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

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The very essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge.¹

INTRODUCTION

Within the limits of the federal judicial power defined by Article III of the Constitution, Congress has nearly complete control over the jurisdiction of the Supreme Court and the lower federal courts.² Despite the breadth of these potential powers, Congress largely has allowed the Supreme Court a free hand in designing the features of judicial federalism, the system of rules and policies which divides power between the state and federal courts.

From the early days under the Constitution, the jurisdiction which Congress has chosen to confer on the federal courts generally

Within the federal judicial power as defined in Article III, the vast powers of Congress to limit the jurisdiction of the lower federal courts are well established. See id. at 362-424. It is arguable that Congress has complete power to limit the jurisdiction of the lower federal courts to any subset of the maximum jurisdiction allowed under Article III of the United States Constitution. Many cases suggest that Congress can specify which constitutionally founded causes of action cannot be heard by a federal court. See Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (stating that Congress's authority to create lower federal courts includes the power of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good"); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (upholding a federal statutory restriction on a federal trial court's jurisdiction); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850) (stating that Congress controls the existence of inferior courts and, thus, also controls the scope of their jurisdiction). But see Johnson v. Robison, 415 U.S. 361, 366-67 (1974) (expressing serious doubts regarding the constitutionality of any statute which included a provision barring federal courts from reviewing the constitutionality of the statute's substantive provisions); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.) (suggesting that Congress must not exercise its power over the jurisdiction of lower courts in a manner that deprives citizens of their constitutional rights), cert. denied, 335 U.S. 887 (1948).
has been regarded as mandatory. There had, however, long been some exceptions to the mandatory jurisdiction requirement even before 1941 when the Supreme Court first used the word "abstention" to describe a doctrine requiring a federal trial court to stay its hand in favor of state court proceedings despite the existence of federal question or diversity jurisdiction. Other imprecisely defined and overlapping abstention doctrines followed.

Some of these forms of judicial self-restraint have proved troublesome and enigmatic. This has been particularly true of the abstention doctrine that originated fifty years ago in *Burford v. Sun Oil Co.* The litigation in *Burford* itself posed questions of the validity of state administrative action challenged under both state and fed-

3. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("With whatever doubts, with whatever difficulties, a case may be attended, we [the Supreme Court] must decide it, if it be brought before us.").


5. For a discussion of the various abstention doctrines, see *infra* part I.

6. One example is the *Colorado River* abstention doctrine, formulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814-17 (1976). See CHEMERINSKY, *supra* note 4, § 14.3, at 668-74 (discussing *Colorado River*); see also *infra* notes 72-75 and accompanying text. Another example is the Supreme Court's vacillating approach to the availability of federal habeas corpus review of state criminal court proceedings, discussed *infra* note 556. See part V for a detailed discussion of overlapping doctrines of judicial federalism.

eral law. The Supreme Court ordered the federal trial court to stay its hand so that sensitive issues of state administrative law could be dealt with by a specialized state court, one familiar with the workings of the state administrative agency. However, the Supreme Court’s Burford opinion does not precisely identify when the involvement of state administrative action would justify a federal court decision to abstain from exercising its jurisdiction.

According to the most recent Supreme Court formulation of the Burford doctrine, New Orleans Public Service, Inc. v. Council of New Orleans, a federal court must refuse equitable relief when granting it would interfere with orders or proceedings 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.”

This description of abstention is unintelligibly abstract without the illustration provided by actual case decisions and opinions. A substantial part of what follows in other sections of this Article is an attempt to determine the meaning of Burford abstention and its place in the constellation of related doctrines of judicial federalism.

Even the basic scope of the Burford doctrine seems to fluctuate

8. Burford, 319 U.S. at 316-17. Although the dual state/federal law nature of the challenge is not highlighted in the Supreme Court’s opinion, the Burford Court does refer to it, stating, “On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here.” Id. at 334. The Supreme Court agreed with the opinion of the lower court that the proceedings presented a simple suit in equity. Id. at 314. The lower court held that the plaintiffs could present a unified challenge to a state agency regulatory order, based upon alleged violations of both local law and the Due Process Clause of the Fourteenth Amendment. Sun Oil Co. v. Burford, 130 F.2d 10, 16 (5th Cir. 1942), rev’d on other grounds, 319 U.S. 315 (1943).

