and results in appropriate punishment that provides for meaningful opportunities for rehabilitation.²²¹ There are also the interests of the prosecutors in having a system that facilitates prosecuting and sentencing offenders in ways the prosecutors find appropriate. Of course, many prosecutors might ultimately agree with a defendant about what a proper process and result looks like; my point is simply that they have their own conception and their own stake in seeing it come to fruition. There are also the interests of victims – where the offenses in question are not victimless – in having *their* needs met and in seeing *their* vision of justice implemented. And there are the concentric circles of impact which ripple out from any given prosecution: the families of the defendants, the immediate community, and the broader public. All of them have a stake in how the criminal justice system is operated and in the outcomes it produces.

With all of that on the table, the question is whether these diverse and weighty interests are appropriately served when state court judges decide whether to create new status and specialty courts and how to structure them. The strongest argument that they are so served is twofold. First, state court judges have expertise in the functioning of the criminal justice system. They see it every day (or at least the ones engaged in this enterprise do) and are positioned to see it from a somewhat neutral position, at least as compared to prosecutors and defense attorneys, defendants, and victims.²²² They also are better acquainted with the system's realities than are legislators, who operate at something of a remove and would need to be educated – by the judges themselves, as well

221. Collins, *supra* note 13, at 1483–84; see *supra* Section III.B.

222. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052 (2016) (“[S]ystemic facts [about the criminal legal system] frequently reside within the considerable amounts of information already within criminal courts’ custody and control.” (emphasis removed)). Crespo’s focus is on constitutional criminal law, see *id.* at 2050 & n. 1, rather than the sort of legislating about the criminal legal system discussed here. But his call for judges to empower themselves by their expertise and to regulate that process has resonance with arguments that judges appropriately act similarly in this quasi-legislative arena.

as by others—in order to approach the level of experience that the judges already have. Second, one could argue that it would be good for experts to construct the “best” criminal justice system and that, in order to do so, those experts would need to feel safe to buck public opinion and would therefore need to be insulated from electoral recrimination and accountability. The judge is often held out as such an actor.

The first argument from expertise is a plausible one. But the second argument about the virtue of judges’ unaccountability fails here for a few reasons. First, as discussed above, many state court judges are elected and so, even taking the argument at face value, these judges would not fit the bill. But more deeply, the various interests at stake here point in so many different directions and are not capable of resolution by reference to some Platonic ideal of a criminal justice system. Far from it, they must be reconciled, traded against one another, and hammered into compromise. Expertise about the inputs cannot do that; only a mandate to make policy by balancing the diverse needs and preferences of the people can. And for that reason, establishing and structuring these courts *needs* to be done by a democratically accountable actor with the capacity to hear those views, strike those balances, and back them up with the institutional credibility that makes even dissatisfied constituents accept the bargain.²²³

So, why not the elected judges? They have the expertise and the formal structural accountability, but what they lack is the capacity for public debate, for airing the issues and various perspectives, and for offering solutions that are uniform rather than ad hoc. And so long as judges are the main movers on this quasi-legislative issue, this will not change because judges are just not equipped to hold the sort of hearings and debates that legislators do when they make policy. They are not well-situated to absorb in a rigorous way policy recommendations from individuals and groups arrayed across all facets of the issue. They are also often personally invested

223. Cf. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283, 300 (2003) (“Legal authorities gain when they receive deference and cooperation from the public,” and such deference and cooperation are more forthcoming when the public has the ability to “state [its] views to an authority and to feel that those views are being considered.”).

in perpetuating a particular model of a specialized court.²²⁴ This is particularly problematic given that, as the examples discussed above tend to illustrate, far too much turns on a particular judge's personal experience or personal feelings. And finally, any one judge's ability to offer a solution extends only to her own courtroom and as far as her power to persuade other judges to do similarly.²²⁵ By contrast, a state's legislature is better-situated to assimilate all of the perspectives that animate the public's interests and to produce from them uniform, statewide policies.

Many of the judges who have established these specialized courts seem to concede as much and to see themselves as filling a second-best role.²²⁶ That is, they perceive an urgent need that the legislature is not meeting and so have thrust themselves into the breach. So this Article does not aim to criticize these judges for what they have done, but rather to argue that they are poorly situated to do it well and that state legislatures need to take on a greater role.²²⁷ At a minimum, they ought to make express delegations to these judges coupled with some degree of overarching policy guidance: What are the goals of a specialized criminal justice system? What values should judges take into account? Which of the various interests at stake are to be centered and which are meant to yield? If the legislature were to answer these bigger questions, then judges engaged in court-creation could at least shift to implementing policy rather than creating it in the first instance, catch as catch can. Better still, the legislature could learn from the judges' expertise – and learn from the defense bar, the prosecution, victims' rights organizations, psychologists, criminologists, doctors, community leaders, and more – and actually make these decisions itself.²²⁸

224. See JAMES L. NOLAN, JR., *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* 137–39 (2009) (describing judges as “true believers” and “proselytizers” for the cause of specialized courts).

225. See *supra* Section III.B.

226. See *supra* notes 182–183, 186 and accompanying text.

227. See Shanahan & Carpenter, *supra* note 27, at 133 (similarly arguing that the courts' role here “is less a long-term solution than a short-term mitigation, which masks yet does not solve” broader societal problems like “an insufficient social safety net in the face of growing inequality” that a legislature is better situated to address).

228. New York City recently established a pilot program in Brooklyn to create a specialized “gun court.” This court is a joint effort of the Mayor, the Commissioner of the NYPD, the City's District Attorneys, the state Attorney General, the state court system's Chief Administrative Judge, the city's Citizens Crime Commission, and others. See *Mayor de Blasio and State Courts Announce “Project Fast Track” to Ensure Shooters Are Quickly Apprehended*

* * *

The prior subpart's evaluation of the state court judge's law enforcement role offered some qualified support for the practice. But it argued that the judge's power to second-guess the prosecutor's discretionary choices ought to be cabined in order to better account for the fact that prosecutors are better situated than judges to make inherently discretionary charging decisions that call upon a wider-angle lens than the judge's docket might afford her. Here, by contrast, the challenge to the judge's quasi-legislative roles comes primarily from the accountability angle because these quasi-legislative roles implicate a wider array of interests. Indeed, almost by definition, making the law involves balancing and assimilating a number of competing goals and views. It is therefore important that the institutions that set policy be broadly and electorally accountable and be positioned to take uniform and consistent action. That sounds more like a legislature and less like a judge.

But state legislatures have their own limitations. This is particularly true in the redistricting context. And the fact that state court judges are often themselves elected means they may not be as inappropriate a substitute as they might otherwise seem. So, where the legislature is particularly ill-equipped by virtue of its own dynamics to perform a particular legislative task—like redistricting—the state court judge can be an eminently justifiable understudy. But where the legislature is not necessarily so limited—like with respect to setting the structure of the criminal courts—the judge's role is substantially harder to justify.²²⁹

and Remain Off the Streets, N.Y.C. (Jan. 12, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/044-16/mayor-de-blasio-state-courts-project-fast-track-ensure-shooters-quickly#/0>. While true legislative initiation would be ideal, for the reasons discussed above, the fact that this program did not emerge *just* from the judges themselves and is integrated into a broader project with politically accountable actors drawing on wide-ranging experience and expertise is a step in the right direction.

