

BURFORD ABSTENTION AND JUDICIAL POLICYMAKING

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The Supreme Court held in Burford v. Sun Oil Co. that federal courts, through an exercise of equitable discretion, could abstain from asserting subject matter jurisdiction over challenges to state administrative agency orders. Since Burford, the Court has failed to reconcile abstention with either Congress's subject matter jurisdiction statutes or the Constitution, which both arguably require federal courts to exercise jurisdiction when the subject matter is proper. Instead of relying on equitable discretion, I believe federal courts can and should ground Burford abstention in constitutional and statutory restrictions on the types of power that federal courts may exert. Article III of the Constitution and the federal question, diversity, and removal jurisdiction statutes require federal courts to abstain from asserting jurisdiction when doing so would require federal courts to take nonadjudicative action.

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INTRODUCTION

In 1943, the Supreme Court held in *Burford v. Sun Oil Co.* that federal courts, through an exercise of equitable discretion, could abstain from asserting subject matter jurisdiction over challenges to state administrative agency orders.¹ Since *Burford*, the Court has failed to reconcile abstention with either Congress's subject matter jurisdiction statutes or the Constitution, both of which arguably require federal courts to exercise jurisdiction whenever the subject matter is proper (as was the case in *Burford*). Instead, the Court and commentators have relied on equitable principles of comity and federalism to justify *Burford* and other types of abstention.² This equity-based approach sparked a heated academic debate over the merits of abstention and judicial discretion generally, with many scholars questioning the historical, constitutional, and democratic legitimacy of federal courts refusing to exercise congressionally mandated jurisdiction.³

Burford remains lost in the shuffle of this broader abstention debate. Scholars have admittedly toyed with the parameters of *Burford* abstention, suggesting factors that federal courts should weigh when considering whether to assert jurisdiction over challenges

¹ 319 U.S. 315, 334 (1943).

² See, e.g., *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 496 (7th Cir. 2011) (citing *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011)) (suggesting that *Burford* “[a]bstention is, at its core, a prudential mechanism that allows federal courts to take note of and weigh significant and potentially conflicting interests”); *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 562, 564 (6th Cir. 2010) (“weighing” the state interest in uniform treatment of a local problem against Congress’s interest in providing a federal forum for diversity cases); *Martin v. Stewart*, 499 F.3d 360, 372, 379 (4th Cir. 2007) (Wilkinson, J., dissenting) (arguing that *Burford* abstention was proper in a facial constitutional challenge to South Carolina’s gambling regulations because gambling is “a quintessential state function”).

³ Compare Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (arguing that the Court’s abstention doctrines ignore Congress’s mandate that federal courts shall assert jurisdiction), with David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545–61 (1985) (identifying a historical basis for reading discretion into the subject matter jurisdiction statutes). The debate has become so heated that one author felt the need to use two exclamation points in the title of his article. Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003).

to state administrative orders and schemes.⁴ But commentators have not grounded *Burford* abstention in anything other than equitable principles.⁵ Similarly, the Supreme Court's limited *Burford* jurisprudence has provided little grounding or clarity. The resulting doctrinal ambiguity has left lower federal courts with extensive discretion: Courts of appeals have doctrinal wiggle room to decide when federal district courts may themselves exercise discretion to assert jurisdiction.⁶

The consequences of leaving courts with so much leeway is significant, as *Burford*, like all abstention doctrines, strongly implicates an individual's interest in being heard in a federal forum. *Burford* abstention denies the choice of litigating in federal court to both diverse litigants and plaintiffs asserting federal questions.⁷ Denial of jurisdiction in *Burford* cases can be particularly problematic because the Supreme Court lacks the power to review purely state law disputes between diverse parties, a situation that is common in the *Burford* context.⁸

⁴ See, e.g., Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 671–74 (1999) (highlighting various factors, such as the risk of class-wide fallout and the potential for preclusion against a state actor, which should be considered in *Burford* cases); Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 979 (1993) (suggesting that the Supreme Court should answer whether *Burford* abstention extends to nonadministrative decisions).

⁵ Suits in equity originally constituted a body of remedies, procedures, and practices that evolved in the English Court of Chancery. While the Federal Rules of Procedure abolished the procedural distinction between legal and equitable causes of action, federal courts may still issue historically equitable remedies, such as injunctions. When deciding whether to exercise an equitable remedy, courts may consider the public consequences of their actions, including “needless friction” with state law. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717–18, 720 (1996) (describing the history of federal court abstention and discretion when considering equitable relief); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 437–52 (2003) (describing the historical roots of the law/equity divide).

⁶ See *infra* Part I.C (identifying the various approaches to *Burford* by the courts of appeals).

⁷ Resolving the debate surrounding federal and state court parity—that is, whether state courts can adequately protect federal rights—and the general costs and benefits of diversity jurisdiction are beyond the scope of this Note. For a summary of the parity debate, see Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 609–14 (1991). The historical justification, benefits, drawbacks, and legal principles of diversity jurisdiction are discussed in 13E CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3601 (3d ed. 2009). It is sufficient to note that *Burford* bypasses a litigant's forum choice, impacting individuals subjected to a state administrative decision. See Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237, 1251–54 (1989) (identifying delay, expense, and bias problems).

⁸ 28 U.S.C. § 1257(a) (2006) (limiting Supreme Court review to decisions involving the “Constitution or the treaties or statutes of . . . the United States”). See *Murdock v. City of*

Parties, thus, may be unable to access any mechanism for federal review.⁹

Instead of relying on equitable discretion, I believe that federal courts can and should ground *Burford* abstention in constitutional and statutory restrictions on the types of power that federal courts may exert. Courts should read Article III of the Constitution and the federal question, diversity, and removal jurisdiction statutes to require federal district courts to abstain from asserting jurisdiction when they risk becoming engrossed in states' rulemaking apparatuses. Article III and the subject matter jurisdiction statutes limit the "type" of action in which federal courts may engage—that is, the Constitution and subject matter statutes both prohibit federal courts from engaging in rulemaking or legislative action. Specifically, Article III allows federal courts to exercise only judicial power.¹⁰ And the subject matter jurisdiction statutes authorize federal courts to review only cases that are "civil actions."¹¹ Federal court review of state administrative schemes may involve improper civil actions under the subject matter jurisdiction statutes and inappropriate uses of judicial power under Article III because they require federal courts to make legislative rules in complicated state regulatory schemes.¹²

Memphis, 87 U.S. (20 Wall) 590, 620 (1874) ("[T]he uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction . . . except[ed] all other cases to which the judicial power of the United States extends . . ."). After *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), federal courts may not hear state-law claims that request injunctive relief against state-level officers for violations of state law. *Id.* at 97–98 (identifying sovereign immunity as a bar to such claims). But federal courts can still hear in diversity at least two causes of action that may trigger *Burford* abstention: claims against local governments and claims against private parties that implicate a state administrative scheme. States may also voluntarily bypass *Pennhurst* by waiving their sovereign immunity, and Congress may abrogate states' sovereign immunity under section five of the Fourteenth Amendment. *Id.* at 99. *But cf.* Erwin Chemerinsky, 12 HASTINGS CONST. L.Q. 643, 652–54 (1985) (noting the doctrinal problems of treating sovereign immunity as a restriction on Article III subject matter jurisdiction and allowing states to waive sovereign immunity for jurisdictional purposes).

⁹ *Burford* abstention differs from other abstention doctrines in this manner. In other cases, habeas corpus, federal review after a state court determines a state issue, or Supreme Court review may be available.

¹⁰ U.S. CONST. art. III, § 1 ("The judicial power . . . shall be vested in one supreme Court, and in such inferior courts as the Congress may . . . establish."). Although drawing a bright line between judicial and nonjudicial power is impossible, the Court's administrative law and due process jurisprudence provides some guiding principles for distinguishing between judicial and nonjudicial authority. *See infra* Part III.C.

¹¹ 28 U.S.C. § 1331 (2006) ("The district courts shall have *original jurisdiction of all civil actions* . . .") (emphasis added); 28 U.S.C. § 1332(a) (2006) (same).

¹² This idea is partially borrowed from a Hart and Wechsler footnote. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1078 n.2 (6th ed. 2009) ("If *Burford* abstention is premised on the notion that a state reviewing court acts in a policymaking partnership with the state administrative

Grounding *Burford* abstention in constitutional and statutory law has at least two benefits over current theories. First, it resolves the quandary noted by various scholars that federal courts ignore mandatory jurisdiction statutes when they choose to abstain at their own discretion. Tethering abstention to the subject matter jurisdiction statutes and Article III would respect the Constitution's limitation on federal courts' authority.¹³ Second, as I explain later, this approach authorizes federal district courts to exercise jurisdiction in cross-system review, which more directly fosters federalism interests.¹⁴

This Note proceeds as follows. Part I discusses abstention generally, the *Burford* decision, subsequent Supreme Court cases explaining and distilling *Burford*, and courts of appeals' divergent applications of the doctrine. Ultimately, Part I demonstrates that the Court has provided too little guidance on *Burford*, resulting in doctrinal confusion among the lower courts. Part II explains the scholarly debate surrounding *Burford* and abstention generally. Although the scholarly discussion of *Burford* is vigorous, commentators have thus far failed to ground *Burford* in anything other than federal common law. Part III demonstrates that *Burford* abstention can be grounded in a more coherent framework, both doctrinally and theoretically. Under this framework, *Burford* abstention would be limited to disputes in which federal courts would be asked to act in a manner inconsistent with Article III and federal subject matter jurisdiction statutes.

I

ABSTENTION AND *Burford*

A. *Explaining Abstention*

Congress controls the subject matter jurisdiction of the lower federal courts. Article III, section one of the Constitution vests the judicial power in the Supreme Court and grants Congress the power to establish lower federal courts.¹⁵ Article III, section two identifies the cases to which the judicial power extends.¹⁶ Because the Constitution grants Congress the authority to create lower federal courts, Congress

agency, would it follow that the state court's decision should be deemed legislative . . . and that ordinary res judicata principles should not apply?").

¹³ U.S. CONST. art. III, § 2 (establishing and limiting the judicial power). A strong defense of separation of powers is beyond the scope of this Note. Others, however, have explained the prudential benefits of a fairly formalistic reading of separation of powers. See, e.g., Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 456–70 (1991) (arguing separation of powers provides a necessary check on governmental overreach).

¹⁴ See *infra* Part III.D (explaining this theory).

¹⁵ U.S. CONST. art. III, § 1.

¹⁶ U.S. CONST. art. III, § 2.

may vest federal courts with subject matter jurisdiction below the Article III ceiling.¹⁷ For example, except for one brief interlude,¹⁸ lower federal courts lacked subject matter jurisdiction over federal questions until 1875.¹⁹ This Note deals primarily with the two most familiar independent grants of subject matter jurisdiction: diversity of citizenship and federal question jurisdiction.

Abstention permits federal courts to refrain from entertaining civil actions even if those actions fall within a relevant subject matter jurisdiction statute. Congress has functionally authorized some forms of abstention, creating exceptions to the general subject matter jurisdiction statutes,²⁰ and the Supreme Court has fashioned other abstention doctrines out of equitable principles.