9. Burford, 319 U.S. at 325-34. The district court declined jurisdiction. Id. at 318. The court of appeals initially affirmed and then, on rehearing, reversed. Burford, 130 F.2d at 18. The Supreme Court reversed the court of appeals, reinstating the district court’s order. 319 U.S. at 334. Part of the Supreme Court’s opinion gives the appearance of deciding only that the district court had discretion to refuse the case. Id. at 318. However, later dicta in the opinion stated that the district court was actually required to dismiss the case. Id. at 334. For a more detailed discussion of the Burford opinion, see infra part II.

10. See infra notes 105-19 and accompanying text (discussing the Burford opinion and its effect on future cases).


12. Id. at 361 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).
with each new statement by the Supreme Court. The doctrine has been regarded widely as being aimed at protecting state administrative processes. Indeed, the passage from New Orleans quoted above defines Burford abstention in terms of interference with administrative agencies. Yet there remains some doubt even as to this basic point. Ankenbrandt v. Richards, decided by the Supreme Court last term, states that it is "not inconceivable" that Burford abstention would apply to some cases involving deference, not to state agencies, but to state court proceedings in which certain sensitive issues of local law would be determined.

It is not clear whether Ankenbrandt signals careful reconsideration of the New Orleans formula. I assume that the controlling rules are to be found not in Ankenbrandt's brief and speculative references to Burford, but rather in New Orleans's more carefully crafted and formulaic statements. These statements better reflect the weight of the case law in limiting Burford abstention to suits involving state administrative agencies. Even if this is true, other

13. The Supreme Court's most recent Burford formula presented in New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989), appears to limit Burford abstention to cases involving state administrative law. Many post-Burford courts of appeals cases also recognize or strongly suggest such a limit. See, e.g., Nucor Corp. v. Nebraska Pub. Power Dist., 891 F.2d 1343, 1344-45, 1348 (8th Cir. 1989), cert. denied, 498 U.S. 813 (1990); Food Fair Stores, Inc. v. Food Fair, Inc., 177 F.2d 177, 185 (1st Cir. 1949). See generally BATOR ET AL., supra note 2, at 1364 (stating that Burford is "often regarded as establishing a distinct form of abstention, often called 'Burford' or 'administrative abstention'). The widespread agreement is not universal. See infra notes 439-65 and accompanying text which discuss the following cases that either dispensed with an administrative requirement for Burford abstention or diluted it so substantially as to render it virtually meaningless: West v. Village of Morrisville, 728 F.2d 130, 135 (2d Cir. 1984) (providing a Pullman abstention alternate ground); Smith v. Metropolitan Property & Liab. Ins. Co., 629 F.2d 757, 760-61 (2d Cir. 1980) (citing Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959), which the Supreme Court had connected with Burford abstention); Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1194 (1st Cir. 1979).


15. Id. at 2216. The Ankenbrandt Court stated, in dictum, that it was not "inconceivable" that Burford could apply to require federal court deference to state determinations of "elements of the domestic relationship" presumably yet to be made in pending divorce, alimony, or custody proceedings. Id. These determinations would almost certainly take place in state courts and not in state agencies. See HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 313 (1986) ("Only a few states now have separate family court systems . . . "). Such disputes typically are adjudicated by courts. 2 HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 97, 346, 483 (1987) (dealing respectively with divorce, alimony, child support, and custody proceedings).

16. New Orleans presents a formula for Burford abstention, 491 U.S. at 361, while Ankenbrandt simply suggests that Burford abstention might be appropriate in certain circumstances, 112 S. Ct. at 2216.

17. See infra note 237 and accompanying text (collecting cases demonstrating the significance of the involvement of state administrative action in determining whether to abstain under the
questions remain. The Burford doctrine’s limitation to administrative cases has been reiterated but never justified in the case law and commentary. Is this limitation justifiable? Additionally, what qualifies as “administrative” action within the Burford doctrine, and in what ways must such action be connected to a case in order to justify abstention? 18

As I will demonstrate, New Orleans clarifies Burford abstention in some respects, seriously shrinking its domain of operation, but it clouds the doctrine in other ways. 19 Confusion over the scope of Burford abounds, both in Supreme Court opinions and in those of the lower courts. The confusion and formulaic vacillation has been perpetuated by a failure to understand Burford’s origins and to come to terms with whether such a doctrine can be justified today, given the changes in our view of judge-made law, administrative law, and federalism. This Article will attempt to clarify what Burford was, is, and sensibly might be, by tracing its roots within the context of developments in federal administrative law occurring at the time Burford was decided, and by looking at developments since that time.

