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JUDGES, Judging and Otherwise

Do we ask too much of state court judges — or not enough?

BY MICHAEL C. POLLACK[1]

Ask the average person to imagine what a judge does, and the answer will most likely be something right out of a courtroom from *Law & Order* — or *Legally Blonde*, *Just Mercy*, *My Cousin Vinny*, *Kramer vs. Kramer*, or any of the myriad law-themed movies and television shows. A judge is faced with a dispute brought by some parties and their lawyers and is charged with resolving it, whether it be a breach of contract, a tort action, a competing claim over property, a disagreement about the meaning of a statute, some accusation that someone has committed a crime, and so on.

This basic conception of courts as resolvers of disputes is not only popularly shared, but it also aligns neatly with what is commonly taught in law schools and with what most lawyers come to think: A judge's role is to dispassionately and evenhandedly apply the rule of law to address the disagreements brought before them. But this adversarial vision of the courts — particularly the *state* courts — is woefully incomplete.

In every state, on top of this adversarial dispute-resolution function, state court judges are charged with a broad range of administrative, legislative, and executive law enforcement functions. These are not the mere odds and ends of governing either; weighty interests like personal identity, autonomy, liberty, reproductive freedom, even electoral democracy, and more are at stake. And yet in none of these settings does the courtroom function like what most people have come to expect.

> State legislatures need to make more conscious choices about structuring the roles they assign to state courts. And until they do, judges ought to reevaluate for themselves how they exercise these deeply important roles beyond judging.

This piece, like the longer law review article on which it is based, develops a more complete portrait of state courts and examines whether we should like what we see. Are the substantial interests at stake in each context appropriately served when state court judges handle them in the ways they are asked to? In some, yes. But in others, there are serious reasons to be concerned. These are not necessarily *constitutional* reasons,[2] but rather primarily *institutional* reasons — rooted in efficacy, expertise, democracy, and fairness. And they do not ▸

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arise because judges are necessarily bad decision-makers in some absolute sense. Rather, they arise because other components of government are likely to be relatively *better* decision-makers in particular arenas — more expert, or with a superior balance of responsiveness and remove, and so on — or because judges operate with inadequate procedural constraints in these arenas. As a result, state legislatures need to make more conscious choices about structuring the roles they assign to state courts. And until they do, judges ought to reevaluate for themselves how they exercise these deeply important roles beyond judging.

JUDGES AS ADMINISTRATORS

Government institutions are routinely called upon to administer laws and programs created by legislatures. For example, such institutions carry out legislative directives to determine — in nonadversarial proceedings — whether people are eligible for certain benefits or licenses based on statutorily defined criteria. The federal Social Security Administration thus determines whether people qualify for disability benefits by reference to specified metrics and, if they do, awards those benefits. Similarly, local parks departments might determine whether applicants qualify to host a concert or a rally in a park and will grant permits to those who meet the relevant standards. While one might call this "adjudication" in the sense that it involves applying law to facts, it is not the act of resolving a dispute. We generally call the institutions that do this sort of legal administration administrative agencies.

But throughout the nation's history, state court judges have also been directed by state legislatures to carry out precisely these sorts of administrative functions. Initially, the courts were allocated these responsibilities in the absence of what we now know as the modern administrative state.[3] Today, however, with robust administrative apparatuses, that allocation often lacks justification. What we have, therefore, can appear to be somewhat random, lacking a unifying theory or rationale and, as discussed at the end of this piece, resulting in normatively questionable practices.

Consider a few examples. First, 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 probate, family court, or general jurisdiction county judge.[4] And nearly all states employ a process plucked from the administrative context rather than the dispute-centric context familiar to ordinary judging: The judge makes the decision by considering the representations in the applicant's usually unopposed petition — which generally is required to state the applicant's reasons for the desired change — in light of the rules imposed by state law.[5]

Initially, the courts were allocated these responsibilities in the absence of what we now know as the modern administrative state. Today, however, with robust administrative apparatuses, that allocation often lacks justification.