The foundational Supreme Court decision regarding “Court-made” abstention is *Railroad Commission v. Pullman Co.*²¹ Justice Frankfurter, writing for the majority, held that a federal district court should “stay [] its hands” when a plaintiff challenges the constitutionality of an unclear state law, and one interpretation of the state law would render a constitutional decision unnecessary.²² The Court, in staying a request for an injunction against a Texas employment law allegedly invalid under the Equal Protection Clause, highlighted the discretionary nature of equitable relief and the important federalism and comity interests at stake. Justice Frankfurter declared that the

¹⁷ U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court.”); U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper”); U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); see also *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to ‘ordain and establish’ inferior courts, conferred on Congress by Article III, § 1, of the Constitution.”); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.) (“[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”); Charles E. Rice, *Congress and the Supreme Court’s Jurisdiction*, 27 VILL. L. REV. 959, 960 (“There is no question but that Congress has the power to define or even entirely eliminate the jurisdiction of the lower federal courts.”).

¹⁸ See Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92 (allowing some jurisdiction to be exercised by circuit courts). This was repealed by the Act of Mar. 8, 1802, 2 Stat. 132.

¹⁹ Act of Mar. 3, 1875, § 1, 18 Stat. 470–73.

²⁰ 28 U.S.C. § 1334(c) (2006) (including both “mandatory” and “permissive” abstention); 28 U.S.C. § 1341 (2006) (restricting federal court authority to enjoin state officials from collecting state taxes); 28 U.S.C. § 1342 (2006) (limiting federal court jurisdiction to enjoin rate orders made by state agencies); 28 U.S.C. § 2283 (2006) (asserting that a federal court may not grant an injunction to stay state court proceedings unless Congress expressly authorizes it or in other limited circumstances).

²¹ 312 U.S. 496 (1941).

²² *Id.* at 501.

“avoidance of needless friction with state policies” and the “rightful independence of the state governments” authorized federal courts to reserve judgment on the federal question.²³ The Court’s endorsement of abstention in *Pullman* was limited; a federal court should only abstain on an “issue” rather than an entire cause of action.²⁴ That is, *England v. Medical Examiners* clarified that a plaintiff may choose to litigate only the unclear state law issue in a state court, and that claim preclusion would not bar that litigant from later returning to federal court, if necessary, for resolution of the constitutional claim.²⁵ Following *Pullman*, the Supreme Court authorized federal courts to abstain in a number of situations.²⁶

B. *The Burford Decision and Supreme Court Application*

Burford, the first abstention case following *Pullman*, created a form of “administrative abstention”²⁷ that is conceptually different from *Pullman*. Unlike the statute at issue in *Pullman*, the state law in *Burford* was clear. Texas regulated its oil fields by issuing drilling and operating permits to prevent unnecessary waste and ensure the equitable distribution of oil. The legal standard for the allocation was “delusive[ly] simpl[e],” but the allocation of permits involved a myriad of difficult factual issues ranging from market demand to subsurface pressure.²⁸ Extraction in one oil well could disturb production in Texas’s twenty-six thousand other wells because a single well may function as a straw, siphoning oil from surrounding property.²⁹ In order to consistently administer its oil-drilling scheme, the Texas

²³ *Id.* at 500–01.

²⁴ *Id.* at 501.

²⁵ 375 U.S. 411, 415–17 (1964). As discussed *infra* Part I.B, *Pullman* is distinct from *Burford*, which does not allow a litigant to return to federal court. And *Pullman* is not applicable when state action is challenged on federal statutory grounds. *Propper v. Clark*, 337 U.S. 472, 489–92 (1949).

²⁶ *Louisiana Power & Light Co. v. City of Thibodaux* requires federal courts sitting in diversity to abstain from hearing extremely unclear state laws concerning an important state legal question. 360 U.S. 25, 27–28 (1959). *Younger v. Harris* prevents federal courts from enjoining ongoing state criminal proceedings in the absence of extraordinary circumstances. 401 U.S. 37, 40, 53–54 (1971). For a discussion of *Younger*’s application to civil proceedings, see 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4254 (3d ed. 2007). *Colorado River Water Conservation District v. United States* authorizes federal courts to issue a stay in limited situations involving duplicative proceedings in a state court. 424 U.S. 800, 817–18 (1976).

²⁷ See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1153–56 (1974) (suggesting that the issue distinguishing *Burford* from *Pullman* is the state court’s role as “an integral part of the regulatory process” in *Burford* (quoting *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 348 (1951))).

²⁸ *Burford v. Sun Oil Co.*, 319 U.S. 315, 323–24 (1943).

²⁹ *Id.* at 318–19.

legislature granted the Texas Railway Commission authority to distribute oil-drilling and production permits and also granted a single state judicial district in Travis County jurisdiction over challenges to the Texas Commission's orders. The Travis County courts had extensive authority: They could undertake de novo review of the Commission's orders and suggest that the Commission enact alternative regulatory standards.³⁰

In *Burford*, Sun Oil requested that a Texas federal district court either cancel Burford's oil permit, which threatened to drain oil from Sun Oil, or enjoin the operation of Burford's well until the Commission reduced Burford's production quota.³¹ Writing for the majority, Justice Black required the federal district court to dismiss the challenge to the Texas Commission rather than issue a stay or decide the case. Justice Black identified state sovereignty as the justification for requiring federal district courts to abstain, noting federal review would likely result in inconsistent decisions and disrupt the state's system for the allocation of oil.³² Unlike a traditional "one-off" suit that impacts nonlitigants only through stare decisis, federal review of the Commission's order would undermine "the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'" ³³ Although the legal standard for allocating drilling permits was simple, the state had carefully concentrated review in a single county court in order to reduce judicial variation in the application of the standard.³⁴ Justice Black also declared that the Texas courts were "working partners with the Railroad Commission in the business of creating a regulatory system."³⁵ The Texas courts had "fully as much power" as the Commission to decide specific cases and formulate standards for the Commission's administrative decisions.³⁶ As such, federal intervention would only disrupt the carefully crafted state regime.

³⁰ *Id.* at 324–26.

³¹ *Sun Oil Co. v. Burford*, 124 F.2d 467, 468 (5th Cir. 1941) (explaining Sun Oil's complaint).

³² *See Burford*, 319 U.S. at 334 ("[A] sound respect for the independence of state action requires the federal equity court to stay its hand."); *see also* Thomas E. Baker, "Our Federalism" in *Pennzoil Co. v. Texaco, Inc. or How the Younger Doctrine Keeps Getting Older Not Better*, 9 REV. LITIG. 303, 310 (1990) ("*Burford* abstention is pure federalism. It is used sparingly, however, because rarely are the circumstances such that a state interest would be unduly impaired by a federal court deciding a case otherwise in its jurisdiction.").

³³ *See Burford*, 319 U.S. at 318 (quoting *R.R. Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579 (1940)).

³⁴ *See id.* at 320–22 (describing Texas's review structure).

³⁵ *Id.* at 326.

³⁶ *Id.*

Justice Douglas, concurring with the majority's decision and reasoning, added an additional wrinkle to Justice Black's "working partnership" thesis. He argued: "[The Travis County district courts] sit in judgment on that agency. That . . . is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy."³⁷ Although Justice Douglas's concurrence is rarely mentioned as a justification for *Burford* abstention,³⁸ it may provide a unique rationale for resolving some of the separation-of-powers arguments made against *Burford* abstention. Namely, as I will discuss below, "fashioning" a "state's domestic policy" may require federal courts to act in a manner that is not judicial in nature and thus to violate the requirements of Article III and the subject matter jurisdiction statutes.³⁹

The Supreme Court first applied *Burford* in *Alabama Public Service Commission v. Southern Railway Co.*, but set aside the requirement that the state courts and administrative agencies be engaged in a "working partnership."⁴⁰ In that case, the Court required a district court to abstain from reviewing an Alabama Public Service Commission order mandating that Southern Railway continue to operate passenger trains routed within Alabama.⁴¹ The Alabama regulatory system was cosmetically similar to the Texas oil production system: Alabama concentrated all suits challenging the Commission in one forum, reviewing courts exercised broad authority, and the state considered railroads an important issue.⁴² However, unlike the Texas oil production scheme, federal courts would not have become

³⁷ *Id.* at 335 (Douglas, J., concurring). It is important to note that Justice Black rejected the claim that the district court was hearing an "'appeal' from the State Commission to the federal court." *Id.* at 317 (majority opinion). This is consistent with my argument; the State Commission and Travis County court operated as state rulemakers.

³⁸ See Charles S. Treat, Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the Burford Doctrine*, 46 U. CHI. L. REV. 971, 984 (1979) (noting that federal courts rarely mention Justice Douglas's concurrence as a justification for abstention). Scholars appear to read Justice Douglas's concurrence as a decision based on federalism, not judicial power. See William A. Calhoun II, Comment, *Arthur Miller's Death of a Doctrine or Will the Federal Courts Abstain From Abstaining? The Complex Litigation Recommendations' Impact on the Abstention Doctrines*, 1995 BYU L. REV. 961, 972 ("As [Justice] Douglas's statements indicate, the federalism concerns in *Burford* were an overriding factor . . ."); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 558 (1997) ("Justice Douglas also emphasized the special federalism concerns raised by federal court review of state administrative agencies . . .").

³⁹ See *infra* Part III.B (explaining this theory).

⁴⁰ 341 U.S. 341 (1951).

⁴¹ *Id.* at 349.

⁴² *Id.* at 348–50.

engrossed in Alabama's policymaking scheme when reviewing the Commission's order—Southern Railway only questioned whether Alabama could constitutionally mandate the operation of a passenger line.⁴³ And *Burford* involved state courts engaging in de novo review of facts and proposing alternative legal rules for oil production, whereas the Alabama courts substantially deferred to the Commission's factfinding.⁴⁴ Departing from *Burford*'s unique factual backdrop, the Court's logic in *Southern Railway* implied that abstention would be appropriate for any situation in which a federal court would disrupt state policy.⁴⁵ It is difficult, if not impossible, to define with limits what constitutes a sensitive state policy or unclear state issue—the only requirements for abstention after *Southern Railway*. Abandoning the requirement that state courts be engaged in a “working partnership”⁴⁶ with state regulatory agencies opened the door for substantial lower court discretion.

Since *Southern Railway*, the Supreme Court has not required abstention under *Burford*. But the Court has distilled the doctrinal requirements. Justice Scalia, writing for the majority in *New Orleans Public Service, Inc. (NOPSI) v. Council of New Orleans*, explained:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”⁴⁷

Justice Scalia's distillation, if read narrowly, seems to require a state court to be engaged in a practice close to policymaking for

⁴³ *Id.* at 342 (describing Southern Railway's requested relief). Chief Justice Vinson noted that the issue before the Court was a policy matter of local concern; he did not contend that federal adjudication threatened to disrupt broadly a complicated state regulatory scheme. *Id.* at 348–49.

⁴⁴ *See id.* at 347–48 (citing ALA. CODE tit. 48, § 82 (1940) (codified at ALA. CODE § 37-1-124 (LexisNexis 1992))) (noting that Alabama courts invalidate Commission orders when “contrary to the substantial weight of the evidence or erroneous as a matter of law”).

⁴⁵ *See id.* at 361 (Frankfurter, J., concurring) (arguing that the due process challenge did not involve a “specialized field of State law” and was “within the easy grasp of federal judges”).

⁴⁶ *Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943).

⁴⁷ 491 U.S. 350, 361 (1989) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The equity requirement was abandoned in *Quackenbush v. Allstate Insurance Co.*, when the Court extended *Burford* “to all cases in which a federal court is asked to provide some form of discretionary relief.” 517 U.S. 706, 730 (1996).