In later sections of this Article, I show that the usual jurisdictional assumption underlying the regime of Erie Railroad Co. v. Tompkins 20 gave way when principles developed for federal judicial review of federal administrative agencies were applied to federal suits challenging state administrative action. Under Erie, state law governed issues not directly controlled by federal law, both in suits grounded on diversity jurisdiction and in those grounded on federal question jurisdiction. 21 Under Erie, unclear state law alone did not warrant abstention: federal courts were forced to anticipate how state courts would interpret the state law involved. 22 Burford, however, saw unsettled state administrative or regulatory law as different and viewed its presence as justifying a federal court’s refusal to provide a forum for a dispute substantially involving such law.

The distinctiveness of administrative law was a product of its concentration, in individual agencies, of theoretically distinct and sepa-

Burford doctrine).
18. For a suggested response to these two questions, see infra parts VI.B and VI.A respectively.
19. For an analysis of the effect of New Orleans on Burford abstention, see infra notes 290-304 and accompanying text.
20. 304 U.S. 64 (1938).
21. Id. at 78.
22. See id. at 78-79.
rated powers: the legislative, the executive, and the judicial. This had the effect of blurring distinctions between the processes of making, interpreting, and applying the law. The distinction between law-finding and law-making began to melt down especially rapidly in the New Deal world of administrative law. As this happened, it became clear that what an agency often did, not just in rule-making proceedings, but in administrative adjudications as well, was to make law and policy, not simply to “find” and apply it. Concern that a federal court might cut short or, worse, usurp state policy-making animated the Burford decision.

Beyond explaining the original Burford doctrine and its early evolution, these facts help clarify the choices that must be made today in deciding whether there is a place for Burford in its original form, in some modified form, or indeed whether there is still a place for it at all. Subsequent developments in administrative law, and in jurisprudence generally, seriously call into question whether the distinction between “law-making” and “law-finding” can bear the weight placed upon it by Burford. As a result, it will be necessary to ask whether Burford should be scrapped entirely or extended to some cases not involving state administrative decisions in any significant sense.

While dealing with the issues summarized above, this Article describes the present ambiguous contours of Burford abstention, as shaped by the few Supreme Court opinions and the many lower court opinions which apply it or expound on it. It considers how the somewhat kindred doctrines of judicial federalism, such as claim preclusion, “primary jurisdiction,” the Rooker-Feldman doctrine, Pullman abstention, Younger abstention, and Eleventh

23. See infra part III.C.2.b.
24. See Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) (“Needless federal conflict with the state policy [is] the inevitable product of this double system of review.”).
26. See infra part VIII.
27. See infra part IV.
28. For a discussion of this doctrine, see infra notes 325-26 and accompanying text.
29. For a discussion of this doctrine, see infra part V.C.
30. For a discussion of this doctrine, see infra notes 327-29 and accompanying text.
31. For a discussion of this doctrine, see infra part I.A and notes 368-73 and accompanying text.
32. For a discussion of this doctrine, see infra part I.C and notes 365-67 and accompanying text.
Amendment law, overlap with Burford, rendering it otiose to a significant degree. Finally, it offers a criticism of Burford and proposals for its redefinition, as well as a wider critique of the regime of judicial federalism, whose problems are in many ways exemplified by Burford.

I. A SHORT INTRODUCTION TO THE ABSTENTION DOCTRINES

Throughout this Article, Burford is compared to other abstention doctrines. The major varieties of abstention are described briefly below. Later, this Article explores the relationship these doctrines have to Burford, as well as their impact upon it.