Once the judge reaches a decision, a dissatisfied applicant can appeal to a higher state court, but that court will generally review the judge's decision under a highly deferential "abuse of discretion" standard.[6]

Beyond this basic framework, however, one quickly finds that legislatures have offered scant guidance. Some state statutes provide that the judge "shall" grant the name change unless there are good reasons *not* to do so.[7] Others adopt the opposite default and provide that the name change shall be granted only if the judge affirmatively finds good cause *to do so*.[8] A number of other states simply provide that the judge "may" grant the name change, full stop.[9] A handful go a step further and provide that the judge "may" grant the change upon a showing by the applicant of good cause.[10] And another handful provide that the judge "may" grant the change if there is no good reason *not* to do so.[11] Many states leave it up to the judge to determine what those reasons and good causes might be,[12] though a few explicitly define what objections or grounds for change might be reasonable.[13] And almost no states affirmatively require judges to provide much of a record or justification for their decisions, a fact that makes meaningful appellate review more of a mirage than it is in the context of ordinary judging, or even than it is in the context of ordinary administrative decision-making.

What this variation illustrates is that there are numerous ways to structure the judge's role in this quasi-administrative judicial setting — ways to give judges more or less bounded discretion — and some of them raise more concerns than others, for reasons discussed in the last section of this piece. Further complicating matters, state court judges sometimes shake loose

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whatever statutory constraints exist or bind themselves to new masts of their own creation. For example, while courts sometimes take seriously the limited grounds for denial in their state's statutes and thus liberally grant petitions,[14] they also sometimes invent further grounds for denial not listed in those statutes.[15] And while courts sometimes embrace the broad latitude to deny petitions afforded them by their state's statutes,[16] they also sometimes conclude 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.[17]

Next, consider another administrative role assigned to state court judges. This one arises in the context of abortion. Many states have required a parent to be notified of or to consent to a minor's decision to seek an abortion unless a government entity grants an exception.[18] In all but one such state, the relevant government entity has been a state court judge.[19] Generally, the minor is required to file an anonymous or pseudonymous petition with the court setting out her desire to bypass her parents and explaining why she can make on her own the decision to have an abortion.[20] The judge is often instructed to consider the petition ex parte and to issue a ruling promptly,[21] perhaps after holding a hearing.[22] Though minors often have the right to court-appointed counsel,[23] attorneys and child advocates understandably describe the process as "daunting" and "intimidating."[24]

The statutory criteria that guide judges are fairly similar across the states. Most states provide 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."[25] Some states go further and list specific factors that the judge must consider — factors like the minor's age, intelligence, maturity, "emotional development and stability," and "credibility and demeanor as a witness."[26] And, in a departure from the name-change context, nearly all of these states require the judge to include in the order "specific factual findings and legal conclusions in support thereof."[27]

Pure legislating — setting policy outside of resolving any adversarial dispute, and simply because one believes it to be wise — is a different beast, and state court judges do it, too.

One last example of an administrative role handled by state court judges is the regulation of attorneys. Every state regulates and licenses various professions like doctors, dentists, and cosmetologists through administrative agencies and boards, but the regulation and licensure of attorneys is handled by the state courts. In some states, this regulatory power is grounded in the state constitution[28]; in others, in statutes[29]; and in others, in judicial decisions.[30] But no matter the legal footing, the often articulated rationales are the same: Lawyers are officers of the court, and only the courts can adequately preserve the independence of lawyers from the political legislatures.[31] These claims have no doubt long been contested,[32] but the states still uniformly rely on them either to farm out the regulation of a profession to the courts or to permit the courts to assert that administrative power for themselves.

JUDGES AS LEGISLATORS

So far, we have seen judges *administering* the law by carrying out directives to regulate and to grant licenses and benefits. But judges also sometimes *make* the law. That is, they *legislate*. Of course, judges also "legislate" in the context of common law decision-making, but common law judging is still rooted in the resolution of adversarial disputes. Pure legislating — setting policy outside of resolving any adversarial dispute, and simply because one believes it to be wise — is a different beast, and state court judges do it, too.