Burford abstention to be proper. The words “transcends” and “disruptive” suggest that *Burford* abstention applies only when a case involves something more than traditional, private adjudication.⁴⁸ However, if one reads “transcends” and “disruptive” broadly, nearly every federal court decision in diversity—via nonmutual preclusion or *stare decisis*—may have some disruptive effect on an important state regulatory scheme.⁴⁹

The Supreme Court has provided little guidance since *NOPSI*. In *Quackenbush v. Allstate Insurance Co.*, which held that federal courts could not abstain under *Burford* when a party requests nondiscretionary relief, the Court explained that federal courts should abstain under *Burford* “rarely.”⁵⁰ Nonetheless, after explaining that there is no formulaic test for *Burford* abstention, the Court endorsed relatively unguided balancing: “This equitable decision balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State’s interests in maintaining ‘uniformity in the treatment of an essentially local problem.’”⁵¹

This latest explanation of *Burford* abstention has left courts and commentators in the dark about when federal courts ought to abstain in cases challenging state administrative orders.⁵² Although lower courts consider various factors, including the state’s interest in its regulatory scheme,⁵³ the probability that federal adjudication would undermine the state’s regulatory scheme,⁵⁴ the congressional interest in providing a federal forum,⁵⁵ and the type of relief requested,⁵⁶ the

⁴⁸ *NOPSI*, 491 U.S. at 361.

⁴⁹ For example, Justice Kennedy’s concurrence in *Quackenbush* views abstention as part of a larger doctrine of federalism; it appears that dual-sovereignty concerns justify federal courts abdicating jurisdiction if there is a particularly sensitive state issue in the case. 517 U.S. at 733–34 (1996) (Kennedy, J., concurring) (arguing that the “recognition [of] the role and authority of the States” must be taken into account to “inform the exercise of federal jurisdiction”). Professor Burt Neuborne suggests this may “provide[] a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.” Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06 (1977).

⁵⁰ *Quackenbush*, 517 U.S. at 728.

⁵¹ *Id.* at 727–28 (quoting *NOPSI*, 491 U.S. at 362).

⁵² See Young, *supra* note 4, at 901–02 (“In between these ends of the continuum, courts have stressed various permutations of a wide variety of factors when analyzing whether to abstain from exercising jurisdiction.”); see also *infra* Part I.C. (describing applications of *Burford* by courts of appeals).

⁵³ *Sierra Club v. City of San Antonio*, 112 F.3d 789, 794 (5th Cir. 1997).

⁵⁴ *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194 (6th Cir. 1995).

⁵⁵ *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 562–68 (6th Cir. 2010) (evaluating the federal interest in providing diversity jurisdiction).

⁵⁶ *Superior Beverage Co. v. Schieffelin & Co.*, 448 F.3d 910, 914 (6th Cir. 2006) (finding abstention inappropriate when a plaintiff seeks both monetary and equitable relief).

lower federal courts are left with considerable discretion to weigh these and other factors in *Burford* cases. As I will discuss next, this has resulted in noticeably different applications of *Burford* by the courts of appeals.

C. *The Courts of Appeals' Application of Burford*

The Supreme Court's description of *Burford* abstention has resulted in inconsistent application of *Burford* by courts of appeals. Often, federal courts treat *Burford* as a super-federalism doctrine, justifying abstention whenever a state has a strong interest in adjudicating a dispute.⁵⁷ Other courts, while requiring the disputed issue to be important for a state, also require litigants to prove that federal review of a particular state administrative scheme would engross federal courts in state policymaking.⁵⁸

1. *Burford as Federalism All the Way Down*

The Fourth Circuit exemplifies a federalism-based reading of *Burford*. It abstains whenever a "State's interests are paramount and . . . a dispute would best be adjudicated in a state forum."⁵⁹ Judge Luttig argued that the Fourth Circuit's methodology, which appears to require district courts to balance federal and state interests and then pick a winner, is based on "policy, not law itself."⁶⁰

*First Penn-Pacific Life Insurance Co. v. Evans*⁶¹ illustrates this approach. In *Evans*, the Fourth Circuit upheld a Maryland district court's decision to abstain from hearing an insurer's request to rescind a life insurance policy. At the time of the insurer's rescission request, the insurance policyholder was in receivership—a result of the Maryland Securities Commissioner's determination that the policyholder had engaged in multiple fraudulent practices.⁶² The Fourth Circuit upheld the district court's decision to abstain, noting that a judgment for the insurer might deplete the holder's assets, that federal jurisdiction risked inconsistent application of Maryland's insurance law, and that a federal court order might impair a state court's ability

⁵⁷ See Treat, *supra* note 38, at 980 n.53, 981 n.54 (collecting cases that do not consider whether federal review would "disrupt" a state administrative scheme). But see FALLON ET AL., *supra* note 12, at 1079 ("The lower courts have generally applied *Burford* narrowly and cautiously.").

⁵⁸ See *infra* Part I.C.2.

⁵⁹ *First Penn-Pac. Life Ins. Co. v. Evans*, 304 F.3d 345, 348 (4th Cir. 2002) (quoting *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 728 (1996)).

⁶⁰ *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 729 (4th Cir. 1999) (Luttig, J., concurring).

⁶¹ 304 F.3d 345 (4th Cir. 2002).

⁶² *Id.* at 347.

to liquidate the insurance holder.⁶³ Not once did the district court identify an administrative agency—which had always been present in the Supreme Court’s *Burford* cases—because there was none.⁶⁴ Moreover, the dispute in *Evans* was a run-of-the-mill insurance contract dispute, which would affect only the assets of a *single* company in receivership. And in *Evans*, asserting jurisdiction would not have required a court to be enmeshed in Maryland’s broader policy concerning the dissolution of receivership estates—the rescission request was not based on the state’s receivership law, but on general contract law.⁶⁵

The Fourth Circuit is not alone in its expansive reading of *Burford* abstention. For example, the Sixth Circuit weighs the federal interest in providing a federal forum against a state’s interest in exclusively controlling a particular area of law.⁶⁶ The Second Circuit abstained from hearing a *facial* constitutional challenge to a statute.⁶⁷

⁶³ *Id.* at 349–51.

⁶⁴ See *First Penn-Pac. Life Ins. Co. v. Evans*, 162 F. Supp. 2d 423, 429 (D. Md. 2001), *aff’d*, 304 F.3d 345 (4th Cir. 2002) (equating a complaint issued by a state executive actor with a dispute within a state administrative agency). Admittedly, the Supreme Court has suggested, but not held, that *Burford* abstention may be appropriate in domestic relations cases—an area of law where a state agency may not be involved. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992).

⁶⁵ *Evans*, 304 F.3d at 346 (identifying the rescission request as based on fraudulent misrepresentation). Also, the federal district court could have stayed the action pending a resolution of the state proceedings. See, e.g., *Barnhardt Marine Ins., Inc. v. New England Int’l Sur. of Am., Inc.*, 961 F.2d 529, 532 (5th Cir. 1992) (staying a cause of action against an insurer facing state court liquidation). Similarly, in land use cases the Fourth Circuit has abstained under *Burford*, even when a *Pullman* stay may have been more appropriate. See *supra* notes 21–26 and accompanying text (explaining stays under *Pullman*). In *MLC Automotive, LLC v. Town of Southern Pines*, plaintiffs alleged the town of Southern Pines violated their substantive due process rights when it rezoned their municipal property. 532 F.3d 269, 275–76 (4th Cir. 2008). Rather than waiting for the town to formulate its local land policy, the court categorically endorsed *Burford* abstention in zoning disputes. *Id.* at 282 (holding that in cases in which federal constitutional claims “stem solely from construction of state or local land use or zoning law . . . district courts should abstain under the *Burford* doctrine to avoid interference with the State’s or locality’s land use policy” (quoting *Pomponio v. Fauquier Cnty. Bd. of Supervisors*, 21 F.3d 1319, 1328 (4th Cir. 1994))). *Pullman* abstention may be the exception, rather than the rule, in land use cases, given that few of these cases involve constitutional claims. See Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 *YALE L.J.* 1134, 1148 (1980) (suggesting that only a minority of land use cases in federal courts involve unclear state issues that affect constitutional claims).

⁶⁶ *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 562–68 (6th Cir. 2010) (applying a *Burford* test that weighs the relative state and federal interests).

⁶⁷ *Liberty Mut. Ins. v. Hurlbut*, 585 F.3d 639, 651 (2d Cir. 2009) (abstaining from hearing a facial constitutional challenge of two New York Workers’ Compensation Law amendments). *But see* *Dittmer v. Cnty. of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998) (finding *Burford* abstention inappropriate when a party claims that a statute is facially unconstitutional).

This was a particularly expansive reading of *Burford* because a facial challenge does not require a federal court to become a state policymaker—a court must only engage in traditional, constitutional decisionmaking concerning any application of the challenged law.⁶⁸ With little guidance, many courts of appeals focus on their own perceptions of the local issue at stake, but never discuss whether federal intervention would require a district court to act in a working partnership with—or entirely as—a state policymaker.

2. *Burford as a Limitation of Federal Judicial Power*

While some circuits have turned the *Burford* inquiry into a test on the importance or complexity of the relevant state interests, other circuits look to the state's administrative structure and the requested relief. These circuits focus on whether asserting jurisdiction would require federal courts to take on rulemaking functions.

The First Circuit's approach to *Burford* requires not only a showing that the state issue in dispute is sufficiently sensitive, but also clear evidence that federal adjudication would place a district court in a role of state policymaker. According to the First Circuit, "*Burford* abstention must only apply in unusual circumstances when federal review risks having the district court become the regulatory decision-making center."⁶⁹

For example, in *Vaquería Tres Monjitas, Inc. v. Irizarry*,⁷⁰ Puerto Rico milk producers challenged in federal court a number of regulations administered by Puerto Rico's Milk Industry Regulation Administration (ORIL).⁷¹ Plaintiffs alleged that the scheme confiscated their property in violation of the Takings Clause and violated their Fourteenth Amendment due process and equal protection rights because ORIL acted in an arbitrary and discriminatory fashion.⁷² The First Circuit, in refusing to abstain under *Burford*, appeared to link abstention to Justices Douglas and Black's concerns about judicial

⁶⁸ Justice Breyer, when sitting on the Court of Appeals for the First Circuit, explained: "Federal courts abstained in *Burford* . . . when they feared that excessive federal court intervention unnecessarily threatened to impede significantly the ongoing administration of a state regulatory system. The threatened interference did not consist merely of the threat that the federal court might declare the *entire state system* unconstitutional . . ." Bath Mem'l Hosp. v. Me. Health Care Fin. Comm'n, 853 F.2d 1007, 1013 (1st Cir. 1988).

⁶⁹ Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20, 30 (1st Cir. 2011) (quoting *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 473 (1st Cir. 2009)), *cert. denied*, 131 S. Ct. 2441 (2011).

⁷⁰ 587 F.3d 464 (1st Cir. 2009).

⁷¹ ORIL is a Spanish acronym for *Oficina de Reglamentación de la Industria Lechera*.