Over the years, the Supreme Court has frequently changed its view regarding the number of abstention doctrines and the precise contours of each one. Most recently, the Supreme Court has indicated that it recognizes four major varieties of abstention, named for four cases: (1) Pullman, (2) Burford, (3) Younger, and (4) Colorado River. The next subsections discuss these doctrines in the order of their recognition by the Supreme Court as distinct forms of abstention, although the precise order is disputable if precursor equitable doctrines are taken into consideration. To these four doctrines I have added a fifth, Thibodaux abstention, connected to Burford in many ways but of uncertain status after New Orleans.

A. The Pullman Doctrine (1941)

In 1941, the Supreme Court first used the word abstention to describe a doctrine requiring a federal trial court to stay its hand in

33. See infra notes 332-57, 360-61, 374-75 and accompanying text (discussing the scope of the Eleventh Amendment bar and the judicially created exceptions to it).
34. See infra part V.
35. See infra parts VI, VII, and VIII.
36. See infra part VIII.
42. Colorado River, 424 U.S. at 817-19.
43. For a collection of such cases, primarily cases antedating Pullman, see Burford, 319 U.S. at 333 n.29. For a collection of earlier cases, see Pullman, 312 U.S. at 500-01.
favor of state court proceedings, despite the existence of federal question or diversity jurisdiction. The Court held that such abstention was often appropriate if a state court might resolve an unclear issue of state law in a way that would spare a federal trial court the need to decide a constitutional question. The Court justified abstention based on the equitable nature of the case before the federal district court. The Court concluded that a federal court considering a request for equitable relief could decline to grant a remedy for a host of prudential reasons, including the avoidance of unnecessary constitutional pronouncements.

Today *Pullman* abstention has been extended to suits at law, but its other requirements remain essentially the same. It is applicable if state court resolution of substantially uncertain state law might eliminate or significantly narrow an important federal constitutional issue which is before a federal trial court.

The procedure immediately following *Pullman* abstention differs from that following federal court abstention under *Burford*. After a decision to invoke *Pullman*, the abstaining federal court may retain jurisdiction passively while the litigation proceeds in the state

45. *Pullman*, 312 U.S. at 501. A Lexis search of the form "'abstention' and date before 3/3/41" reveals that the word abstention was used by the Supreme Court just eight times prior to *Pullman*, but it was not used in reference to refusals of jurisdiction.

*Pullman* involved a constitutional challenge to a regulatory commission order requiring all sleeper cars to be continuously in the charge of an employee with the rank of conductor. *Id.* at 497-98. At the time, all train conductors were white and all porters black, and the order was implemented in response to a practice on lightly traveled routes of leaving cars in the charge of porters. *Id.*

46. *Id.* at 501.

47. *Id.* at 500. The Supreme Court required the federal trial court to abstain so that the Texas courts could determine whether the regulation was within its authority as conferred by statute. *Id.* at 501-02.

48. *Id.* at 500.

49. United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135-36 (1962) (requiring abstention, in a suit seeking a monetary award, in order to permit state judicial construction of unclear state law so that a federal constitutional ruling might be avoided); see also BATOR ET AL. *supra* note 2, at 1362 n.8 (citing *Ideal Cement*, 369 U.S. 134 and its discussion of extending *Pullman* to actions at law).


51. *Midkiff*, 467 U.S. at 236. For a recent application of *Pullman* abstention, see Catlin v. Ambach, 820 F.2d 588 (2d Cir. 1987), which held that *Pullman* abstention is appropriately invoked to avoid an unnecessary decision as to whether the state's residency requirement violated the equal protection rights of handicapped students.
The Supreme Court has adjusted federal doctrines of issue preclusion so that a litigant may reserve her right to return to federal court for determination of federal issues of law after a state court has ruled on the state issues before it. If such rights are reserved, a resolution of the federal issues by the state court will not bar their relitigation on return to the formerly abstaining federal court. The differing Burford post-abstention procedure is described in the following section.

B. The Burford Doctrine (1943)

Burford abstention is normally viewed as appropriate in certain cases involving difficult questions of state law connected with state administrative processes. A more precise definition remains elusive under the varying results and abstract verbal formulations found in cases addressing the meaning of this doctrine. Exploring and criticizing the likely contours of the present Burford doctrine is the task of most of the remainder of this Article.