One example is the important and increasingly controversial role that judges play in redistricting — not only in resolving litigation about redistricting, but also in actually drawing district lines themselves.[33] District maps are statutes,[34] and they reflect policy choices.[35] This is no doubt the reason redistricting has consistently been characterized by the U.S. Constitution and the Supreme Court as a legislative function.[36] And yet, in California, Maine, Mississippi, New Jersey, and Washington, state court judges are explicitly made backup mapmakers. If the legislature or relevant commission cannot agree on a map in these states, the map is drawn either by a group of officials that includes a judge, or by a panel of judges entirely on their own.[37] That is, if the other responsible entities fail to produce a district map, the state court will create its own — *even in the absence of a party seeking a judg-* ▸

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ment.[38] In six additional states, courts have the special remedial power in the litigation context — where there *is* a party seeking a judgment — to create their own redistricting maps upon finding that a given map is unlawful.[39]

Another important example of judicial legislating is the establishment of specialized courts for particular offenses or particular classes of defendants. These include both "problem-solving" courts, like drug courts, domestic violence courts, and gun courts,[40] and so-called "status courts," like girls courts or veterans courts.[41] Unlike ordinary courts, which are established by legislative action, these courts are generally created on an ad hoc basis by judges themselves.[42] In the pages of this very publication over 20 years ago, Judge Truman Morrison expressed his "concern[] about the power that judges have" to create new courts and indicated that he did 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."[43] "When you try and channel the energies of social change into the judicial branch," he cautioned, "it's not a good fit."[44] Judge Cindy Lederman similarly warned in the same article that, if judges "accept this challenge, we're no longer the referee or the spectator. We're a participant in the process [which is] quite a leap. It's not traditional."[45] Put another way, it's not "judging" — in the sense of resolving disputes — but legislating.

JUDGES AS ENFORCERS

Last, in addition to *administering* and *making* law, state court judges sometimes *enforce* law. Here, I refer to the exercise of executive enforcement discretion and, specifically, the choice whether to prosecute an individual.

> Legislatures should consider reallocating some administrative roles to bona fide administrative agencies with the necessary subject matter expertise and insulation from electoral pressures.

In the common conception, the prosecutor enforces the law by choosing whether and which charges to file,[46] and the judge sits as arbiter. But in 19 states, trial court judges have the power to unilaterally dismiss prosecutions on their own initiative.[47] These judges are instructed to do so not based on an evaluation of the sufficiency of evidence, but based on their own normative judgments about whether a case *ought* to be pursued even if there is ample evidence of guilt.[48] In most of these states, the power is capaciously framed by statute as the power to dismiss prosecutions "in furtherance of justice,"[49] thus leaving this determination to the judge's open-ended discretion.[50] However it is drawn, the allocation of this power to the state judiciary reflects a conscious choice by legislatures to vest the courts with an enforcement power typically wielded by executive officials.[51] And as Brooklyn Law Professor Anna Roberts has cataloged, judges tend to take the view that they maintain broad discretion in this setting, rooting their decisions to dismiss prosecutions less in law and more in the conclusion that the prosecutor made the "wrong" choice.[52]

TOWARD BETTER JUDGMENT BEYOND JUDGING

How should we feel about all of this? First, some good news. As odd as some of these nonjudicial roles might seem, a few are relatively justifiable. As the longer article on which this piece is based explores in greater depth,[53] though judges' executive enforcement role usurps some prosecutorial power, it can serve as a healthy check by another actor with expertise in the criminal legal system. And while there might be some concern about judges getting in the way of elected prosecutors carrying out their democratic mandates, many state court judges are likewise elected and thus accountable to the public like prosecutors are.

Courts' legislative roles are also somewhat defensible, primarily because they are essentially gap-filling or necessary "second-best" roles.[54] Take redistricting: Legislatures themselves are hardly paragons of virtue when it comes to fair redistricting,[55] so involving judges makes sense because they have structural independence from the legislature and personal independence from the consequences of district lines, but they also have some electoral accountability of their own.

And when it comes to specialized courts, it would surely be ideal if legislatures could enact uniform solutions, rather than leaving it to judges to make ad hoc changes. But at least judges have expertise in the functioning of the criminal legal system, and at least judge-led action does not exclude the possibility of subsequent legislative action. Indeed, many judges who have done work in this arena seem to have done so not to arrogate power but simply to fill a need left unmet by legislators.[56] Rather than quarrel with these judicial roles, then, we ought to understand them as decent enough

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substitutes while urging legislators to legislate — and to look to experienced judges for inspiration and guidance as they do.