⁷² *Irizarry*, 587 F.3d at 471–72.

policymaking.⁷³ The court noted that plaintiffs did not challenge a particular rate amount or a specific decision as invalid under ORIL's authorizing statute, but challenged the entire ORIL decisionmaking process itself as invalid and arbitrary.⁷⁴ Therefore, a decision by the district court did not meddle in the careful balance of the local regulatory scheme, but rather passed judgment on the scheme as a whole. While this did involve a complicated state administrative scheme of local importance, the First Circuit found that abstention was not required because the district court was faced with a simple civil action. The district court determined only whether a state administrative process violated constitutional safeguards.⁷⁵

The Ninth Circuit's approach to *Burford* is somewhat similar to that of the First Circuit. The Ninth Circuit has highlighted common issues necessary for *Burford* abstention, which relate to the role of courts as policymakers versus law-deciders. These factors include a concentration of suits in a particular state court, an inability to separate complex state law issues, and a high likelihood that federal review might disrupt coherent state policy.⁷⁶ The Ninth Circuit's approach to *Burford* is also narrower than the Supreme Court's distillation in *NOPSI*. It requires all suits to be concentrated in a single specialized state court for *Burford* to apply, instead of simply requiring timely state review.⁷⁷ And while *NOPSI* required either the presence of difficult state law questions or the disruption of state efforts to establish policy, the Ninth Circuit demands both.⁷⁸

Given the ambiguity inherent in the Supreme Court's post-*Burford* explanation of administrative abstention, it is difficult to

⁷³ *Id.* at 474 (“We observed in *Patch* that “[t]he fundamental concern in *Burford* [was] to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution.” (quoting *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998))).

⁷⁴ *Id.* at 475.

⁷⁵ *Id.* at 476.

⁷⁶ *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982).

⁷⁷ *Compare* *New Orleans Pub. Serv., Inc. (NOPSI) v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (requiring “timely and adequate state-court review”), *with* *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991) (requiring “that the state has concentrated suits involving the local issue in a particular court”).

⁷⁸ *Compare* *NOPSI*, 491 U.S. at 361 (requiring either “difficult questions of state law” or “federal review . . . [that] would be disruptive of state efforts to establish a coherent policy”), *with* *Tucker*, 942 F.2d at 1405 (requiring both that federal issues must not be easily separable from important state law issues *and* that federal review “might disrupt state efforts to establish a coherent policy”). The Ninth Circuit also narrowly construes the definition of a disruption of coherent state policy. *Turf Paradise, Inc. v. Ariz. Downs*, 670 F.2d 813, 820 (9th Cir. 1982) (holding that a “potential” conflict with a state court or agency decision is insufficient and authorizing *Burford* abstention only when jurisdiction would actually “obstruct the regulation of gambling by the Arizona Racing Commission”).

declare a particular circuit's approach the doctrinally "correct" one. However, the approaches of the First and Ninth Circuits both suggest that focusing on a federal court's need to become a state policymaker to resolve a dispute may provide a limited, workable framework for *Burford*.

II

THE CURRENT ACADEMIC ABSTENTION DEBATE

The academic debate surrounding the legitimacy of abstention focuses largely on whether the subject matter jurisdiction statutes mandate federal court adjudication and how that interacts with a doctrine that leaves jurisdiction to the courts' discretion. The debate entails historical disagreements over whether comity and federalism are traditional equitable principles, as well as practical considerations such as docket overload, expertise, and democratic legitimacy. This section examines both sides of this debate—whether *Burford* is a form of judicial overreaching or a type of historically and prudentially justified judicial discretion—and attempts to reach a compromise.

A. *Burford* Abstention as Judicial Overreaching

The Supreme Court's various abstention doctrines spurred debate about the constitutionality of Court-created abstention. Justice Frankfurter, dissenting in *Burford*, identified a core separation-of-powers argument against abstention. Specifically, he argued that the statutory grants of diversity and federal question jurisdiction, identifying circumstances in which federal district courts "shall" assert subject matter jurisdiction,⁷⁹ foreclosed federal courts' discretion to abstain.⁸⁰ The Constitution implicitly gives Congress control over the subject matter jurisdiction of district courts.⁸¹ And when Congress enacted the subject matter jurisdiction statutes pursuant to its constitutional power, it had already made the decision that the advantages of a federal forum outweighed the benefits of comity and state independence. Thus, Justice Frankfurter argued, a judicial decision to abstain disregards a congressional mandate for federal courts to exercise subject matter jurisdiction.⁸²

⁷⁹ See 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction . . ."); 28 U.S.C. § 1332(a) (2006) (same).

⁸⁰ *Burford v. Sun Oil Co.*, 319 U.S. 315, 336–38 (1943) (Frankfurter, J., dissenting).

⁸¹ See *supra* notes 15–19 and accompanying text (identifying Congress's control over the subject matter jurisdiction of federal courts).

⁸² *Burford*, 319 U.S. at 336 (Frankfurter, J., dissenting) ("To deny a suitor access to a federal district court under the circumstances of this case is to disregard a duty enjoined by

A number of legal scholars, with Professor Martin Redish at the forefront, have extended Justice Frankfurter's critique of judicial abstention.⁸³ Professor Redish adds a constitutional competency argument. That is, in a constitutional democracy, an unelected judiciary should only have the power to repeal laws that violate constitutional restrictions. Even if federal courts have some inherent equity-based authority, there is no justification for federal courts to use this authority to ignore a constitutional, congressional mandate to exercise jurisdiction.⁸⁴ Professor Redish raised the stakes of the abstention debate, equating the use of traditional equity principles to a form of unconstitutional adverse possession. This argument is consistent with a number of Supreme Court decisions emphatically declaring that federal courts must exercise jurisdiction if a case or controversy falls within one of the jurisdictional statutes.⁸⁵

Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties.”).

⁸³ See Redish, *supra* note 3, at 76 (highlighting the constitutional and democratic costs of judicial abstention); see also Donald L. Doernberg, “*You Can Lead a Horse to Water . . .*”: *The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1020 (1990) (explaining that there is “little or no textual or historical support” for judicial abstention doctrines); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 415–17 (1983) (suggesting that the authority to inquire about the proportionate allocation of power between state and federal courts belongs to Congress).

⁸⁴ See Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of “Democracy Bashing,”* 40 CASE W. RES. L. REV. 1023, 1031 (1990) (“[J]udicial refusal to act, in the face of a constitutionally valid legislative directive to the contrary, constitutes the effective exercise of a judicial veto power over legislative action.”); see also Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 343 (1988) (arguing that judicial repeal of presumptively constitutional congressional statutes is “indefensible as a matter of fundamental democratic theory”). Other scholars imply ulterior motives. Professor Smith suggests that the Supreme Court uses textualism politically: The Court strictly reads jurisdiction-stripping legislation while tending to ignore the textual mandate of jurisdiction-conferring legislation. Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1937 (2008) (highlighting the Court's use of discretion when interpreting grants of jurisdiction but noting that “there have been almost no cases in which the Court's textualists have read a statute ostensibly ousting the federal courts of jurisdiction to do less than its plain terms suggest”).

⁸⁵ See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 732 (1996) (Scalia, J., concurring) (“There is no ‘serious affront to the interests of federalism’ when Congress lawfully decides to pre-empt state action—which is what our cases hold (and today's opinion affirms) Congress does whenever it instructs federal courts to assert jurisdiction over matters as to which relief is not discretionary.”); *Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943) (“Congress having adopted the policy of opening the federal courts to suitors in all diversity . . . , we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“[T]his Court . . . must take jurisdiction if it should. . . . We have no more right to

Constitutional critics of abstention also argue that even if courts traditionally have exercised discretion when hearing cases arising in equity, the doctrine of equity developed in England, which lacked a federal structure, and thus cannot provide a historical justification that accommodates federalism concerns.⁸⁶ Accordingly, extending abstention to common law actions is particularly problematic, as English courts historically could refuse jurisdiction only when applying forum non conveniens and the prerogative writs.⁸⁷ And even if there is a historical backdrop for judicial abstention, Congress has both mandated that federal courts refrain from exercising jurisdiction and specifically authorized limited discretionary jurisdiction.⁸⁸ If Congress explicitly has authorized this limited discretionary jurisdiction, federal courts cannot logically assume that Congress endorsed unbounded common law discretion.⁸⁹

A final criticism of *Burford* abstention concerns its effect on litigants' ability to return to federal court for final resolution of their federal claims. Professor Redish argues: "By far the least justifiable forms of abstention are the *Burford* branch for complex state administrative schemes and *Thibodaux* abstention . . ."⁹⁰ The decision to abstain, rather than simply stay an action pending the resolution of state law, is particularly problematic because claim preclusion likely will bar a litigant from returning to federal court after a state court resolves a state law question.⁹¹ Even if there are federalism benefits to

decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

⁸⁶ Redish, *supra* note 3, at 89.

⁸⁷ See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1530–31 (1997) (explaining problems with historical justifications for "Erie-based" abstention).

⁸⁸ The congressionally authorized abstention doctrines are explained *supra* note 20. The supplemental jurisdiction statute provides an example of Congress authorizing discretionary jurisdiction. 28 U.S.C. § 1367(c)(4) (2006) (authorizing federal courts to decline supplemental jurisdiction if "there are other compelling reasons for declining jurisdiction"). Of course, the response is equally plausible: Congress's acceptance of abstention for decades suggests ratification. Given the indeterminacy of congressional intent, anti-abstention scholars may be justified in relying on the statute's plain text. See Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 380 (1988) (suggesting congressional intent is unclear on the question of discretionary jurisdiction).

⁸⁹ See Clark, *supra* note 87, at 1534–35 ("If Congress had understood the federal courts to possess such authority implicitly, then the explicit authorization set forth in 28 U.S.C. § 1367(c) would have been quite unnecessary.").

⁹⁰ Redish, *supra* note 3, at 98.

⁹¹ See Field, *supra* note 27, at 1153–54 (explaining that after a federal court abstains under *Burford*, res judicata "will bar a party from having the federal district court decide the issue anew"); see also *Baltimore Bank for Coops. v. Farmers Cheese Coop.*, 583 F.2d 104, 108 (3d Cir. 1978) (citing Professor Field for this proposition).

having state courts resolve state administrative law questions, Congress's control over federal courts' subject matter jurisdiction dictates that "such a decision should be made by Congress."⁹²

B. Abstention as Historically and Prudentially Justified Discretion

The separation-of-powers debate on judicial abstention is not one-sided. Professor David Shapiro, among others, argued that judicial abstention is one of many discretion-based doctrines deeply embedded in Anglo-American judicial history.⁹³ According to Shapiro, even if the abstention doctrines may conflict with the text of various subject matter jurisdiction statutes, federal courts consistently have used prudential reasons to justify not entertaining a dispute.⁹⁴ Similarly, other commentators contended that the legislative history surrounding the subject matter jurisdiction statutes is vague at best, and federal courts should at least consider prudential issues when determining if jurisdiction is proper.⁹⁵

Proponents of abstention also rely on institutional competence justifications.⁹⁶ For example, the judiciary may be more capable than Congress in fine-tuning the vague statutes that define the reach of federal jurisdiction because judges are on the front lines, so to speak, of litigation.⁹⁷ Furthermore, abstaining federal courts consistently cite

⁹² Redish, *supra* note 3, at 98. Others frame their opposition to abstention as a fairness claim: Abstention prevents out-of-state litigants from escaping local prejudice in diversity cases. *E.g.*, Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 106 (1987) ("When a federal court declines to exercise properly invoked diversity jurisdiction for reasons of wise judicial administration, the purposes of diversity jurisdiction are subverted. The essential rationale for diversity jurisdiction is to permit litigants to be free of local prejudice . . .").