229. This conclusion calls into some question the legitimacy of what Andrew Crespo describes as the often unaccountable role, which he heralds for its potential in the criminal law context, that state court judges play or could play in making rules of procedure. See Crespo, *supra* note 26, at 1383–84, 1387 (observing that state courts are “empowered—quite unlike their federal counterparts—with authority to repeal or override legislatively enacted statutes simply by promulgating a countervailing rule of procedure,” and offering that this means “[state court judges] are heroes on the horizon” who can use this power to “regulate prosecutorial power”). To be sure, Crespo recognizes that judges might exercise this power to enable prosecutorial pathologies rather than tame them, *see id.* at 1388, but that question mark is precisely what makes it so dangerous to allocate that legislative role to a relatively less accountable institution like the state judiciary.

C. State Judges as Administrators

The last of the hats that state judges wear is their administrative one. This Article explored three of the quasi-administrative functions over which state judges are assigned authority: name change applications, access to abortion, and attorney admission and discipline.²³⁰ This Section takes these in turn and demonstrates that each raises significant concerns, at least as currently structured.

1. Name change applications

Take the name change applications first. These implicate significant personal interests for the applicants. It might be easy to wave these away as flights of fancy for those seeking bizarre monikers for shock value, but the reality is often otherwise. These applicants are people who are trying to reconcile their identities and lived experiences with their legal names.²³¹ For example, until recently, those in committed same-sex relationships who lived in jurisdictions where the institution of marriage (and the simpler, more automatic name change that can ensue) was prohibited to them often sought to share a last name that would reflect the reality of their commitment.²³² Today, even though that particular roadblock has been removed,²³³ trans and non-binary individuals continue to seek new names and legal documents that reflect their gender identities.²³⁴ And stepping outside the LGBT rights context,

230. See *supra* Part I.

231. See Emens, *supra* note 40, at 763 (“Names are a highly personal matter, arguably constitutive of our selves.”).

232. See, e.g., *In re Miller*, 824 A.2d 1207 (Pa. Super. Ct. 2003) (reversing denial of name change application made by person seeking to adopt her same-sex partner’s surname); *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002); *In re Bacharach*, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001); see also Emens, *supra* note 40, at 790 (making similar observation).

233. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

234. See *In re Powell*, 95 A.D.3d 1631 (N.Y. App. Div. 2012) (reversing lower court rejection of name change application made by transgender person); *In re A.M.B.*, 997 A.2d 754 (Me. 2010) (vacating and remanding denial of transgender applicant’s petition); *In re McIntyre*, 715 A.2d 400 (Pa. 1998) (reversing lower court decision denying petition for name change); *In re Eck*, 584 A.2d 859 (N.J. Sup. Ct. App. Div. 1991) (same); *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. 1987) (noting prior granting of transgender applicant’s name change petition); see also *In re Bobrowich*, No. 159/02, 2003 WL 230701, at *1 (N.Y.C. Civ. Ct. Jan. 6, 2003) (requiring “medical and psychiatric evidence” to “establish whether or not the petitioner is a transvestite or a transsexual,” and if not, then “the court will require some showing on the part of the [male] petitioner that [the requested name] is regarded as a male name in this or some other culture”); J. Dylan Sandifer, *A Day in Name-Changing Court*, VOX

similar identity-setting, identify-reflecting interests exist for anyone seeking to legally change their name.²³⁵ Without going quite so far as to suggest that the First Amendment is directly implicated, it is not a stretch to see that one's ability to change one's legal name finds voice in the same sorts of guarantees of free self-expression that protect art, literature, protest, and so much more.²³⁶ Of course, everyone is free to "go by" any name they choose in their daily lives without even informing the government about it, let alone seeking permission.²³⁷ But even something as simple as boarding a plane or opening a bank account is made simpler when one's legal name matches one's chosen name, which is no doubt why we have an official system in which names can be changed in the first place.

The interests of the applicant are not the only interests at stake, however. The broader public has an interest in ensuring that an applicant is not changing his name in order to subvert the law – for example, by escaping prosecution, evading a sex offender registry, or dodging financial obligations. The public might also have an interest in preventing the corrosion of national discourse through the entry into the mainstream of names which might deeply offend, although the degree to which the government can act to serve that interest consistent with the First Amendment is questionable, to say the least.²³⁸ These, however, are more or less the extent of the

(July 25, 2019), <https://www.vox.com/the-highlight/2019/7/16/20694731/how-to-change-your-name-legal-name>.

235. See Emens, *supra* note 40, at 774 (noting that "the act of naming is often an act of power" and that "[t]he ability to choose one's own name is arguably therefore an important aspect of self-possession"); Sandifer, *supra* note 234 ("We all named ourselves, and demanded to be recognized.").

236. See Julia Shear Kushner, Note, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 339 (2009) ("[N]ames have been used as a means of expression prior to their regulation by the state."); Laura A. Heymann, *A Name I Call Myself: Creativity and Naming*, 2 U.C. IRVINE L. REV. 585, 594 (2012).

237. See *supra* note 42.

238. The Supreme Court's recent decisions in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), are instructive. The Court concluded in both cases that prohibiting the registration of allegedly "disparag[ing]" and "immoral[] or scandalous" trademarks violates the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend." *Tam*, 137 S. Ct. at 1751; *Brunetti*, 139 S. Ct. at 2299–300.

interests at stake beyond the applicant's own interests.²³⁹ That is, it is difficult to come up with any neutral reason beyond avoiding enabling fugitives and avoiding substantial offense why anyone should care what another adult chooses as his or her legal name.²⁴⁰

With the significant interests on the side of the applicant's self-expression, and the handful of interests arrayed against the applicant, we have to ask whether all of those interests are properly served and balanced by state court judges operating in the legal regimes currently in place throughout the fifty states. The short answer is that some of those regimes hit much closer to the mark than others do. But before exploring why, it is important to first examine who would be the best sort of decisionmaker along the axes of accountability, expertise, and discretion. First, and in contrast to the functions already discussed, there is little need for electoral accountability here because the public's interests are so much weaker than those of the individual applicants.²⁴¹ Indeed, electoral accountability might in fact be *undesirable* because it could distort the judge's decisionmaking in pernicious ways.²⁴² For example, an electorally accountable decisionmaker might be more inclined to rule against name changes that appear to denote a change in gender in order to demonstrate his bona fides to an electorate that might be hostile to LGBT rights (or, at a minimum, to avoid alienating those constituents).²⁴³ Once the applicant's

239. Perhaps the public might also have an interest in minimizing the administrative cost of updating records, but that speaks more to a preference for limiting name change rights in general rather than to resolving any particular application.

240. See *In re Miller*, 824 A.2d 1207, 1214 (Pa. Super. Ct. 2003) (similarly arguing that a denial of a name change in the absence of concerns like evasion of prosecution or financial obligations "rob[s] the applicant of that which in no way enriches, or protects, the public and makes the applicant poor indeed").

241. Of course, if you think that electoral accountability *is* beneficial in this context, the fact that so many state court judges are elected ought to satisfy that demand and make them a well-situated decisionmaker.

242. See Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1589-90 (2019) ("The more one believes an agency's decision needs to be based on factors other than public preferences, the less one is appeased by institutional design that favors majoritarianism.").