When it comes to the administrative roles state court judges serve, however, the picture is decidedly less sunny. Like the interests at stake in the other roles, the interests implicated here are weighty, deeply personal ones that approach or implicate outright constitutional guarantees. But here, judges — for all of their strengths — are substantially less well-suited to serve these interests.

To see why, think carefully about what sorts of qualities we want in the gatekeepers for processes like name changes or access to abortion for young women. Do judges have the right balance of independence and accountability? Do they have sufficient expertise in the subject matter? Do they have a degree of individualized discretion that is nonetheless bounded by considerations set by policymakers?[57] Can claimants seek meaningful review of adverse decisions by some higher authority?

The answer to all of these questions is no. There is evidence that state court judges who are elected and must face reelection have shortcomings when it comes to protecting vulnerable individuals.[58] General jurisdiction judges at best have no more expertise than anyone else in something like name changes and may affirmatively lack necessary expertise in areas like child welfare. And while the laws surrounding abortion access require judges to articulate their findings and reasons,[59] the same is not true with respect to name-change decisions, which consequently resist meaningful appellate review. Finally, speaking of the prospect of an appeal, while judges have a stronger claim to expertise when it comes to the admission and regulation of attorneys, that role is handled primarily by state *high courts*. The result is that there is no path to appeal to another decision-maker.[60]

With these shortcomings in mind, legislatures should consider reallocating some administrative roles to bona fide administrative agencies with the necessary subject matter expertise and insulation from electoral pressures. The Department of Records, for example, could process name-change applications, and the Department of Child Services could process parental bypass petitions.

Short of such reorganization, however, legislatures ought to more assertively limit the discretion judges have when serving these administrative roles by providing explicit and exclusive lists of criteria these judges-as-administrators must consider.[61] This is especially critical in those states where the statutory law discussed above offers little in the way of guidance or guardrails.[62] And where they do not currently, legislatures ought to require judges to give reasons when rejecting these sorts of administrative claims — both to enable meaningful appellate review and because the very act of reason-giving can improve the quality of decision-making.[63] These are well-understood best practices in both the ordinary dispute-resolution context — judges write opinions — and in the ordinary administrative decision-making context, where the relevant decision-makers are often required by law to articulate the bases for their decisions.[64] Reasons ought to be similarly required when judges engage in administrative decision-making.

In the meantime, judges can take steps to better administer these functions. Even where statutes do not require it, judges should impose upon themselves reason-giving obligations and should be clear about the factors they are evaluating, why those factors are worth considering, and why they are or aren't satisfied. For their parts, appellate judges should review these administrative decisions just as they would ordinarily review the decisions of other administrative decision-makers: with something like substantial evidence review.[65] Doing so need not be particularly onerous — the records in these cases would often be straightforward — but it would still encourage the judges making administrative decisions on the front lines to more clearly root their determinations in facts and articulated considerations.[66] And it would allow applicants to more fully air and more fairly vindicate their significant interests.

CONCLUSION

It is critical for lawyers, legislators, scholars, and judges alike to see the state courts for what they are: complex, multifaceted institutions responsible for a whole range of functions outside of traditional "judging." This richer understanding should not only help us better engage with the state courts but also motivate us to ensure that state law and higher courts shape the architecture of decision-making one function at a time, taking careful steps to guide, review, or limit judges in the ways that will best reflect the most desirable decision-making processes in each arena and that will best respect the values and rights at stake. ▸

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1 The ideas contained in this piece were originally published in greater detail as *Courts Beyond Judging*, 46 BYU L. Rev. 719 (2021), and are adapted here with thanks to the *Brigham Young University Law Review*. I am grateful to Ben Grunwald, Amelia Thorn, and Samuel Weinstein for their comments and suggestions.

2 *See Avery v. Midland County*, 390 U.S. 474, 482–83 (1968) (observing that the states have permissibly taken a "varied, pragmatic approach in establishing governments").

3 *See, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1871 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 76 (1994).