⁹³ Shapiro, *supra* note 3, at 545–61 (identifying analogous doctrines to abstention, such as justiciability, forum non conveniens, exhaustion of remedies, supplemental jurisdiction, Supreme Court original jurisdiction, and discretionary appellate jurisdiction); see also Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1098 (1985) ("Abstention is more accurately viewed as a judge-made forum rule for a judge-made cause of action . . .").

⁹⁴ See Shapiro, *supra* note 3, at 545 ("[O]pen acknowledgement of reasoned discretion is wholly consistent with the Anglo-American legal tradition.").

⁹⁵ See Chemerinsky, *supra* note 88, at 380 (noting that separation-of-powers analysis cannot resolve many jurisdictional issues for which congressional intent is unclear).

⁹⁶ For an explanation and critique of federal courts' reliance on institutional competence arguments when making jurisdictional decisions, see Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89 (1998).

⁹⁷ See Shapiro, *supra* note 3, at 574 (arguing that courts are "functionally better adapted" to fine-tune jurisdictional statutes). Professor Shapiro, however, offers little guidance for when courts should refrain from asserting subject matter jurisdiction; he explains the history of discretionary relief and lists factors courts ought to consider when abstaining, but leaves much to the "principled discretion" of federal judges. See *id.* at 578–79.

the need to promote comity by avoiding friction between federal and state courts.⁹⁸

C. *Attempts at Compromise*

Some commentators have attempted to resolve the debate between pro- and anti-abstention scholars. Professor Barry Friedman suggests that appellate review of federal claims, through Supreme Court review of state high court decisions, often provides a sufficient forum to vindicate federal rights.⁹⁹ Accordingly, the appropriateness of abstention should be based on whether a federal trial forum is necessary to combat factfinding bias.¹⁰⁰ Supreme Court review alone adequately protects federal rights in facial constitutional challenges when appellate review cannot be colored by bias at the trial stage.¹⁰¹ Although this approach may provide theoretical coherence for some forms of abstention, Professor Friedman recognized that Supreme Court review may be insufficient in *Burford* cases when subject matter jurisdiction is based on diversity.¹⁰² In these situations, a state trial court's bias against out-of-state litigants during factfinding may not be curable by federal appellate review.¹⁰³ Besides, when jurisdiction *only* arises from diversity and no federal questions are present, the Supreme Court may be unable to review a state court's decision, leaving an out-of-state litigant without any federal review.¹⁰⁴

Professor Gene Shreve also provided an alternative theory to resolve the abstention debate, arguing that federal courts may create "jurisdictional common law" only when they are furthering "judicial administration" rather than "political" goals.¹⁰⁵ Professor Shreve's approach offers some limit to judicial discretion, requiring courts to

⁹⁸ See, e.g., *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) (identifying the need to prevent "needless friction" with state officials); *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 350 (1951) (same).

⁹⁹ Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 547-48 (1989). This model, and the debate surrounding abstention, is quite similar to discussions of non-Article III agency adjudication. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 949-51 (1988) (suggesting that appellate review of agency adjudication is often adequate to protect the right to a federal forum). Although the similarity between federal review of state court and agency adjudication is fascinating, it is beyond the scope of this Note.

¹⁰⁰ Friedman, *supra* note 99, at 551.

¹⁰¹ *Id.* at 550-54. (laying out the revisionist theory of abstention).

¹⁰² *Id.* at 585.

¹⁰³ *Id.*

¹⁰⁴ See *supra* note 8 and accompanying text (identifying restrictions on appellate review).

¹⁰⁵ Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 BYU L. REV. 767, 789-91 (arguing that federal courts may abstain based on judicial administration concerns but not federalism).

justify abstention on efficiency or equity grounds, rather than comity or federalism. However, his theory leaves much to be desired. It seems too easy to meet Professor Shreve's shibboleth: Most abstention doctrines can be justified by claiming to allocate resources efficiently between state and federal judiciaries. And administrative or procedural tools can also easily mask substantive goals.¹⁰⁶

In the *Burford* context, commentators have recognized, but not explicitly defined, potential constitutional and statutory justifications for restricting subject matter jurisdiction in cases concerning state administrative agencies.¹⁰⁷ James Rehnquist noted that *Burford* cases often involve a state assigning power to its judiciary that would be "practically untenable, inconsistent with the principles of review set forth in the Federal Rules of Civil Procedure, and perhaps even unconstitutional. . . . [I]t is difficult for the federal courts to sit, in effect, as state courts."¹⁰⁸ Although I believe Rehnquist is correct, my goal is to provide support for the idea that *Burford* abstention is "practically untenable."¹⁰⁹

Other scholars recognize the danger of judicial overreaching posed by a broad application of *Burford* abstention, but insist that the factual backdrop in *Burford* resolves the separation-of-powers concern.¹¹⁰ Professors Ann Woolhandler and Michael Collins suggest that allowing the Court to ignore Congress's jurisdiction statutes may be constitutionally problematic. While Professors Woolhandler and Collins masterfully document the history of administrative abstention

¹⁰⁶ See, e.g., Richard E. Pierce, *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1759–60 (1990) (noting that seemingly neutral standing principles may be used to further political purposes); Frank B. Cross, *Legal Process, Legal Realism and the Strategic Political Effects of Procedural Rules* 19 (Univ. of Tex. Sch. of Law Working Paper Series, Law and Economics Working Paper No. 065, 2005), available at <http://ssrn.com/abstract=837665> (documenting the political effect of procedural decisions).

¹⁰⁷ Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 852 ("[T]he Court seems to have created and preserved the [*Burford*] doctrine in recognition of the structural limits the Constitution imposes on the federal judicial power, but has found it difficult to articulate with any confidence the exact location of the constitutional boundary.").

¹⁰⁸ James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1078 (1994) (footnote omitted). Justice Douglas also expressed concern about federal courts continuously interfering with state administrative agencies through de novo review; he did not, however, identify a constitutional or statutory basis to justify abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315, 335–36 (1943) (Douglas, J., concurring).

¹⁰⁹ Rehnquist, *supra* note 108, at 1078.

¹¹⁰ See, e.g., Lewis Yelin, Note, *Burford Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1889 (1999) (suggesting that expanding abstention beyond the facts of *Burford* creates a separation-of-powers problem).

and suggest alternative justifications for *Burford*, they do not necessarily address the objections of Professor Redish and others.¹¹¹

As I will discuss in the next Part, there is a principled way to resolve the separation-of-powers concerns voiced by Justice Frankfurter and anti-abstention scholars. Article III of the Constitution and the subject matter jurisdiction statutes, both insisting that courts should only resolve judicial disputes, may justify a circumscribed form of *Burford* abstention.

III

REREADING *BURFORD* ABSTENTION

In this Part, I assume that the Supreme Court's abstention doctrines violate Congress's command that federal courts must retain jurisdiction if a civil action falls within a subject matter jurisdiction statute. However, I demonstrate that there may be *Burford*-type situations in which statutory and constitutional restrictions require federal district courts to abstain from asserting jurisdiction. This argument turns on a conceptual distinction between adjudicating and legislating. In constitutional circles, distinguishing types of resolution "power" has fallen out of vogue,¹¹² but the distinction is widely used in administrative law and retains historical support. I argue that courts can legitimately apply *Burford* abstention, notwithstanding congressional jurisdiction statutes, by distinguishing between different types of governing power.

While it is impossible to draw a clear line separating purely "legislative" and "adjudicative" decisionmaking—a single court decision, through *stare decisis* or nonmutual preclusion, can create rules that govern more than the parties at hand¹¹³—it is possible to make some meaningful distinctions. Professor Jeffrey Rachlinski highlights a relatively noncontroversial distinction between the legislative and adjudicative process. He argues that adjudication builds law "one dispute at

¹¹¹ See Woolhandler & Collins, *supra* note 4, at 655 (1999) (recognizing that "insufficient consideration has been given to Congress's grants of original jurisdiction" in the attempt to "fine-tune" the doctrine).

¹¹² See, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990) ("There is thus an inescapable and inevitable 'legislative' component in the executive task of faithfully executing the laws; and there is an inescapable and inevitable 'legislative' component when the courts interpret and apply the laws."); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

¹¹³ See *Comm'rs of Rd. Improvement Dist. No. 2 v. St. Louis Sw. Ry.*, 257 U.S. 547, 554 (1922) ("The distinction between a proceeding which is the exercise of legislative power and of administrative character and a judicial suit is not always clear.").

a time,”¹¹⁴ while legislation builds law through a top-down process that creates general principles to cover future disputes.¹¹⁵ Adjudication requires the correct resolution of individual disputes whereas the legislative process is “more likely to reflect efforts to accommodate competing political interests than are judicial solutions.”¹¹⁶

The Supreme Court has long recognized that federal agencies may have the choice of acting through either legislative or adjudicatory mechanisms.¹¹⁷ And outside of abstention, the Court has repeatedly signaled that federal courts lack the authority to engage in quintessentially legislative functions, especially when their decisions will implicate the rights of unrepresented parties.¹¹⁸ As I explain below, both concepts—governing flexibility and limits on federal court power—justify *Burford* abstention in many situations.

A. *Statutory Limitations on Subject Matter Jurisdiction*

State judiciaries often use decisionmaking mechanisms that differ radically from the federal judicial model. Professor Helen Hershkoff identified an extensive history of state courts issuing advisory opinions, deciding moot public questions, and discharging intuitively non-judicial functions such as sua sponte investigations into political questions.¹¹⁹ In *Burford* itself, the state court was part of a complex

¹¹⁴ Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006).

¹¹⁵ *Id.*

¹¹⁶ *Id.* Professor Kenneth Davis takes a similar approach, arguing that “adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts . . . are general facts which help the tribunal decide questions of law and policy and discretion.” KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* § 7.02 (1959).

¹¹⁷ See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (holding that the Securities and Exchange Commission is authorized to proceed by rulemaking or ad hoc litigation); see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 (2004) (highlighting the litany of policymaking forms available to federal agencies).

¹¹⁸ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring) (decertifying a class based partially on representation concerns); *United States v. Richardson*, 418 U.S. 166, 179–80 (1974) (disqualifying standing to litigate generalized grievances).

¹¹⁹ Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1837–38 (2001); see also *id.* at 1875 (“[J]udicial practice in some states departs considerably from the theory and practice of federal courts; in these states, federal doctrine does not adequately describe or account for the state courts’ role in state and local governance”); G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 539 (1984) (“[S]tate courts continue to make important policy through their development of the common law, a mode of policymaking which is limited in the federal courts.”).

administrative scheme for the distribution of oil licenses. Because *Erie* commands federal courts to mimic the legal rulings of the relevant state court system, a decision to exercise jurisdiction in some cases may require federal courts to act in a non-judicial manner. Thus, in *Burford*-type situations, federal courts may be asked to take on unfamiliar rulemaking roles.

Herein lies a potential statutory justification for restricting subject matter jurisdiction in cases concerning state administrative agencies.¹²⁰ The diversity and federal question statutes both limit federal district courts' subject matter jurisdiction to civil actions within a court's original jurisdiction.¹²¹ *Burford*-type cases, which often involve courts acting as regulatory partners with state administrative agencies, simply may not represent proper "actions."

The Supreme Court defines an action somewhat circuitously as a "civil or criminal judicial proceeding."¹²² The Federal Rules of Civil Procedure similarly define a civil action as one involving a judicial proceeding—meaning, a complaint must be filed with a court for commencement of a suit.¹²³ Despite the difficulty of formulating a comprehensive definition of the civil action, the Federal Rules of Civil Procedure and the Supreme Court definitions both require a judicial proceeding. Arguably, disputes arising from some state administrative processes do not satisfy this requirement.