243. See Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 211, 228 (2012) ("In an environment in which judges are often obliged to defend their records on salient political issues and make policy statements, retention elections (and their competitive complement, nonpartisan elections) can create incentives for judges to cater to public opinion . . ."); Leib, *supra* note 27, at 720 (quoting one local judge in New York as saying, "We are all political. It is silly to deny it

interests are understood as touching on rights – which we generally do not put up for a vote on a case-by-case basis – it should scan as problematic to have the entity deciding whether a particular person’s right should be respected or not be primarily accountable to a broader public.²⁴⁴ An unelected judge would be well-suited from this perspective, then, to play this role. Indeed, judges are often viewed as the guardians of rights. But as discussed above, most state court judges are elected,²⁴⁵ which takes away from the claim that they are the best-situated decisionmaker in a context that might demand greater insulation from the give and take of electoral politics.

Second, there is little need for expertise here. Neither the interests of the applicants nor the interests of the broader public implicate anything particularly complicated or technical. On the one hand, this is a point in favor of the generalist judge serving as the decisionmaker, but on the other hand, it is a point in favor of essentially any official serving as the decisionmaker. After all, whichever official assigned the task would be capable of learning the relevant criteria and of developing experience applying them.

Third, we come to the need for and desirability of individualized discretion. If the interests at stake were generally in equipoise, or hard to quantify or balance, then it would be important to not only afford the decisionmaker wide discretion but to assign the task to a decisionmaker comfortable with making such judgment calls – that is, an entity that is otherwise entrusted by interested individuals and by the general public with discretion in other contexts, and one that has experience balancing incommensurable values. A state court judge operating under a broad, standardless statute would fit that bill. But the interests at stake here are rarely so difficult to balance. In the vast majority of cases, the applicant’s interest in self-expression is met on the other side by no meaningful public interest. The name being chosen is not so offensive or hateful as to be threatening to the public discourse,

about an elective office,” and noting that this “confirms limited prior empirical evidence suggesting that lower-level elected judges are responsive to constituents”); cf. 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) (finding that elected judges become more punitive as the judges approach reelection).

244. See Croley, *supra* note 216, at 727 (“Vindicating individual or minority constitutional rights might prove too much for judges for whom reelection is important.”).

245. See *supra* note 215 and accompanying text.

nor is the applicant attempting to subvert legal process. In those cases, the exercise of discretion on the part of the decisionmaker is at best unnecessary – the application should be granted. At worst, it risks too many denials of applications based on the decisionmaker’s personal sense of impropriety or, as discussed above, based on the decisionmaker’s sense of what his electoral constituency feels is appropriate. And in the few cases where the public’s interest really is triggered, the applicant’s interest is almost categorically swamped, and the appropriate course is to deny the application. Again, little case-by-case discretion is needed. Of course, while determining whether the applicant is attempting to subvert the law is more or less a factual inquiry, there might well be the need for some degree of discretion when it comes to evaluating the hateful or offensive quality of a chosen name. But that is just about the size of it, which means that any discretion that is afforded to the decisionmaker must be carefully bounded to avoid the risk of improper denials.

Putting these considerations together produces the conclusion that, while the state judiciary is not a wholly improper place to put the task of resolving name change applications, it is also not the best place to put it.²⁴⁶ Instead, this may be an area where an unelected bureaucrat could play an important role: Relatively insulated from politics and qualified to determine whether an applicant satisfies stated criteria without exercising much individualized discretion, a true administrator could be the superior decisionmaker for this

246. An additional risk of making judges the assigned decisionmakers here is that some judges may incorrectly perceive based on the very fact of that assignment that they are *meant* to exercise wide discretion. For example, as one New York Civil Court judge put it, he “could just as ‘blindly’ sign each and every application to change a name that comes before [him],” but the fact that the legislature gave the job to him suggested to him that that is not what he was meant to do. *In re Bobrowich*, No. 159/02, 2003 WL 230701, at *4 (N.Y.C. Civ. Ct. Jan. 6, 2003). “If that were the legislative intent, it would be an administrative process” akin to the issuance of a birth certificate where no one reviews the propriety of a birth name, rather than one assigned to a judge. *Id.*

quasi-administrative task.²⁴⁷ This, after all, is how Hawaii handles these applications.²⁴⁸

But if judges are going to continue to be the decisionmakers, then adequate safeguards need to be imposed in order to ensure that they do not exercise too much discretion and do not bend too far towards electoral accountability or personal caprice at the expense of the applicant's interests.²⁴⁹ Some states do a fairly good job at imposing such fetters by statute. For example, Oklahoma, discussed above, requires the judge to grant the name change application *except* when the judge finds one of just two facts: that the change is "sought for an illegal or fraudulent purpose," or that a "material allegation in the petition is false."²⁵⁰ Virginia similarly provides that the judge "shall" grant the application "unless the evidence shows that the change of name is sought for a fraudulent

247. To be sure, bureaucrats are imperfect. They sometimes use their positions as front-line faces of authority to citizens to exert influence, provide incorrect information, offer unsolicited opinions, and make other "normative interventions" with respect to individual applications. Emens, *supra* note 40, at 824–27 (discussing this phenomenon in the context of marital name changes). They also sometimes face resource or staffing constraints, and their political independence is not impregnable. See Seifter, *supra* note 27, at 521–23. In rare circumstances, they even sometimes flout constitutional commands outright. See Morgan Gstalter, *Anti-Gay Marriage County Clerk Kim Davis Loses Reelection in Kentucky*, HILL (Nov. 6, 2018), <https://thehill.com/homenews/campaign/415366-anti-gay-marriage-county-clerk-kim-davis-loses-reelection-in-kentucky>. But it is not the case that judges never engage in similar behavior. See *Alabama Chief Justice Tells Probate Judges to Refuse Same-Sex Marriage Licenses*, ASSOCIATED PRESS (Feb. 9, 2015), <https://www.npr.org/2015/02/09/384852553/alabama-chief-justice-tells-probate-judges-to-refuse-same-sex-marriage-licenses>; *infra* notes 291–293 and accompanying text (discussing judges and court staff deterring minors from availing themselves of their rights in the abortion context). And bureaucrats and administrators can still use their subject-matter expertise to serve as "site[s] of legal transformation" and as sources "of liberation, rather than unmitigated repression." Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83, 90 (2017); see *id.* at 131, 144 (discussing social workers who allowed LGBT individuals to adopt and foster children or supported transgender children in schools in conflict with outmoded state law). See generally Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019) (discussing bureaucratic resistance). Finally, if concerns about bureaucratic decisionmaking linger such that this task ought to remain with judges, remember that bureaucrats are reviewed by courts. See *infra* notes 264–271 and accompanying text. And if even that is not enough to allay those concerns, that simply makes more salient the need to refine the judges' decisionmaking process as articulated below.

248. See *supra* notes 71–73 and accompanying text.

249. Some judges recognize this risk of their own accord. See, e.g., *In re Bacharach*, 780 A.2d 579, 583 (N.J. Super. Ct. App. Div. 2001) ("[A] request for a name change should not be denied simply because a judge disputes the wisdom of the request or disagrees with the reason for the change based on his or her personal views or philosophy.").