4 *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); *but see* N.C. Gen. Stat. §§ 101-2(a), 101-5(f) (2014–15) (providing that the clerk of the court has the "duty" not to grant an application if good reasons exist for denying it and that the applicant may appeal the clerk's decision to the local judge, whose decision is "final" and not appealable). Hawaii is the lone state in which this process takes place outside the courts. *See* Haw. Code R. §§ 2-2-2, 2-2-6 (1987) (directing applicants to petition the lieutenant governor).

5 *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); *but see* La. Rev. Stat. § 13:4752 (2019) (providing for an adversarial process in which the proceedings "shall be carried on contradictorily with the district attorney," whose role is to "represent the state").

6 *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).

7 *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).

8 *See, e.g.*, Colo. Rev. Stat. § 13-15-101(2)(a) (2016); Kan. Stat. Ann. § 60-1402(c) (1990); 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).

9 *See, e.g.*, Conn. Gen. Stat. § 52-11(a) (2014); Ind. Code § 34-28-2-1 (2017); Ky. Rev. Stat. § 401.010 (2013); N.H. Rev. Stat. § 547:3-i(I) (2003); Tenn. Code Ann. § 29-8-104 (1978).

10 *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).

11 *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); Wisc. Stat. § 786.36(1) (2018).

12 *See, e.g.*, N.Y. Civ. Rights Law § 63 (2014).

13 *See, e.g.*, Okla. Stat. tit. 12, § 1634 (1953).

14 *See, e.g.*, *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").

15 *See, e.g.*, *In re* Dengler, 287 N.W.2d 637, 639 (Minn. 1979) (concluding that, notwithstanding narrow statutory language, courts 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).

16 *See, e.g.*, *In re* Bobrowich, Index 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").

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

18 In *Bellotti v. Baird*, the Supreme Court held that a state requiring parental involvement must "provide an alternative procedure whereby authorization for the abortion can be obtained." 443 U.S. 622, 643 (1979). But the Court did not require that that procedure run through the state courts. *Id.* at 643 n.22 ("[A] State choosing to require parental consent [may] delegate the alternative procedure to a juvenile court or an administrative agency or officer.").

19 Maryland is the only state that has created a bypass procedure that relies on a doctor's judgment rather than a court's. *See* Md. Code Ann., Health-Gen. § 20-103(c)(1) (1991).

20 *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).

21 *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).

22 *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).

23 *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).

24 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/.

25 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).

26 Fla. Stat. § 390.01114(4)(c)(1) (2020); *see, e.g.*, Kan. Stat. Ann. § 65-6705(n) (2014); 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

27 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).

28 *E.g.*, N.J. Const. art. VI, § 2 cl. 3; Fla. Const. art. V, § 15; Utah Const. art. VIII, § 4; Ark. Const. amend. 28.

29 *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).

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

31 *See, e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378–79 (1866); People *ex rel*. *Karlin v. Culkin*, 162 N.E. 487, 489, 493 (N.Y. 1928); *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/.

32 *See, e.g.*, Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 Buff. L. Rev. 525 (1983).

33 For an illustration of recent controversies surrounding this judicial role, see, for example, Ian Millhiser, *The Fate of American Elections is in Amy Coney Barrett's Hands*, VOX (Mar. 4, 2022), https://www.vox.com/22958543/supreme-court-gerrymandering-redistricting-north-carolina-pennsylvania-moore-toth-amy-coney-barrett.

34 *See, e.g.*, S.B. 881, 81st Ore. Legis. Assemb., 2021 Spec. Sess. (Ore. 2021), https://olis.oregonlegislature.gov/liz/2021S1/Downloads/MeasureDocument/SB881/Enrolled.

35 *See Burns v. Richardson*, 384 U.S. 73, 92 (1966).

36 *E.g.*, U.S. Const. art. I, § 4, cl. 1; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n.*, 135 S. Ct. 2652, 2667–68 (2015).

37 *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.

38 In about eight more states, judges are charged with choosing at least some members of the state's independent redistricting commission. *See* Alaska Const. art. VI § 8(b); 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); Vt. Stat. Ann. tit. 17 § 1904(a) (2019); Wash. Const. art. II § 43(2).

39 *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); N.C. Gen. Stat. §§ 1-267.1; 120-2.4(a) (2016).

40 *See* Erin R. Collins, *Status Courts*, 105 Geo. L.J. 1481, 1492, 1482–83 (2017).