The case law surrounding the removal jurisdiction statute—allowing removal of civil actions brought in "state courts,"¹²⁴—provides some guidance on what actions should be considered cognizable in judicial proceedings for *Burford* and subject matter purposes. Given the disconnect between state and federal court functions, the Supreme Court and courts of appeals have relied on a functional test

¹²⁰ Scholars have recognized—but not explicitly defined—this statutory justification. See Rehnquist, *supra* note 108, at 1078 (suggesting that the Federal Rules of Civil Procedure and statutory restrictions on judicial action may justify *Burford* abstention).

¹²¹ 28 U.S.C. § 1331 (2006) ("The district courts shall have *original jurisdiction of all civil actions . . .*") (emphasis added); 28 U.S.C. § 1332(a) (2006) (same).

¹²² BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 n.3 (2006) ("These primary definitions have not changed in substance since 1966. Black's (8th ed. 2004) now defines 'action' as '[a] civil or criminal judicial proceeding' . . ."); see also *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953) (differentiating a civil action from an administrative proceeding); *United States v. El-Ghazali*, 142 F. App'x 44, 46–47 (3d Cir. 2005) (identifying a number of legal dictionaries describing "action" as a proceeding involving a court). The Ninth Circuit, somewhat comically, recognized the difficulty of concretely defining a civil action: "It is hard to define 'civil action' broadly enough to embrace all its possible forms, but one definition that is always correct is that civil actions are those that are not criminal." *United States v. Soueiti*, 154 F.3d 1018, 1019, *amended by* 162 F.3d 1035 (9th Cir. 1998).

¹²³ FED. R. CIV. P. 3.

¹²⁴ 28 U.S.C. § 1441(a) (2006) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . .").

to determine if a federal court may hear an action removed from state court.

This approach has led the Supreme Court to focus on the nature of an action, rather than the title given to it by a state tribunal, to determine if a state tribunal is acting as a “court” when resolving a dispute between parties. In *Upshur County v. Rich*, for example, the Supreme Court held that a state court’s review of a commission’s land appraisal was “administrative” and thus outside the scope of the removal statute.¹²⁵ Under then-applicable West Virginia law, a county court was statutorily authorized to engage in the quintessentially judicial function of declaring land assessments unreasonable, but the county court could also independently value property.¹²⁶ As a result, despite West Virginia’s decision to label this state tribunal a “county court,” the Supreme Court held that the removal statute did not authorize federal district courts to assert jurisdiction over the quintessentially “administrative act” of property valuation.¹²⁷ This interpretation makes doctrinal sense: State decisionmakers can neither diminish the forum rights of litigants by calling a state court a legislative body, nor can they bypass the subject matter jurisdiction statutes by labeling a legislative body a “court.”¹²⁸

More recently, the First Circuit has elaborated on this functional test for determining whether a proceeding in a state tribunal constitutes a “civil action” and occurs within a “state court” under the removal statute.¹²⁹ In determining if the Puerto Rico Labor Relations Board functioned as a court, the First Circuit relied on a number of factors, including (1) the Board’s procedures and enforcement powers, (2) the issue over which the Board asserted jurisdiction, and (3) the institutional power granted to the Board by the state legislature.¹³⁰ Because the Board was attempting to adjudicate a “breach of

¹²⁵ 135 U.S. 467, 470–71 (1890) (“[I]t is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. Such appeals are not embraced in the removal act.”).

¹²⁶ *Id.* at 472 (“If, upon hearing the evidence offered, the county court shall be of opinion that there is error in the assessment complained of, or that the valuation fixed by the commissioners is excessive, the said court shall make such order correcting the said assessment as is just and proper.”).

¹²⁷ *Id.*

¹²⁸ See *Ry. Co. v. Whitton’s Adm’r*, 80 U.S. 270, 285–86 (1871) (limiting state courts’ ability to restrict federal jurisdiction); see also *Terral v. Burke Constr. Co.*, 257 U.S. 529, 531–32 (1922) (holding that a state lacks the power to revoke a foreign corporation’s license to engage in intrastate business on the ground that the corporation violated a state statute by removing an action to federal court).

¹²⁹ *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 43–44 (1st Cir. 1972).

¹³⁰ *Id.* at 44.

an agreement between the parties” and lacked statutorily authorized rulemaking power, the First Circuit allowed the defendant to remove the action to federal court.¹³¹ Similarly, the Seventh Circuit stated that “the title given a state tribunal is not determinative” of whether a state tribunal constitutes a court under the federal removal statute. Rather, it is necessary to evaluate the “functions, powers, and procedures” of the state institution.¹³²

Outside of removal statute precedent, some guidance on whether a state tribunal is operating as a court can be found in the Supreme Court’s case law surrounding the Anti-Injunction Act. In *Prentis v. Atlantic Coast Line Co.*, which involved railway ratemaking, Justice Holmes endorsed a functional approach to determine whether a state tribunal’s activities constitute a “proceeding[] in a court” within the meaning of the Anti-Injunction Act.¹³³ Justice Holmes acknowledged that the Virginia State Corporation Commission’s decision to alter the rate for rail transportation constituted “the making of a rule for the future, and therefore [was] an act legislative not judicial in kind” even if the Commission’s proceedings “at another moment, or in its principal or dominant aspect, is a court such as is meant by [the Anti-Injunction Act].”¹³⁴ Deciding whether a proceeding constitutes an action cognizable by a federal court thus “depends not upon the character of the body but upon the character of the proceedings.”¹³⁵

These precedents collectively support a functional approach for determining whether a state tribunal’s decision is adjudicative or legislative, and they provide support for my reading of “civil action” in the diversity and federal question statutes. When confronted with a complicated state administrative scheme, a federal court should ask what

¹³¹ *Id.*

¹³² *Floeter v. C. W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam). *But cf. Bellsouth Telecomm., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283 (N.D. Fla. 2002) (holding a state tribunal’s status should be determined at a higher level of generality than its role in a single proceeding). For an excellent note arguing that efficiency concerns should prevent the removal of cases from state administrative agencies, see Erica B. Haggard, Note, *Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test*, 66 WASH. & LEE L. REV. 1831, 1867–70 (2009). Haggard agrees the Supreme Court has labeled state court decisions as nonadjudicative, but she argues the converse should not be true (administrative agencies cannot be courts under the removal statute). *Id.* at 1861–67.

¹³³ 211 U.S. 210, 226 (1908) (construing the Anti-Injunction Act, now codified at 28 U.S.C. § 2283 (2006)).

¹³⁴ *Id.* at 226.

¹³⁵ *Id.*; see also *NOPSI*, 491 U.S. 350, 371 (1989) (reaffirming *Prentis*’s legislative/adjudicative distinction); James William Moore & William VanDer creek, *Federal Removal Jurisdiction—Civil Action Brought in a State Court*, 14 Sw. L.J. 297, 308 (1960) (distinguishing, without discussion, pre-judicial administrative decisions and judicial review of a state administrative action).

role a litigant is asking it to play. If a federal court will need to legislate or engage in a working partnership with a state policymaker, as in *Burford*, the court should consider not asserting subject matter jurisdiction. By interpreting “civil action” in the jurisdictional statutes to require adjudication, rather than legislative or administrative actions, courts may abstain in a principled manner in *Burford*-type cases involving nonadjudicative decisionmaking.

B. Article III and Judicial Power

Article III of the Constitution grants the federal courts “judicial Power”¹³⁶ without defining the phrase. Justices and commentators who have attempted to identify the appropriate functions of judicial power highlight the difficulties of neat line-drawing.¹³⁷ However, given the explicit constitutional demarcation of executive, legislative, and judicial power, some attempt must be made to classify the operative powers of the distinct constitutional branches.¹³⁸ Justice Frankfurter, in *Coleman v. Miller*, clarified that in allocating judicial power, the “Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges.”¹³⁹ Likewise, Professor Hershkoff explained that even supporters of a relatively broad reading of judicial power insist that “Article III has

¹³⁶ U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . .”).

¹³⁷ See *INS v. Chadha*, 462 U.S. 919, 963, 966 n.10 (1983) (Powell, J., concurring) (noting a constitutional violation occurs when “one branch assumes a function that more properly is entrusted to another,” but also recognizing that “independent regulatory agencies and departments of the Executive Branch often exercise authority that is ‘judicial in nature’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976))); Bator, *supra* note 112, at 264 (“Every time an official of the executive branch . . . goes through the process of finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of judicial power.”); see also Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (“Article III’s ‘limitation’ of the ‘judicial power’ to ‘cases and controversies’ has little necessary meaning . . .”); J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1035 (1985) (“[A]rticle III . . . provides no clear dividing line between constitutional and unconstitutional restrictions or expansions of the judicial realm.”).

¹³⁸ As James Madison articulated:

It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.

THE FEDERALIST NO. 48 (James Madison).

¹³⁹ 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

‘virtually no meaning’ without reference to the ‘traditional, fundamental limitations upon the powers of common-law courts.’”¹⁴⁰

At a minimum, it is difficult for separation-of-powers opponents of abstention to justify their opposition to abstention, and the concomitant increase in assertion of federal jurisdiction that would result, by arguing for an expansive reading of judicial power. Indeed, their separation-of-powers argument is premised on a cabined view of each branch’s power. Professor Redish, among others, believes that “judicial power is inherently characterized by the adjudication of individualized, live disputes. Promulgation of free-standing rules of general applicability does not fit within this model, even when those rules deal with . . . the adjudicatory function.”¹⁴¹

Relying on the idea of a separate judicial power, the Supreme Court has determined that some administrative or legislative actions fall outside the judicial authority under Article III. For example, in the oft-cited *Hayburn’s Case*, Chief Justice Jay explained that Article III prohibited Supreme Court Justices, riding circuit, from administering and processing Revolutionary War veterans’ benefit requests.¹⁴² Congress had authorized federal courts to evaluate and grant benefits, subject to review by the Secretary of War and Congress.¹⁴³ Although ostensibly clarifying Article III’s ban on advisory opinions, Chief Justice Jay explained that “the duties assigned to the Circuit courts by this act, are not [judicial] in as much as it subjects the decisions . . . first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature.”¹⁴⁴ In other words, the fact that the statute provided for review of judges’ decisions by legislative and executive actors meant that the role undertaken by the circuit courts was not judicial. *Burford* provides an example of *Hayburn*-type administration: The Travis County Court, in its role as a quasi-administrator, was empowered to “formulate new standards for the

¹⁴⁰ Hershkoff, *supra* note 119, at 1879 (quoting *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)); see also Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 822 n.463 (2001) (“The Convention’s silence has led most scholars to conclude that everyone simply assumed that federal courts would act the way Anglo-American courts traditionally had functioned.”).

¹⁴¹ Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 725 (1995); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884–85 (1983) (distinguishing between the incidental use of “executive action” in resolving individual rights and the judicial usurpation of governance).

¹⁴² 2 U.S. 409 (1792).

¹⁴³ See Act of Mar. 23, 1792, ch. 11, 1 Stat. 234–44.

¹⁴⁴ 2 U.S. at 410; see also *Chicago & S. Air Lines v. Waterman S.S.*, 333 U.S. 103, 113 (1948) (noting that if Congress or the President disregards the judgment of a federal court, “it would be only because it is one the courts were not authorized to render”).