250. OKLA. STAT. tit. 12, § 1634 (1953); see *supra* note 49 and accompanying text.

purpose or would otherwise infringe upon the rights of others.”²⁵¹ Others, however, do not. All of the “may-issue” states discussed above inherently fail to cabin the judge’s discretion,²⁵² as do the “shall-issue” states that vaguely require a finding of “reasonable cause” or a “good reason” or the like before the issuing obligation is triggered.²⁵³ In light of the foregoing analysis, the latter jurisdictions should consider reforming their statutes to more closely emulate the former. Doing so would better reflect and respect the interests at stake and the nature of the decision being made.²⁵⁴

But even the states that limit judges’ discretion in this arena could bolster those limitations by expressly providing for appellate review that is more active and that better fits the administrative quality of the action. Now, judges’ decisions on name change applications are generally reviewed for abuse of discretion.²⁵⁵ Where that standard of review applies, “the appellate court will not reverse ... unless the ruling is manifestly erroneous.”²⁵⁶ The most common examples of the sorts of decisions that are subject to abuse of discretion review include sentencing and evidentiary rulings,²⁵⁷ though those by no means define the universe. This form of review is generally justified in a few ways. First, in these contexts, the judge “has a wide range of choice as to what he decides,” free from the

251. VA. CODE ANN. § 8.01-217(C) (2013).

252. See *supra* notes 58–62 and accompanying text.

253. See, e.g., KAN. STAT. ANN. § 60-1402(c) (2014); MO. REV. STAT. § 527.270 (2011) (“would be proper”); NEB. REV. STAT. § 25-21,271(3) (2008) (same); NEV. REV. STAT. § 41.290(1) (2013) (“good reason exists”).

254. Cf. *In re Bobrowich*, No. 159/02, 2003 WL 230701, at *4 (N.Y.C. Civ. Ct. Jan. 6, 2003) (lamenting the fact that the name change statute “provides no guidance” and suggesting that “[p]erhaps the legislature should amend the Civil Rights Law to provide the similar guidance in regard to the names of natural persons as it has outlined for corporations”).

255. See, e.g., *In re Mayol*, 137 S.W.3d 103, 105 (Tex. Ct. App. 2004); *In re Parrott*, 392 S.E.2d 48, 48 (Ga. Ct. App. 1990); *In re Reed*, 584 S.W.2d 103, 104 (Mo. Ct. App. 1979); *In re Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974). Of course, a court can also conclude that the judge has abused his discretion by making a decision contrary to the strict terms of a statute. See, e.g., *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017) (explaining that errors of law are necessarily abuses of discretion); *In re Bicknell*, 771 N.E.2d 846, 847–48 (Ohio 2002) (noting abuse-of-discretion standard but reversing denial of name change because applicant satisfied defined statutory requirements).

256. *Gen. Elec. Co. v. Joiner*, 552 U.S. 136, 142 (1997) (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879)).

257. See, e.g., *Gall v. United States*, 552 U.S. 38, 46 (2007) (federal sentencing); *Gen. Elec. Co.*, 522 U.S. at 141–42 (evidentiary rulings).

sorts of constraints that require a particular outcome upon application of a legal rule to a set of facts.²⁵⁸ Second, those contexts involve “case-specific” decisions “that turn[] not on ‘a neat set of legal rules,’ but instead on the application of broad standards to ‘multifarious, fleeting, special, narrow facts that utterly resist generalization.’”²⁵⁹ Third, engaging in that sort of application entails making individualized judgments—“fact-intensive, close calls” with respect to relevance, burden, and the like—in which a district court judge is said to have relative “expertise” compared to an appellate judge relying on a cold record.²⁶⁰ Fourth, these decisions are understood to necessitate “flexibility” for the district court judge.²⁶¹ Finally, the Supreme Court has intimated that this form of review is appropriate because some of the decisions to which it applies—though I would hasten to add that sentencing is not one of them—are of relatively low consequence.²⁶²

None of that is or ought to be true with respect to name change applications. There often are—or, as just discussed, should be—specific criteria governing the judge’s decision and narrowing her range of choice. Nothing about the question turns on the sorts of close calls about, say, a witness’s demeanor, that have justified abuse-of-discretion review in other contexts. Flexibility and discretion are thus *bugs*, not features, in this context. And the decision is not one of low consequence. For all of those reasons, then, more searching review is called for.²⁶³

Fortunately, we already have a model for what that might look like. Appellate courts do not extend such abuse-of-discretion deference when the decisionmaker is, rather than a judge, an administrative agency or bureaucrat. In the context of

258. *McLane*, 137 S. Ct. at 1169 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971)).

259. *Id.* at 1167 (citations omitted) (first quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983); and then quoting *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1988)).

260. *Id.* at 1167–68; see *Pierce*, 487 U.S. at 560 (holding that abuse of discretion review is appropriate where “the district court may have insights not conveyed by the record,” such as “whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government”).

261. *Pierce*, 487 U.S. at 562.

262. *Id.* at 563 (suggesting that abuse-of-discretion review is appropriate with respect to awards of attorney’s fees under the Equal Access to Justice Act because the median award “has been less than \$3,000”).

263. *Cf. Weinstein-Tull*, *supra* note 27, at 1093 (similarly calling for greater scrutiny of local courts’ decisions in dispute-resolution contexts).

administrative decisionmakers, appellate courts instead demand a showing of “reasoned decisionmaking.”²⁶⁴ At the federal level, “virtually every form of agency action” is accompanied by a judicial “demand for explicit reason-giving.”²⁶⁵ The same is generally true at the state level.²⁶⁶ And while this review remains deferential— “[t]he court is not empowered to substitute its judgment for that of the agency”²⁶⁷—it has teeth. The administrative decisionmaker is required to offer reasons that “have some basis in the record,”²⁶⁸ that are articulated “in sufficient detail to permit judicial review,”²⁶⁹ that match those the legislature has meant to be considered,²⁷⁰ and that could “lead a reasonable person to make” the same judgment.²⁷¹

This may not seem like a particularly wide departure from abuse-of-discretion review, and it is not. Both are deferential, and when compared to truly de novo review, their differences appear even less meaningful. But zoom in just a bit on the spectrum and important distinctions emerge. Simply put: abuse-of-discretion review does not require the decisionmaker to do anything more than articulate some defensible basis for his decision. It does not necessarily require him to articulate those reasons in a way that can be—or actually is—backed up with evidence. Shifting to the form of review familiar to administrative law would provide a number of benefits.²⁷² First, a reason-giving requirement coupled with record review encourages “reflective findings, in furtherance of evenhanded application of law, rather than impermissible whim, improper influence, or misplaced zeal.”²⁷³ Or, as Justice Gorsuch

264. *E.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998).

265. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 962 (2007).

266. *See, e.g.*, N.Y. A.P.A. § 307(1); MASS. GEN. LAWS ch. 30A, § 11(8); WASH. REV. CODE § 34.05.461(3); MODEL STATE ADMIN. PROC. ACT §§ 313, 318 (2010).

267. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 416 (1971).

268. *Nat. Res. Def. Council v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

269. *Id.*

270. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

271. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (citing *Overton Park*, 401 U.S. at 416).

272. *See supra* note 202 and accompanying text.

273. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see* Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in*

recently put it, “The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking.”²⁷⁴ It also guards against the bad side of electoral accountability – that is, the concern that the judge will act to satisfy the electorate rather than to fairly decide the application on its own terms. Second, it prompts decisionmakers to step outside of their own experience and to consider and confront their priors because they know that a reviewer might not share those priors.²⁷⁵ Third, it reduces the negative side effects of (presumed) expertise – the decisionmaker’s sense that everyone sees the world as he does and his consequential overconfidence in his decisions – and amplifies the positive aspects of expertise.²⁷⁶ Finally, all of these benefits together lend legitimacy and “increase[] confidence in the fairness” of the decisions being made.²⁷⁷

One objection to this shift towards reason-giving and record review is that it could make the decisionmaking process more costly and time-consuming on the front end. Particularly at a time when many state courts find themselves strapped for cash, it might sound perverse to suggest they do *more* work.²⁷⁸ But it should also sound perverse to suggest that important citizen interests be

Third Party Records, 64 AM. U. L. REV. 195, 219–20 (2014) (“Social science demonstrates that actors believing they will be held accountable are more likely to work carefully and less likely to engage in error, and thus are more likely to make sound decisions and less likely to make irrational or ill-informed ones.”).