One procedural clarification is useful at this early stage. The post-abstention protocols under Burford have been seen as sharply different from those under Pullman. Unlike Pullman abstention, Burford abstention is generally understood to entail a federal court's outright dismissal of the case before it, leaving the state court as the sole forum for the resolution of the dispute. The federal court does not retain jurisdiction, and the parties are not permitted to reserve the right to return to federal trial court after the conclusion of the state

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52. See Isthmus Landowners Ass'n v. California, 601 F.2d 1087, 1090 (9th Cir. 1979). For occasional exceptions to this procedural aspect of the Pullman doctrine, see 17A Wright et al., supra note 37, § 4243, at 66-67.
54. Id. at 417. The England Court also held that where a party freely and without reservation submits his federal claims to a state court for decision, he has elected to forego his right to return to federal court. Id. at 419.
55. One category of Burford abstention, as described in New Orleans, explicitly refers to avoidance of difficult questions of state law while the other refers to avoidance of disruption as a result of federal court intervention. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 391 U.S. 350, 362 (1969). Disruption would not occur if state law were so clear that the federal courts could tolerably anticipate state court results. Burford itself refers to a history of mistaken federal court predictions. Burford v. Sun Oil Co., 319 U.S. 315, 327-28 (1943). Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992), raises, at least, some doubt as to whether Burford remains limited to cases involving administrative agencies. Ankenbrandt's possible effect on the shape of Burford abstention is discussed supra notes 15-16 and accompanying text.
56. Isthmus Landowners Ass'n, 601 F.2d at 1090.
court proceedings.\textsuperscript{57} Any later filing of the same case in a federal
court will almost certainly be dismissed on grounds of claim or issue
preclusion.\textsuperscript{68} Hence \textit{Burford} abstention, unlike the \textit{Pullman} variety,
normally results in a complete loss of a federal forum for the resolu-
tion of any issues of federal law raised in a case.\textsuperscript{69} However, the
recent statements of the Supreme Court in \textit{Ankenbrandt v. Rich-
ard}s\textsuperscript{60} suggest that the \textit{Pullman} approach, at least occasionally,
may be appropriate in cases of \textit{Burford} abstention.\textsuperscript{61}

\section*{C. The Younger Doctrine (1971)}

In \textit{Younger v. Harris},\textsuperscript{62} the Supreme Court recognized a general
prohibition against using federal court injunctions to stay pending
state court criminal proceedings.\textsuperscript{63} As originally conceived, \textit{Younger}
abstention resembles \textit{Pullman} abstention in some respects; in others
it resembles the \textit{Burford} variety, but in still other ways it differs
from both. First, to the extent that both \textit{Pullman} and \textit{Burford} ab-
stention are grounded on the fear that federal courts will errone-
ously apply state law, \textit{Younger} abstention is different.\textsuperscript{64} The propri-
ety of \textit{Younger} abstention depends entirely upon the type of state
proceeding with which a federal suit might interfere, and not on the

\textsuperscript{57} \textit{Id.}; Sabato v. Florida Dep't of Ins., 768 F.2d 1562, 1566 (S.D. Fla. 1991). \textit{See generally}
\textit{CHEMERINSKY, supra} note 4, \textsection 12.3, at 617-19 (comparing and contrasting the procedural ramifi-
cations of the various abstention doctrines).

\textsuperscript{58} For a discussion of claim preclusion in this context, see \textit{infra} note 324 and accompanying
text. \textit{Burford} itself suggests that after abstention, the only further federal court involvement
would be certiorari from the state proceedings to the United States Supreme Court. \textit{Burford}, 391
U.S. at 334.

\textsuperscript{59} The federal forum is lost not only in federal question suits, but also in diversity suits in
which federal questions may be dispositive of the result as well. \textit{See, e.g.}, \textit{Sola Elec. Co. v. Jeff-
erson Elec. Co.}, 317 U.S. 173, 175-76 (1942). Along with the loss of a federal forum to resolve
federal legal issues, in both federal question and diversity suits, \textit{Burford} abstention results in the
loss of fact-finding made or supervised by federal judges.

\textsuperscript{60} 112 S. Ct. 2206 (1992).

\textsuperscript{61} \textit{Id.} at 2216 n.8 (suggesting that in some circumstances, it may be appropriate for a federal
court to retain jurisdiction under the \textit{Burford} abstention doctrine).