Commission's administrative practice and suggest that the Commission adopt them."¹⁴⁵ The Travis County Court's rulemaking recommendations were subject to later review by the Texas Commission, similar to the review by the Secretary of War and Congress in *Hayburn*. In order to model the working relationship between the County Court and Railway Commission, a federal court would need to act outside of Article III confines. It would suggest, rather than pass judgment on, alternative rules. Or it could ignore the state scheme, and rule on disputes without the full toolbox afforded to state courts, ignoring *Erie's* constitutional admonition against inequitable administration of law.¹⁴⁶

More recently, the Supreme Court relied on a functional interpretation of "judicial power" and "case" under Article III of the Constitution in a state bar admission case.¹⁴⁷ In *In re Summers*, the Supreme Court stated that when determining if a state proceeding constituted a "case" under Article III, "[t]he form of the proceeding is not significant. It is the nature and effect which is controlling."¹⁴⁸ The Court later affirmed its *In re Summers* holding, recognizing that state courts can make decisions without meeting Article III's judicial power requirement; however, Supreme Court review of a state court decision *only* is justified when there is cognizable judicial adjudication.¹⁴⁹ This provides at least some support for the idea that while state courts can

¹⁴⁵ *Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943).

¹⁴⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64, 77–79 (1938). The First Circuit explained this concern in *Allstate Insurance Co. v. Sabbagh*, 603 F.2d 228 (1st Cir. 1979). After the Massachusetts Commissioner of Insurance required Allstate to lower its automobile insurance rates, Allstate bypassed the state's statutory and judicial review mechanism by requesting injunctive and declaratory relief. *Id.* at 229–30. The First Circuit explained that Massachusetts's reviewing court had "special powers" and "specialized knowledge," which a district court would lack. *Id.* at 233 (quoting *Burford*, 319 U.S. at 327). As a result, "federal court intervention would disrupt the regulatory scheme and the issue in the state court would be different because the state court could respond to the problem differently." *Id.* at 233; see also *Med. Malpractice Joint Underwriting Ass'n of R.I. v. Pfeiffer*, 832 F.2d 240, 244 (1st Cir. 1987) (finding *Burford* abstention inappropriate in part because "the state courts are not a part of a regulatory process and possess no special powers not possessed by the district court to correct any constitutional problems with the Commissioner's order").

¹⁴⁷ 325 U.S. 561, 566–67 (1945).

¹⁴⁸ *Id.* at 566–67; see also *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 259 (1933) ("[I]f no 'case' or 'controversy' is presented for decision, we are without power to review the decree of the court below. In determining whether this litigation presents a case . . . , we are concerned, not with form, but with substance." (citations omitted)).

¹⁴⁹ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989) (recognizing that the constraints of Article III do not apply to state courts but explaining that an appeal from a state supreme court decision requires a case or controversy as per Article III).

participate in a rulemaking scheme that borders on legislation, federal courts cannot constitutionally follow suit.

Given that federal review of a state administrative action may require a working partnership with a state agency rather than adjudication, abstention under *Burford* might be constitutionally mandated. Even if states can provide their courts with general rulemaking or advisory power, Article III's limitations prevent federal courts from engaging in the same practices. Recall that in *Irizarry* the First Circuit carefully identified the distinction between establishing price rates for future milk distribution (legislative) and challenging the constitutionality of an entire administrative scheme (adjudicative).¹⁵⁰ Linking abstention to Article III questions would look similar to the approach taken in *Irizarry*:¹⁵¹ Rather than balancing the interests of a state and a litigant, federal courts would consider the state tribunal's particular decisionmaking process and powers.¹⁵²

C. Administrative Law as a Model

Tethering *Burford* abstention to the adjudication/legislation divide may replace ad hoc balancing with unpredictable definition debates. But federal courts have experience delineating between legislative and adjudicative decisions when reviewing state and federal administrative agency actions.¹⁵³ In *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁵⁴ Justice Holmes distinguished between an administrative agency adjudicating the rights of individuals "exceptionally affected . . . upon individual grounds" and a legislative administrative action "reaching a general determination" through a public act.¹⁵⁵ The Supreme Court, recognizing that the legislative/adjudicative distinction is at times difficult to draw, has followed Justice Holmes's specific/general distinction when interpreting federal law, state statutes, and the Administrative Procedure Act.¹⁵⁶

¹⁵⁰ See *supra* notes 69–75 and accompanying text.

¹⁵¹ See *id.*

¹⁵² The Article III and subject matter jurisdiction discussion somewhat overlap. Defining a "civil action" and "judicial power" both center on what is considered proper federal court action.

¹⁵³ See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 505 (7th ed. 2011) (identifying "many decisions" in which courts determine if a state administrative agency's action is adjudicatory, and thus must include due process protections).

¹⁵⁴ 239 U.S. 441 (1915).

¹⁵⁵ *Id.* at 445–46.

¹⁵⁶ See, e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978) (explaining that in nominally rulemaking proceedings, an agency action can be sufficiently adjudicative so as to require due process protections); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (finding an order quasi-legislative

After *Bi-Metallic*, lower courts have also successfully used the adjudicative/legislative distinction to determine whether a state tribunal's actions are adjudicative and thus implicate due process protections.¹⁵⁷ For example, in challenges to zoning board decisions, federal courts have distinguished between a board decision that applies existing law to an individual's permit request and board action that creates generally applicable policy.¹⁵⁸ Interestingly, federal courts have considered both whether a particular state administrative agency's decision was either adjudicative or legislative—for ripeness, *Rooker-Feldman*, or *Younger* purposes¹⁵⁹—and whether federal courts should abstain from hearing challenges to the agency's decision under *Burford*. The outcome for both issues is often the same. In other words, federal courts find *Burford* abstention appropriate when state judicial review of an administrative agency is legislative in nature (or vice versa).¹⁶⁰

However, lower courts have disagreed on whether they should look to the nature of the *dispute* or the type of *tribunal* when deciding if an agency action is adjudicative.¹⁶¹ Given the earlier discussion of the hybrid governing nature of state tribunals, federal courts should

when “applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act”); *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 765–66 (1969) (distinguishing between adjudication and rulemaking under the APA).

¹⁵⁷ See e.g., *75 Acres, LLC v. Miami-Dade Cnty.*, 338 F.3d 1288, 1294 (11th Cir. 2003) (applying the “strikingly uniform approach to procedural due process” to determine if a zoning law was legislative or adjudicative); *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n*, 198 F.3d 1, 13–15 (1st Cir. 1999) (distinguishing the legislative and adjudicative functions of the Northeast Dairy Compact Commission).

¹⁵⁸ See, e.g., *L C & S, Inc. v. Area Plan Comm'n*, 244 F.3d 601, 604 (7th Cir. 2001) (Posner, J.) (focusing on the “generality and consequences” of a zoning ordinance to determine if the ordinance was “legislation or really something else”); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 693 (3d Cir. 1980) (highlighting the difference between permit grants and general statements of city policy).

¹⁵⁹ *Younger* abstention is discussed *supra* note 26, and *Rooker-Feldman* is explained *infra* note 166. For an overview of the Supreme Court's ripeness doctrine, see Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 161–80 (1987).

¹⁶⁰ See, e.g., *NOPSI*, 491 U.S. 350, 363, 372 (1989) (finding *Burford* abstention inappropriate because federal jurisdiction would not “intrude into the processes of state government” and finding a claim ripe because federal review involved “a judicial act”); *Delmarva Power & Light Co. v. Morrison*, 496 F. Supp. 2d 678, 686, 690–91 (E.D. Va. 2007) (holding that because state judicial review may be part of the state's “legislative process,” *Rooker-Feldman* may not prohibit federal courts from asserting jurisdiction over an agency decision and alternatively holding that *Burford* prevents the court from interfering in the rate agency's decisionmaking process); *Pub. Serv. Co. of N.H. v. Patch*, 962 F. Supp. 222, 231, 237 (D.N.H. 1997), *aff'd*, 136 F.3d 197 (1998) (finding that state court review of a commission's order would not be part of a “unitary and still-to-be-completed legislative process” and that *Burford* abstention would be inappropriate because jurisdiction would not transform federal courts into a regulatory review institution (quoting *NOPSI*, 491 U.S. at 372)).

¹⁶¹ Courts often look to either the nature of a particular decision or the nature of the decisionmaking body. See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427,

look to the nature of the dispute when deciding whether abstention is appropriate. Labeling state tribunals adjudicative or legislative simply because a majority of its decisions, but not the current one, fit within a governing category would ignore the complexity of state tribunals; state courts do not simply mimic federal courts. Even more, for the same reason that courts require due process in adjudicative but not legislative settings—namely, that individualized government action uniquely risks “particularized abuse”¹⁶²—federal courts should abstain only when a litigant asks a federal court to act as a state rulemaking body. The need to protect against out-of-state bias also diminishes when a state tribunal creates a general rule that applies to citizens and noncitizens alike—both residents and nonresidents will have to bear the costs.¹⁶³ And, as explained below, federal judicial review of state courts’ quasi-legislative decisions can provide sufficient review of federal questions.

D. Multijurisdictional Review

Labeling state court decisions as legislative or administrative rather than adjudicative may alter the traditional allocation of litigation between federal and state courts. Under current *Burford* doctrine, after a federal court abstains from hearing a case, a litigant may only access a federal forum if her dispute involves a federal question and the Supreme Court reviews the dispute.¹⁶⁴ However, under the

1509 (1978) (identifying tests in which courts focus on the nature of the decisionmaking body, type of decision, or facts used).

¹⁶² Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1119 (1984) (explaining the values that underlie due process).

¹⁶³ In adjudication, it is possible for out-of-state bias to creep in during the fact-finding stage. See John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 12 (1963) (noting that diversity jurisdiction counters out-of-state bias). Even Supreme Court appellate review, if available, may be unable to counter this problem. See Field, *supra* note 27, at 1083–84 (explaining that the Supreme Court does not typically review state courts’ factual determinations). And although quasi-legislative decisions could discriminate against nonresidents, they will face constitutional challenge. *Saez v. Roe*, 526 U.S. 489, 501–02 (1999) (explaining when discrimination against nonresidents violates the Privileges and Immunities Clause); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977) (finding that discrimination against out-of-state products may violate the Dormant Commerce Clause).

¹⁶⁴ See *supra* note 91 and accompanying text (identifying the preclusive effect of *Burford* abstention). I do not believe that the Supreme Court would hear an appeal from a state high court that involved a traditional, complex *Burford* case. Rather, the Court could follow its current *Burford* doctrine and adjudicate a limited federal question arising from a state high court decision even if a federal district court previously abstained from hearing the same cause of action under *Burford*. For example, a federal district court could abstain from hearing a Takings Clause challenge to a local zoning board decision. A litigant would then bring the same cause of action in a state court, but that state’s high court could completely misread the Supreme Court’s Takings Clause jurisprudence and dismiss the cause of

jurisdiction-based and Article III-based approach to *Burford* put forth in this Note, after a state tribunal makes a nonadjudicative decision (i.e., a quasi-legislative decision), preclusion would not prohibit a litigant from challenging that decision in a federal district court on federal constitutional or statutory grounds.¹⁶⁵

This theory embraces a multijurisdictional approach of judicial review that is more consistent with the congressional decision to protect out-of-state litigants and to give plaintiffs a hearing in a federal forum. If a litigant requests that a tribunal engage in policymaking, she should rely on a state agency or tribunal for relief, rather than federal court. However, once that process ends, and a litigant wishes to challenge either the statutory or constitutional legitimacy of a particular agency action, she should have access (assuming diversity or a federal question) to a federal court.¹⁶⁶

Professor Friedman notes, however, that “[t]he common assumption is that cases must be litigated either in federal court or in state court. Rarely is the answer thought to be ‘both.’”¹⁶⁷ This concern is minimized, though, once state courts are no longer assumed to be mirror images of Article III courts. State courts regulate legal bars, establish procedural rules, issue advisory opinions, and engage in legal reform—roles outside of the traditional context of common law adjudication.¹⁶⁸ Challenging a final legislative decision by a state court is

action at the pleading stage. The Supreme Court could then review the state high court’s decision and remand without resolving the entire case and interfering with the state’s administrative scheme.