274. *Biestek v. Berryhill*, 139 S. Ct. 1148, 1162 (2019) (Gorsuch, J., dissenting) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1313–14 (1975)); see *Kerry v. Din*, 135 S. Ct. 2128, 2144 (2015) (Breyer, J., dissenting) (explaining that “an opportunity to present relevant proofs and arguments [to] a neutral decisionmaker [who will engage in] reasoned decisionmaking” “help[s] to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004))).

275. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588 (2002).

276. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 496–99 (2002).

277. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1761 (1975).

278. See Shanahan & Carpenter, *supra* note 27, at 128 (observing that state civil courts are “overwhelmed” and handle “98 percent of the tens of millions of civil legal cases filed each year”); Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 259, 268 (Katharine G. Young ed., 2018) (“Not only did court budgets decline after the 2008 recession, six states closed courthouses a day a week; and nine sent judges on unpaid furloughs.”).

afforded inadequately careful process in the name of saving money. So, if one is truly concerned about the burden on state courts here, the responses ought to be either to apply even more pressure on state legislatures to fix these budgetary shortfalls, or to reallocate this task to another entity with the resources to do it effectively. Regardless, though, the more thoughtful first-line decisionmaking on offer here need not be significantly more expensive. After all, the issue, while weighty for the individual, is not exactly complex. The record the judge would be expected to compile should therefore not be particularly taxing to assemble.

In sum, requiring that judges articulate their reasons and root those reasons in an evidentiary record when they make name change application decisions would ameliorate some of the risks associated with entrusting that decision to a state court judge. It would also better reflect the quasi-administrative nature of the decision.

2. *Minors' access to abortion*

The analysis is similar with respect to minors' access to abortion without parental involvement. Yet again, the interests of the applicant are profound and substantial, and they implicate rights of constitutional dimension.²⁷⁹ And yet again, those are not the only interests at stake. To be clear, the question in these cases is not, or at least is not meant to be, whether the applicant is entitled to an abortion or not.²⁸⁰ Rather, the question is whether the applicant is entitled to an abortion *without parental involvement*. And that, according to the Supreme Court, turns on whether the minor can show "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes," or that, regardless, "the desired abortion would be in her best interests."²⁸¹ So while the minor has an interest in exercising her right to an abortion and to

279. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion); *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132, 147 (1976).

280. Because the question is not meant to be whether the applicant is entitled to an abortion or not, there is no need here to account for other sorts of interests that some might argue weigh against a woman's right to abortion access. Rather, the interests at stake in the narrower question at issue in these cases revolve only around the minor's access to an abortion and her parents' involvement in that medical choice.

281. *Bellotti II*, 443 U.S. 622, 643-44 (1979).

bodily autonomy, the other interests at stake include those of the minor's parents who might be interested in, say, directing the upbringing of their children and ensuring that their children make informed choices.²⁸² The public, too, might care about protecting the role of parents and ensuring that minors make mature choices.²⁸³ And, to come full circle, the minor may have important interests in *not* involving or notifying her parents – if, for example, her parents are abusive or might throw her out of the family home or worse.²⁸⁴ Indeed, as the Supreme Court has emphasized, even if “deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate ‘to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy.’”²⁸⁵

So we pose the question again: Who would be the right decisionmaker in terms of accountability, expertise, and discretion? Answering this question is made somewhat easier by focusing on the Supreme Court’s guidance about what ought to animate the inquiry – namely, the maturity of the minor and the degree to which she is informed of her options. What institutional characteristics make one best situated to evaluate these two questions?

First, take electoral accountability. Here, as with name change applications, electoral accountability might be undesirable because it could distort the decisionmaking process in pernicious ways.²⁸⁶ For example, an electorally accountable decisionmaker might be more inclined to reject minors’ bypass applications in order to

282. See *id.* at 637 (“[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”); cf. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”).

283. See *Bellotti II*, 443 U.S. at 634 (“The unique role in our society of the family, the institution by which ‘we inculcate and pass down many of our most cherished values, moral and cultural,’ requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.” (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503–04 (1977) (citation omitted))).

284. See, e.g., Redden, *supra* note 81 (offering the example of a young woman in Alabama who sought a judicial bypass because, among other things, “[h]er father had told her that if she ever came home pregnant he would kill her”).

285. *Bellotti II*, 443 U.S. at 643 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

286. See *supra* note 242 and accompanying text.

demonstrate his anti-abortion or “pro-family” bona fides. From this perspective, an unelected judge would be a well-positioned decisionmaker, but the fact that most state court judges are elected should raise concerns about excessive political accountability.²⁸⁷ The fact that parents have some interests at stake does not do much to explain away this concern; after all, electoral accountability means accountability to the broader electorate, not just the parents. And while the danger from the minors’ perspective is by far the more real-world one, broad political accountability at least in theory risks interfering with the parents’ interests too. At least on the face of things, it is plausible that the electorally accountable decisionmaker would put a thumb on the scale in favor of minors’ bypass applications in order to demonstrate his pro-choice bona fides to that electorate. So neither the minor’s interests nor the parents’ interests provide much support for a politically accountable decisionmaker. Instead, both of them suggest a role for a more politically insulated decisionmaker.

What might provide the necessary justification for the electorally accountable decisionmaker, then, is the public’s interest. While the set of possible name change decisions that are not in the public interest is small and somewhat easily drawn, the set of decisions in this context that are not in the public interest is, at a minimum, subject to much more contestation. Of course, as just discussed, the public might well care about increasing or decreasing the number of minors receiving abortions without parental involvement, full stop. But that is not my meaning here because, given the way that the Court has framed the inquiry, that is not how the public’s interest is meant to be understood. Instead, the public’s interest ought to be understood as ensuring that those minors who do receive abortions without parental consent are only those who are mature enough and well-enough informed to do so, however many that might be.²⁸⁸ In comparison to the name change

287. See Canes-Wrone et al., *supra* note 243, at 224, 228 (finding that, in states with judicial retention and nonpartisan elections, “a 10 percentage point increase in pro-life public opinion increases the likelihood of a pro-life vote [by the elected judge] by 8-10 percent[,]” and concluding that “retention elections encourage judges to be responsive to public opinion on hot-button issues”); Croley, *supra* note 216, at 727-28 (“The protection of abortion rights in judicial districts where the protection of such rights is disfavored by a majority constitutes another example where the protection of constitutional rights may be threatened by electoral accountability.”).

288. See *supra* notes 281-285 and accompanying text.

context, this version of the public interest might admit of a slightly wider and more contestable band of possible “wrong” answers for which the public might justifiably want to punish an erring decisionmaker. And framed in this way, the public’s role needs not come at the expense of the minor or the parents but would instead give the minor (or parents) the ability to call on the electorate to help her (or them) vindicate her (or their) interests.

On the other hand, though, the public always has an interest in ensuring that rights-holders receive the protection to which they are entitled, but no more, lest that protection impact the interests of others.²⁸⁹ We do not generally say as a result that all decisions made about rights must be or even should be made by politically accountable actors. Doing so would prove far too much. The conclusion, then, is similar to the name change context: accountability is of questionable value in a decisionmaker here.