\textsuperscript{62} 401 U.S. 37 (1971).

\textsuperscript{63} \textit{Id.} at 41.

\textsuperscript{64} In \textit{Pullman}, the Supreme Court stated: "Reading the Texas statutes and the Texas deci-
sions as outsiders without special competence in Texas law, we would have little confidence in our
independent judgment regarding the application of that law to the present situation." 312 U.S.
496, 499 (1941). In \textit{Burford}, the Court stated that "[c]onflicts in the interpretation of state law,
dangerous to the success of state policies, are almost certain to result from the intervention of the
lower federal courts." 319 U.S. 315, 334 (1943). By contrast, the applicability of \textit{Younger} absten-
tion generally turns, not on the clarity of state law, but on the form and stage of the state proce-
dings against which a federal injunction is sought. \textit{See infra} note 65 and accompanying text.
lack of clarity of state law involved in that proceeding. *Younger* requires abstention only where certain state judicial style proceedings are attacked, whether or not the state law to be applied in them is unclear.\(^{66}\) Originally these included only state criminal proceedings, but coverage has been extended to important civil and administrative proceedings of a judicial nature brought by a state in its own tribunals.\(^{66}\) In contrast, *Burford* abstention is concerned with the possible misreading of state law by federal judges,\(^{67}\) for it is generally recognized as applying only where there are issues of state law which are difficult for the federal courts to resolve.\(^{68}\)

In terms of post-abstention procedure, *Younger* originally resembled *Pullman* more closely than it did *Burford*. When *Younger* was decided, convicted criminal defendants generally had the right to return to federal courts (in habeas corpus proceedings) after state criminal litigation had run its course.\(^{68}\) However, given recent limitations on federal habeas corpus actions,\(^{70}\) the consequences of *Younger* abstention have become more like those of *Burford* abstention. Thus, increasingly the de facto consequence of *Younger* abstention is the absolute dismissal of a federal attack on pending state court criminal proceedings, with no possibility of returning later to federal court to relitigate the federal issues.\(^{71}\)

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65. 401 U.S. at 43-44. In extreme cases, the clarity of a state law against a prosecution might indicate a bad faith prosecution, one circumstance the *Younger* Court recognized as an exception to its prohibition of federal injunctions against state criminal prosecutions. *Id.* at 48-49.


67. *See* Burford, 319 U.S. at 327; *infra* note 55.


70. *See* Teague v. Lane, 489 U.S. 288, 311-12, 316, 318-21 (1989) (holding by a majority of Justices, in separate opinions, that new constitutional rules of criminal procedure will not be recognized or applied in habeas corpus proceedings unless they are "implicit in the concept of ordered liberty"); Wainwright v. Sykes, 433 U.S. 72 (1977) (tightening the requirements for raising, in federal habeas corpus proceedings, issues not properly raised in the state criminal proceedings); Stone v. Powell, 428 U.S. 465, 495 (1976) (holding that federal habeas corpus relief may not be granted to state prisoners on unconstitutional search or seizure grounds if "full and fair" opportunity for litigation of the issue is provided by the state).

71. *See supra* note 70 and accompanying text (indicating the increasing difficulties in obtaining federal habeas consideration of state criminal cases).

Colorado River abstention is a doctrine of very limited application. The general rule is that federal courts are not permitted to abstain simply because the parties before them are pursuing the same case in state court.\(^{72}\) In *Colorado River Water Conservation District v. United States*,\(^{73}\) however, the Supreme Court created an exception to this rule based upon what it characterized as "truly unusual" facts.\(^{74}\) While the Supreme Court's and lower federal courts' exposition of this doctrine is not clear, the doctrine's main focus is on geographic convenience to the parties and on the possibility of harm from duplicative state and federal litigation.\(^{75}\) Colorado River abstention does not focus primarily on the nature of the issues litigated or their lack of clarity as do the *Pullman, Burford,* and *Younger* varieties of abstention. Because Colorado River abstention is rarely used and because its overlap with *Burford* is largely serendipitous, an understanding of Colorado River abstention is not crucial to an understanding of Burford's current contours or whether these contours are grounded in sound reason.