¹⁶⁵ See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (finding preclusion appropriate when an administrative agency acts in a “judicial capacity”); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226–28 (1908) (finding that administrative agencies’ legislative proceedings may not be granted preclusive effect); RESTATEMENT (SECOND) OF JUDGMENTS § 839 (1982) (finding preclusion appropriate when a state agency acts in a judicial capacity). Also, if federal courts treat *Burford* abstention as a purely subject matter jurisdiction question, preclusion should not bar litigants from returning to federal court after the dismissal for lack of subject matter jurisdiction, once the facts surrounding the cause of action have changed. See *Saleh v. Holder*, 470 F. App’x 43, 44 (2d Cir. 2012) (reversing district court’s dismissal with prejudice for failure to exhaust administrative remedies and holding that proper disposition was to dismiss without prejudice).

¹⁶⁶ The district court would have original jurisdiction according to *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). There, the Supreme Court explained that a federal district court has original jurisdiction over decisions by state courts that “[are] not judicial in nature.” *Id.* at 479. The Court relied on Justice Holmes’s functional approach in *Prentis* when deciding whether the D.C. Court of Appeals constituted a “court” for original jurisdiction purposes. *Id.* at 476 (“This Court has considered the distinction between judicial and administrative or ministerial proceedings on several occasions.” (citing *Prentis*, 211 U.S. 210)); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (limiting application of the *Rooker-Feldman* doctrine).

¹⁶⁷ Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1214 (2004).

¹⁶⁸ Hershkoff, *supra* note 119, at 1872–74.

no different from requesting a federal court to enjoin an unconstitutional state administrative rule.¹⁶⁹

Another benefit of this multijurisdictional approach is that it best preserves states' interests in establishing their own legislative solutions to complicated local problems, while protecting the federal interest in providing a forum for litigants in federal question and diversity cases.¹⁷⁰ This approach, in some ways, models current habeas corpus doctrine. State courts and administrative agencies could make an initial judgment. Federal courts, however, would retain jurisdiction to review decisions for federal constitutional and statutory violations after a state tribunal engages in nonadjudicative actions.¹⁷¹

E. Potential Criticisms

There are potential problems with my approach to *Burford* abstention. It may deny litigants access to any forum whatsoever, misread the *Burford* doctrine, or ignore alternatives. I respond to each problem in turn.

1. Access to a Judicial Forum

Professors Ann Woolhandler and Michael Collins caution that blurring the line between “judicial” and “administrative” actors may result in the denial of any judicial review over important state regulatory activity.¹⁷² They are correct, but this problem arises largely if a court reads *Burford* as purely about federalism. If federal courts abstain any time federal review interferes with an important state interest, an individual may lack any avenue to challenge a state's administrative decision if a state does not authorize judicial review of the agency.¹⁷³

¹⁶⁹ And, of course, federal courts can review both state court- and state legislature-created rules. See *supra* note 166 (explaining federal district court review of state court legislative actions); *Strauss v. Drew*, 739 F. Supp. 1231 (N.D. Ill. 1990) (explaining when the Court's abstention, sovereign immunity, and *Rooker-Feldman* doctrines do not prohibit district court review of a state court's orders).

¹⁷⁰ See Friedman, *supra* note 167, at 1275 (arguing, in the context of *Pullman*, that abstention may protect both state and federal interests).

¹⁷¹ Even vocal supporters of extensive federal jurisdiction recognize the benefit of a multijurisdictional approach to sensitive state enforcement schemes, such as criminal law. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 316–21 (1988) (recognizing the benefits of federal courts abstaining from hearing challenges to state criminal cases under *Younger* given the existence of habeas corpus).

¹⁷² See Woolhandler & Collins, *supra* note 4, at 659 (arguing that distinguishing agency from judicial action better accords with state and federal notions of due process).

¹⁷³ Review may also be practically unavailable in diversity cases for out-of-state litigants. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78

However, rereading *Burford* as a limitation on judicial rulemaking actions may resolve this concern. In *Burford*, the Travis County court's review extended beyond traditional adjudication and reached into the legislative sphere. My approach would allow a party to challenge a state court's legislative decision in a federal district court. For example, because the Travis County court's decision was not "judicial" in *Burford*, an action in a federal district court challenging the Travis County court's quasi-legislative action would still be original and thus fall within a district court's jurisdiction.¹⁷⁴ If state courts defer to the Travis County court's interpretation of oil production law, the only logical challenge would be constitutional. The state tribunal would determine the content of the applicable state law.¹⁷⁵

2. *The Necessity of Burford*

As an independent doctrine, *Burford* may be unnecessary if the challenged state decision is legislative in nature. In other words, *Burford* abstention could simply be labeled statutory and constitutional interpretation.¹⁷⁶ This is undoubtedly correct. My argument is not concerned with the outcome in the federal court decisions applying *Burford* in a limited manner.¹⁷⁷ For those cases, I mean only to provide a principled justification for *Burford* abstention. For other cases, my reading of *Burford* may prevent abstention. Recall that

N.Y.U. L. REV. 1293, 1300–01 (2003) (suggesting out-of-state bias concerns still justify diversity jurisdiction).

¹⁷⁴ Professor Young suggests the Supreme Court should force states to make a decision as to "whether a specialized state court should be treated as part of the agency or as a court." Young, *supra* note 4, at 976. I only disagree with Professor Young's argument that absent a state court decision declaring a specialized court to be an agency for res judicata questions, federal courts should presume a state "court is a court." *Id.* Given the multiple roles that state courts play, this may unnecessarily replace logic with labels.

¹⁷⁵ Professors Woolhandler and Collins argue that the only constitutional challenge to agency action, substantive due process, "now seems chimerical." See Woolhandler & Collins, *supra* note 4, at 659. However, there is a risk that federal courts may not give the state agency decision proper deference in a statutory challenge. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1936–37 (2011) (providing examples of federal courts ignoring state statutory interpretation principles). And state administrative action may violate traditional due process protections. See, e.g., *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988) (finding *Burford* abstention inappropriate when plaintiffs claimed a state agency deprived them of property without a hearing).

¹⁷⁶ Cf. Treat, *supra* note 38, at 1002 (briefly implying that *Burford* abstention is something more than pure statutory or constitutional interpretation).

¹⁷⁷ See, e.g., *Allstate Ins. Co. v. Sabbagh*, 603 F.2d 228, 233 (1979) (abstaining from hearing a challenge to a Massachusetts Commissioner of Insurance decision because the administrative scheme provided the reviewing state court "special powers" and "special knowledge"); *Hanlin Grp. v. Power Auth.*, 703 F. Supp. 305, 308–10 (S.D.N.Y. 1989), *aff'd*, 923 F.2d 844 (2d Cir. 1990) (abstaining based on the inherent discretion and expertise involved in state court review).

federal courts have used *Burford* to abstain even from hearing facial constitutional challenges to state statutes, based on the rationale that these statutes are part of complicated policymaking schemes.¹⁷⁸ While still on the First Circuit, then-Judge Breyer explained, “The threatened interference [in *Burford*] did not consist merely of the threat that the federal court might declare the *entire state system* unconstitutional Rather, in our view, abstention in the *Burford* line of cases rested upon the threat to the proper administration of a *constitutional* state regulatory system.”¹⁷⁹ The purpose of *Burford*, according to Justice Breyer’s analysis, is to abstain from interference in the proper administration of an *already* permissible regulatory scheme, not to altogether avoid review of the constitutionality of the scheme in the first instance. Linking the outcome of *Burford* to constitutional and statutory restrictions on judicial power provides a principled justification for preventing federal courts from undermining a state regulatory system. This approach can be properly labeled “abstention,” “statutory interpretation,” or something else.

3. *Certification as an Alternative*

Critics may argue that any form of *Burford* abstention may be unnecessary if a federal court can certify a legal question to the highest state court.¹⁸⁰ Although certification is a productive mechanism to ensure that federal courts correctly determine state law, the more significant problem in strict *Burford* cases is not legal, but factual. In *Burford*, Justice Black noted that the legal standard for issuing oil permits was uncomplicated.¹⁸¹ The regulatory scheme was complex because courts must make a difficult factual determination concerning oil production and market demand; one individual’s oil production rights affect every other person’s production rights. Most states’ certification laws, however, allow federal courts to certify a question to a state’s highest court, bypassing the state courts with factual expertise on an issue.¹⁸² Thus, certification does not provide a satisfactory

¹⁷⁸ See, e.g., *Liberty Mut. Ins. v. Hurlbut*, 585 F.3d 639, 651 (2d Cir. 2009) (abstaining from a facial federal constitutional challenge to a statutory amendment to New York’s worker compensation law). *But see* *Dittmer v. Cnty. of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998) (finding *Burford* abstention inappropriate when a party claims a state act is facially unconstitutional).

¹⁷⁹ *Bath Mem’l Hosp. v. Me. Health Care Fin. Comm’n*, 853 F.2d 1007, 1013 (1st Cir. 1988) (Breyer, J.).

¹⁸⁰ See Clark, *supra* note 87, at 1465 (arguing certification may resolve the need for abstention).

¹⁸¹ *Burford v. Sun Oil Co.*, 319 U.S. 315, 323 (1943) (explaining the legal simplicity of allocating oil permits).

¹⁸² Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 174 (2003) (noting that certifi-

alternative to *Burford* because it does not adequately address the issues that are central in *Burford* cases.

CONCLUSION

Outside of *Burford*, the Supreme Court's abstention doctrines usually attempt to respect states' judicial, rather than legislative, decisions. According to current Court doctrine and academic scholarship, *Burford* is another federalism-based form of abstention, requiring federal courts to respect the states as co-equals to the federal government. However, *Burford* is unique in that it limits federal judicial disruption of states' important and complicated administrative, not judicial, schemes. And *Burford* abstention at least originally required more than just an important state question.

The Constitution and the subject matter jurisdiction statutes, rather than the importance a state attaches to an issue, should provide the basis for federal court abstention in *Burford*-type cases. In some circumstances, this would create a multijurisdictional model for litigation, permitting a litigant to resolve different questions in different forums. If a state court's review of a regulatory scheme is sufficiently legislative, a federal court should dismiss the case without prejudice, allowing a litigant to return after the state issue is resolved. Under this approach, federal courts would respect the plain language of Congress's subject matter jurisdiction statutes, Article III of the Constitution, and states' interests in developing and controlling their administrative schemes.

cation often "leapfrog[s] over the appellate process, and separates law from fact"). And many states do not permit federal district courts to certify questions to a state court. 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248, at n.30 & n.31 (3d ed. 2007) (identifying the states that authorize federal district courts to certify questions to a state high court).