Next, what of expertise? Now, in contrast to the name change context, there is a fairly meaningful role for expertise. The inquiry in question requires the decisionmaker to understand child psychology, medicine, and perhaps more. This is not to say that a generalist cannot develop such expertise over time, but it would be easier for the decisionmaker to do so if his or her job was science-based and centered around children and their needs.

Third and finally, we turn to the question of individualized discretion. In contrast again to the name change context, where the interests at stake are fairly easy to weigh, it must be admitted that striking such a balance is not as easy here. Whereas questions like whether a name change is being sought to evade justice have an objective, verifiable answer, questions like whether a particular minor is sufficiently mature might not. As a result, it is hard to credibly say that no discretion should be afforded to the decisionmaker. But the foregoing discussion makes clear at the same time that the decisionmaker’s discretion must be strictly limited to the question at hand: the minor’s level of maturity and information. The evil to be avoided most of all is the decisionmaker

289. Cf. *Univ. of Notre Dame v. Sebelius*, 998 F. Supp. 2d 912, 935 (N.D. Ind. 2013), *aff’d*, 743 F.3d 547 (7th Cir. 2014), *cert. granted, judgment vacated sub nom.* *Univ. of Notre Dame v. Burwell*, 575 U.S. 901 (2015), and *aff’d sub nom.* 786 F.3d 606 (7th Cir. 2015) (“The public—however one chooses to define that vague term—certainly has an interest in the vindication of First Amendment rights. But it also has an interest in the full enforcement of duly enacted laws.”).

substituting his or her feelings about abortion access *vel non* for a careful evaluation of *this minor's* circumstances.²⁹⁰ Indeed, there is no shortage of reports of judges denying minors' bypass requests on grounds other than those provided by law—that is, having nothing to do with the minor's maturity or circumstances and instead having to do with the judge's beliefs about abortion and about those who perform abortions.²⁹¹ One court officer in Alabama reportedly said,

“My judge is anti-abortion, and he doesn't believe a child should have this done without her parents. You have the *right* to file But that doesn't mean he will grant it. We had one [case] one time . . . and her doctor advised her to have an abortion for medical reasons, and [the judge] still would not grant it.”²⁹²

Similar stories arise in other states as well.²⁹³ Given the unavoidable fact that this particular issue is not only contentious but one about which government officials routinely push the envelope in an effort to pare back access,²⁹⁴ it is crucial to ensure that the necessary discretion not be unfettered, and that those fetters be enforced.

290. When Justice Souter was a trial court judge in New Hampshire, he spoke out against a New Hampshire parental consent and judicial bypass bill and specifically noted this danger. See Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 83–84 (1995) (quoting John Milne, *Souter Note Helped Sink '81 N.H. Bill on Abortion; Letter Seen Offering No Clue to Personal Views*, BOS. GLOBE, July 26, 1990, at 1).

291. See Redden, *supra* note 81 (discussing, for example, a case in which a judge denied a bypass petition because she felt that the abortion provider was a “butcher” who just wanted “this young lady's money,” and in which that decision was affirmed on appeal); HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 85 (2007) (quoting one court employee in Alabama saying, “I can 100 percent guarantee you that [the judge] will not grant [the petition]. The family court judge does not believe it is an issue that should be decided by the court. The judge will not grant it; it's the judge's decision. He will not grant it.”).

292. SILVERSTEIN, *supra* note 291. At a bypass hearing, a judge reportedly said to the minor appearing before him, “What you have asked the Court to allow you to do is something that is extremely serious and fatal to your child.” *Id.* at 129. And another judge is known to tell minors, “This is an enormous decision, and I don't want you to make it.” *Id.*

293. See, e.g., Scarnecchia & Field, *supra* note 290, at 86, 91–92 (collecting similar stories in other states); SILVERSTEIN, *supra* note 291, at 116–17 (same).

294. See, e.g., Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019, 6:37 PM), <https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortion-becomes-law-in-ohio> (observing that Ohio became the sixth state to outlaw abortion once a fetal heartbeat can be detected, which is long before the timeframe set out in *Roe v. Wade*, and quoting a legislator as saying, “Will there be a lawsuit? Yeah, we are counting on it We're counting on it. We're excited about it.”).

So as with name changes, the state judiciary may not be the best place to put this particular task.²⁹⁵ Both contexts raise similar concerns about political accountability that cut against elected judges serving as the decisionmakers, and while there is a stronger argument for discretion in the abortion context (which might militate in favor of the judiciary), there is also a stronger argument for expertise (which might militate against it). Once again, then, this may be an area where an unelected, expert bureaucrat like an official in the state's department of health or department of child services could play an important role.²⁹⁶

But whether the decisionmakers remain the judges or are instead expert bureaucrats, strict limits must be imposed on the exercise of their discretion. Formally, at least, most states do a better job here than they do with name change applications. As discussed above, most states provide that the judge "shall" waive the applicable parental involvement requirement if the judge determines that such parental involvement would "not be in the best interest of the minor" or that "the minor is sufficiently mature to decide whether to have an abortion."²⁹⁷ Some even list specific factors the judge must consider.²⁹⁸ And most states go a step further and require the judge to include "specific factual findings" in support of their orders.²⁹⁹ By limiting the grounds on which the judge's decision can rest and by requiring the judge to make specific findings in support of those limited inquiries, these statutes impose fetters on the judge and thus – again, formally – minimize the risk of improper discretion or excessive political influence. In light of the importance of such precautions, states certainly ought to maintain them. Every state would also do well to make clear that whatever factors it requires the judge to consider are exclusive of other considerations – like, say, the judge's views about abortion.

295. See *supra* note 247 and accompanying text.

296. Here, in particular, one might expect that a professional in a state's department of child services, for example, might use his or her expertise to prioritize the welfare of the minor applicant in the face of political efforts to interfere with her rights. Cf. George, *supra* note 247, at 85–86. Working with such a professional might also be a less intimidating and frightening experience for the minor applicant than appearing before a judge. See *supra* note 81 and accompanying text.

297. COLO. REV. STAT. § 13-22-707(1)(a) (West 2020); see *supra* Section I.B.

298. See, e.g., FLA. STAT. § 390.01114(4)(c)(1) (2019); *supra* notes 89–93 and accompanying text.

299. § 13-22-707(1)(a); see *supra* notes 86–88 and accompanying text.

But the more important reform would be to make sure that these formal limits on judges' discretion truly operate to limit that discretion. One important way of doing that would be to explicitly provide for appellate review that is more active and that better fits the administrative quality of the action. Specifically, just as with name changes, these states should require the judge to articulate the reasons in support of his decision and to compile a factual record that provides real support for those reasons, and should empower appellate courts to promptly reverse if these requirements are not complied with.³⁰⁰ Such a reform would ensure, for example, that bypass denials based on little more than the judge's views about abortion—when the law calls instead for an evaluation of the minor's circumstances—would not be affirmed.³⁰¹

3. Attorney admission and discipline

Finally, turning to bar admission and discipline,³⁰² there is a somewhat stronger argument that judges are the right decisionmakers here. The interests at stake are primarily those of the attorney (or would-be attorney) and those of their clients or future clients in the broader public. That is, as with any licensed or regulated profession, the governing body must protect the public from unqualified or unscrupulous professionals and must at the same time deal fairly with those participating in or seeking to participate in the profession.³⁰³ So subject individuals have an interest in receiving and keeping their licenses to practice law,³⁰⁴ and clients and the public have an interest in the wrong people not receiving or retaining those licenses. The public's interest here is thus somewhat greater than that of the public in the name change or abortion contexts. That is, an admission or discipline decision

300. See *supra* notes 255–276 and accompanying text.

301. See *supra* note 291 and accompanying text.

302. See *supra* Section I.C.

303. Other attorneys might be said to have some interest in the reputation of the profession and in the proper enforcement of the profession's rules, but that interest is, for present purposes at least, mostly accounted for by the subject attorney and by the clients and future clients.