41 *See id.* at 1483–84.

42 *See, e.g.*, 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); Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 New Eng. J. on Crim. & Civ. Confinement 357, 364–65 (2009); *Drug Court's Holistic Approach*, Miami Dade County (last accessed May 21, 2022) https://web.archive.org/web/20200128160145/https://www.miamidrugcourt.com/index.php?option=com_content&view=article&id=44&Itemid=54; Kristen Meriwether, *Veterans Treatment Courts Offer Hope, but Only in Three Boroughs*, Gotham Gazette (last accessed May 21, 2022), https://perma.cc/DV8Q4M6F; *Hawaii Girls Court*, Haw. St. Judiciary (last accessed May 21, 2022), https://web.archive.org/web/20180903010007/http://www.girlscourt.org/aboutus.html.

43 Greg Berman, *"What is a Traditional Judge*

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Anyway?" Problem Solving in the State Courts, 84 Judicature 78, 81 (2000).

44 *Id.* at 82.

45 *Id.* at 80.

46 *See Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (emphasizing that 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"); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that the power to refrain from prosecuting "has long been regarded as the special province of the Executive Branch").

47 Anna Roberts, *Dismissals as Justice*, 69 Ala. L. Rev. 327, 330 (2017).

48 *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'").

49 *E.g.*, Minn. Stat. Ann. § 631.21 (West 2017); *see also* Roberts, *supra* note 47, at 332, 333 n.21 (collecting statutes).

50 *See* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 Mo. L. Rev. 629, 656 (2015). A small minority of these states instead permits a 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. *See, e.g.*, Haw. Rev. Stat. § 702-236(1)(b) (2019); N.J. Stat. Ann. § 2C:2-11(b) (West 2020); Roberts, *supra* note 47, at 334–35 (discussing same).

51 *See, e.g.*, *Rickert*, 446 N.E.2d at 423 (noting the aim "to remove the power . . . from the offices of District Attorney and Attorney-General and lodge it, instead, in the courts alone").

52 Roberts, *supra* note 47, at 340–44 (collecting cases).

53 *See* Pollack, *supra* note 1, at 758–62.

54 *See id.* at 763–70.

55 *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (observing that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" and that "such gerrymandering is 'incompatible with democratic principles'" (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015))).

56 *See* Berman, *supra* note 43, at 80, 83, 85.

57 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2255, 2331–38 (2001); 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); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 469–91 (2003).

58 *See, e.g.*, Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. Econ. & Org. 211, 224, 228 (2012) (finding that, in states with retention 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"); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 727–28 (1995) ("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."); Helena Silverstein, Girls on the Stand: How Courts Fail Pregnant Minors 85, 116–17, 129 (2007) (collecting examples in context of minors seeking abortions).

59 *See supra* note 27 and accompanying text.

60 In *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983), the Supreme Court held that a bar admission decision by a state high court was a judicial determination of which no federal review was available. For the reasons discussed here, that was conceptually incorrect, and *Feldman* therefore ought to be revisited to permit attorneys some path to seek review of a state high court's administrative decision. *See* Pollack, *supra* note 1, at 790-93.

61 *See supra* note 13 and accompanying text.

62 *See supra* notes 10–12 and accompanying text.

63 *See, e.g.*, Nestor M. Davidson & Ethan J. Leib, *Regleprudence — at OIRA and Beyond*, 103 Geo. L.J. 259, 303 (2015); Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1313–14 (1975); Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. Rev. 1184, 1233 (2014); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 Cornell L. Rev. 549, 588 (2002); Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 657–58 (1995); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 Cornell L. Rev. 486, 496–99 (2002); Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1280–82 (2009).

64 *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 962 (2007) ("[V]irtually every form of agency action" is accompanied by a judicial "demand for explicit reason-giving."); Model State Admin. Proc. Act §§ 313, 318 (2010).

65 *See, e.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

66 *Compare State Farm*, 463 U.S. at 43 (federal administrative agencies must justify their decisions by reference to statutory criteria and reasons rooted in a record of evidence), *with McLane Co. v. EEOC*, 137 S. Ct. 1159, 1169 (2017) (federal judges need not, when their decisions are reviewed for abuse of discretion).