304. See *Bell v. Burson*, 402 U.S. 535, 539 (1971) (citation omitted) (“Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.”).

that unwarrantedly favors the attorney might harm more people – in the sense of subjecting them to deficient or insidious attorneys – than a name change or abortion decision that unwarrantedly favors the applicant ever could.

On the electoral accountability front, then, the notion that the bar gatekeeper ought to be accountable to the public has some resonance. Indeed, as discussed above, there have often been calls to move the regulation of attorneys out of the courts and into the accountable legislative sphere for precisely this reason.³⁰⁵ On the other hand, some (mostly judges and attorneys) have argued that, as then-Chief Judge Benjamin Cardozo put it, “[If] the house is to be cleaned, it is for those who occupy and govern it, rather than strangers, to do the noisome work.”³⁰⁶ On this view, it is emphatically *not* the job of the public, but rather of the courts themselves, to regulate and discipline the bar. And the public should trust the bar, the story goes, because attorneys as a group, and the judges who come from their ranks and govern the bar, ought to have little interest in degrading their reputation by association with such bad actors.³⁰⁷ Yet another rejoinder often offered to the prospect of more electorally accountable control of the bar is that too much accountability is in fact undesirable. On an individual level, just as with name changes and abortion, a given attorney or attorney candidate might worry that electoral accountability would come at the expense of his own interest by distorting the decisionmaker’s consideration of his case. And on a more systemic level, attorneys as a whole might worry that “legislative regulation, subject to political influence, would impair the independence of lawyers” and make them beholden to dominant political forces rather than to their clients and to the law.³⁰⁸

So, when it comes to electoral accountability, we have a more mixed bag than we do in the name change and abortion arenas where there is a simpler story to tell about the pernicious side

305. See *supra* notes 120–122 and accompanying text. Even the American Bar Association has recognized this danger, although it has always vehemently resisted addressing it through legislative oversight. See Devlin, *supra* note 110, at 921–31.

306. *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 493 (N.Y. 1928) (Cardozo, C.J.).

307. See *id.* at 488 (observing that “[t]he bar as a whole felt the sting of the discredit thus put upon its membership by an unscrupulous minority”).

308. Devlin, *supra* note 110, at 930 (referencing concerns articulated by the ABA).

of accountability. That pernicious side exists here too, but with more upside. But when we turn to expertise and discretion, the argument in favor of judges serving as the relevant decisionmakers is amplified. As with the abortion context, there is a meaningful role for expertise—expertise in the norms and rules of attorney conduct, in the problems that attorneys and clients encounter, and in the ethical qualifications required of attorneys. But unlike the abortion context, the judges are among those who possess that expertise. And because many attorney discipline and admission questions involve gray areas that necessarily call for the exercise of professional judgment, it is important that the relevant decisionmaker be in a position to call upon her own lawyerly judgment and discretion. State court judges are well suited to carry out that role.

In contrast, then, to the other two quasi-administrative roles that state court judges play, this one carries some added justifications in the first instance. It is far from perfect, though, and calls for broader accountability must be taken seriously given the serious public interests at stake. Short of reallocating the decisionmaking authority—which would raise problems of its own—it is therefore important for the bar admission and discipline process to be transparent to the public and to feature clear standards that are rigorously enforced.³⁰⁹ If state courts are failing to meet that burden on their own, the imposition of minimum standards as guardrails ought to be considered by legislatures.

But a larger problem lurks that is unique to this context: there is little to no avenue for meaningful appellate review. While most of the concerns driving calls for greater accountability are rooted in the public interest, the simultaneously significant interest of the attorney or candidate attorney means that the possibility of an erroneous decision against the attorney cannot be ignored.³¹⁰ The foregoing analysis of the other two quasi-administrative contexts discussed the ways in which states need to ensure that applicants can have adverse decisions reviewed for more than mere abuse-of-discretion review in higher state courts, but at least as a structural matter, such review is at least available in those arenas. In this

309. The American Bar Association has made similar calls for transparency and has driven disciplinary reforms in that direction. *See id.* at 928–29.

310. *See, e.g.,* Leaf v. Sup. Ct. of State of Wis., 979 F.2d 589 (7th Cir. 1992) (attorney alleging bias in, and raising constitutional challenges to, disciplinary procedures he faced).

context, by contrast, the decisionmaker is usually not a trial-level judge but is often instead the state's highest court.³¹¹ In-state appellate review is therefore often not available at all.

Due to a doctrine of federal jurisdiction, federal court review is generally not available either.³¹² The *Rooker-Feldman* doctrine is generally understood to prohibit relitigation in federal courts (besides the Supreme Court) of a case decided in state court.³¹³ Indeed, the "*Feldman*" half of *Rooker-Feldman* was itself a case about bar admission decisions. Marc Feldman applied for a license to practice law in the District of Columbia and was rejected by the District's highest court, the Court of Appeals. He then filed a suit in federal district court challenging the Court of Appeals' decision. The district court dismissed his complaint, concluding that it could not "review[] an order of a jurisdiction's highest court."³¹⁴ The D.C. Circuit disagreed, characterizing the admission decision as an administrative decision rather than a judicial one.³¹⁵ The Supreme Court, however, agreed with the district court, reasoning that the bar admission proceedings at issue were in fact "judicial" and that, accordingly, no review could lie in federal court.³¹⁶ The upshot, then, is that attorney candidates and attorneys who have been aggrieved by a state high court's admission or discipline decision are without any opportunity to have that decision reviewed by

311. See Barry Friedman & James E. Gaylor, *Rooker-Feldman, from the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1132 (1999). *But see* N.Y. JUD. L. § 90 (McKinney 2020) (providing that the intermediate court of appeals has power to admit and discipline attorneys).

312. An aggrieved party can seek certiorari in the U.S. Supreme Court from the state high court's judgment, but that is "too rare to be meaningful." Friedman & Gaylor, *supra* note 311, at 1132 n.20. One source estimates that the Supreme Court grants between one and two percent of all petitions filed, and an individual seeking mere error-correction is exceptionally unlikely to fit the bill. See Adam Feldman, *Cert Analytics*, EMPIRICAL SCOTUS (Jan. 10, 2017), <https://empiricalscotus.com/2017/01/10/cert-analytics/>.

313. See *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (*Rooker-Feldman* prohibits "state-court losers" from seeking federal "district court review and rejection" of "state-court judgments"); Friedman & Gaylor, *supra* note 311, at 1134.

314. *Feldman*, 460 U.S. at 470.

315. *Feldman v. Gardner*, 661 F.2d 1295, 1310 (D.C. Cir. 1981), *vacated sub nom.* *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983) (acknowledging that "review of a final judgment of the highest judicial tribunal of a state is vested solely in the Supreme Court of the United States," but concluding that the district court had jurisdiction here because the bar proceedings "were not judicial").

316. *Feldman*, 460 U.S. at 481; see *supra* note 123.

anyone, save for the remote possibility of a grant of certiorari in the U.S. Supreme Court.

In light of the interests at stake, this is an intolerable result. For one thing, individuals subject to other professional licensing and regulatory bodies *do* have the opportunity to appeal adverse decisions to a higher state court, because the decision would not have been made in the first instance by that high court.³¹⁷ The anomaly that the attorney licensing organization is the high court does not on its own justify the different result. One option, then, as Barry Friedman and James Gaylord have argued, is “to remove the attorney disciplinary process from the state supreme courts.”³¹⁸ That would certainly solve this particular problem, but it might raise problems of its own. That is, for the reasons discussed above, the state courts might actually be well-suited to handle these issues; other state agencies might be less well-suited to do so. Perhaps attorney admission and discipline decisions could more widely be moved to lower state courts, as in states like New York, but concerns about disuniformity, or about individual judges making admissions decisions that would put attorneys before other judges who might not have admitted that attorney had they had the choice, might militate against doing so.³¹⁹ After all, in contrast to the name change and the abortion contexts, the admitted attorneys will be repeat players in the state court system, interacting with the judges themselves. This introduces a more meaningful systemic interest in reducing the number of gatekeepers and thus reducing the potential for inconsistent decisions. Another option might be to provide a special state court of appeal in which review could be had of the bar decisions of the state high court.³²⁰ But this work-around, while perhaps effective, is cumbersome.

317. See Friedman & Gaylord, *supra* note 311, at 1163 (“The ironic result of *Feldman* is that lawyers and judges in licensing and disciplinary cases receive less process due them than any other individuals or entities in similar circumstances receive.”).

318. *Id.* at 1171.

319. In New York, attorneys are admitted and disciplined by the Appellate Division of the Supreme Court, which is the state’s intermediate court. See N.Y. JUD. L. § 90 (McKinney 2020). Attorneys facing discipline “shall have the right to appeal to the court of appeals from a final order of any appellate division.” *Id.* § 90(8).

320. Cf. *Court of the Judiciary Overview*, ALA. JUD. SYS., <http://judicial.alabama.gov/appellate/judiciary> (last visited Oct. 12, 2020) (providing for a special court in which judicial officers may be tried for violations of canons of judicial conduct).

The cleanest solution, then, might be to overrule *Feldman*, not just because *Feldman* is deeply mistaken on its own terms, but because the foregoing analysis reveals that doing so would yield important results on the ground. To be clear, doing so need not mean abandoning the *Rooker-Feldman* doctrine itself: judicial decisions of state high courts should remain immune from review in federal district courts.³²¹ But overruling *Feldman* would simply recognize that the decision made by the D.C. Court of Appeals in that case was, contrary to the Supreme Court's ruling, *not* judicial but rather administrative—or, at least, to use the language of this Article, quasi-administrative. As Justice Stevens aptly put it in his dissent in the case, the D.C. Court of Appeals, when handling *Feldman*'s admission application, “performed no more and no less than the administrative function of a licensing board.”³²² Moreover, overruling *Feldman* would better reflect the interests at stake and the nature of the decision at issue. After all, if *Feldman* were seeking a license to practice medicine or to braid hair, he would have initially appeared before a state administrative agency (one that was indisputably administrative) and would have been able to appeal from an adverse decision to some court.³²³ As Friedman and Gaylord put it, “[i]t is just happenstance that when the applicant is a lawyer, the administrative agency in many states is also the highest court.”³²⁴ That is, the Court in *Feldman* seems to have been distracted by the fact that a court was the decisionmaker. But recognizing, as this Article illustrates, just how many functions are

321. This is not to say that related critiques of the unwarranted expansion of the doctrine are mistaken, because they are not. *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) (“Variously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress’ conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law”); *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 404–09 (6th Cir. 2020) (Sutton, J., concurring) (similarly lamenting that federal courts still erroneously “pull[] into [*Rooker-Feldman*’s] vortex . . . many things the rule does not do”). But rather than being centered on *expansion*, the critique offered here is centered on *Feldman* itself and is therefore aimed at reframing the boundaries of the heartland of *Rooker-Feldman*.

322. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 489 (1983) (Stevens, J., dissenting); *see Friedman & Gaylord, supra* note 311, at 1172 (calling it “obvious” that Justice Stevens was correct).

323. A litigant seeking to come to federal court would still, of course, have to articulate some federal question, whether it be procedural due process, equal protection, or the like. *Feldman*'s original complaint raised due process challenges. *See Feldman*, 460 U.S. at 469 n.3.

324. *Friedman & Gaylord, supra* note 311, at 1172.

truly served by the state courts puts the Court's error in bold relief. And its confusion is no excuse for continuing to relegate attorneys to lesser process than other regulated professionals enjoy.³²⁵

* * *

With respect to the legislative and law enforcement functions analyzed above, it was fair to conclude that the departures from the traditional judge's dispute-resolution role were, at least in some applications, moderately if imperfectly defensible. When it comes to these quasi-administrative tasks, by contrast, the accountability, expertise, and discretion considerations point in a more troubling direction. While judges are often electorally accountable, and while that helped support their quasi-legislative roles, that fact cuts *against* their being the appropriate decisionmaker here, where there are concerns that they will privilege the preferences of the electorate over the claim of the applicant. This concern arises with particular strength in the name change and abortion contexts, as illustrated, but it is likely to animate many similar quasi-administrative functions for the simple fact that these are the contexts in which citizens are approaching their government seeking permission to do something that might pit them against others in their community. Moreover, many such functions demand subject-matter expertise to which judges—with the exception of attorney admission and discipline—have no particular claim. Finally, and again due to the nature of the task, these are arenas in which one might justifiably worry that the decision *not* be too discretionary lest the decisionmaker's personal views unduly motivate her decision.

For all of these reasons, it is worth considering whether to reallocate these functions to other institutions of state government. But even if they remain with the judges, it is crucial to mitigate these concerns by tightly defining the criteria the judges are to evaluate and by holding them to those criteria by imposing reasoning obligations and by enforcing those obligations with rigorous appellate review. And where that review cannot be had in state courts, the federal courts ought to be opened to it.

325. See *id.* at 1173; *Feldman*, 460 U.S. at 490 (Stevens, J., dissenting) (“The fact that the licensing function in the legal profession is controlled by the judiciary is not a sufficient reason to immunize allegedly unconstitutional conduct from review in the federal courts.”).

CONCLUSION

The state courts are responsible for a wide range of functions beyond traditional “judging.” Whether they have been assigned that role by state law or have taken it on for themselves, the result is that the state courts must be understood and evaluated, not simply as sites of dispute resolution, but as institutions of state government—and ones that are far more complicated and multifaceted than previously recognized. As this Article has shown, careful examination of the functions served by state courts reveals that the hats the state courts wear come in a variety of shapes and sizes. But all implicate important interests and pose potential institutional design challenges. It is therefore critical to ensure that state law and higher courts—to say nothing of scholars, citizens, and policy advocates—see the state courts for what they truly are.

Reorienting our thinking about state courts around their more complicated reality means paying far more careful attention to which hat a state court is wearing in a particular context. It means shaping the architecture of decisionmaking one function at a time, taking concerted steps to guide, review, or limit the court in the ways that will best reflect the most desirable decisionmaking processes in each arena and that will best respect the values and rights at stake. And, in the end, it means making more conscious choices about which tasks those courts ought to be responsible for.