E. The Thibodaux Doctrine (1959)

A fifth abstention doctrine merits mention although its current status has been rendered uncertain by the Court's latest descriptions of Burford abstention. In *Louisiana Power & Light Co. v. City of Thibodaux*,\(^{76}\) the Supreme Court affirmed the decision of a federal district court to abstain from hearing a state eminent domain proceeding filed in federal court under diversity jurisdiction.\(^{77}\) The Court implied that the lack of clarity of state law, in combination with the importance of the matter to the state, warranted abstention.\(^{78}\)

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72. McClellan v. Carland, 217 U.S. 268, 282 (1910) (stating that it is well recognized "that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction").

73. 424 U.S. 800 (1976).

74. *Id.* at 817-20. The suit involved challenges by various Native American tribes to a state engineer's allocation of state water rights. *Id.* at 805. There were over 1,000 defendants. *Id.* at 820.

75. *Id.* at 820 (finding it significant that 300 miles separated the Denver federal district court and the state court).


77. *Id.* at 30.

78. See *id.* at 29-30.
A later Supreme Court case suggested that *Thibodaux* abstention may be a subset of the *Burford* variety.79 This suggestion is important to an understanding of *Burford* because *Thibodaux* did not involve the potential interference with state administrative processes usually thought to be the hallmark of *Burford* abstention. If the matter litigated in *Thibodaux* had been brought in the state system, it would have originated in state court and not in an administrative proceeding.80 Thus, the state legislature entrusted the application and development of the system of law involved in *Thibodaux* to the state courts rather than to an agency, and yet abstention was permitted on the grounds that an unclear and sensitive state law matter would be better resolved in the state courts. Writing for the Court, Justice Frankfurter justified abstention based upon the importance of avoiding a federal court guess as to unclear and disputed state law so “intimately involved with sovereign prerogative.” Thus, he enlarged abstention that is based on state law beyond the set of cases involving state administrative agencies.81

Despite these differences between the two cases, the 1976 *Colorado River* opinion strongly links *Thibodaux* and *Burford*, even suggesting that the former is a variety of *Burford* abstention.82 But, as discussed more fully later in this Article, the Supreme Court, in its recent decision *New Orleans Public Service, Inc. v. Council of New Orleans*,83 seems to have retracted this suggestion.84 Compounding the confusion further, recent cryptic statements in *Ankenbrandt v. Richards*85 may have retracted the *New Orleans* “retraction.”86

Depending on how one reads the enigmatic case law, *Thibodaux* currently may be viewed as part of the *Burford* doctrine, as a separate major or minor doctrine, or as no doctrine at all. Indeed, as this Article suggests later, it may make sense not only to recognize a connection between the two forms of abstention, but also to see *Thibodaux* as a broader, general category subsuming all or part of

79. *Colorado River*, 424 U.S. at 814; see infra notes 297-99 and accompanying text.
80. Not all proceedings in state court are judicial. Some are administrative or legislative. See infra notes 209-11 and accompanying text.
84. Id. at 361. The Court seemed to limit *Burford* to the administrative realm, whereas *Thibodaux* did not involve an agency. See *Thibodaux*, 360 U.S. at 25.
86. Id. at 2216. Unlike *New Orleans*, *Ankenbrandt* indicates that *Burford* may apply to cases not involving state administrative agencies. See supra note 15; infra notes 296-305.
the Burford doctrine. Ankenbrandt offers possible support for this position.87

After these extremely brief sketches of Burford and its siblings, it is time to turn to a more detailed discussion of the case in which Burford abstention originated.

II. Burford v. Sun Oil Co. and Its Background

In 1943, Sun Oil Company sued Burford and the Texas Railroad Commission (Commission) in federal district court, invoking diversity and federal question jurisdiction.88 The suit attacked the validity of a Commission order permitting Burford to drill four wells on a small lot located on the East Texas oilfield, asserting that such action was invalid on both federal constitutional and state statutory grounds.89

Under Texas law in place at the time the Burford controversy arose, "the holder of an oil lease [owned] the oil in place beneath the surface" of his land.90 However, the value of those ownership rights was sometimes imperiled by the possibility that others with surface ownership over the same pool would pump more than their fair share of oil.91 Texas statutory law assigned to the Commission the task of determining how much oil each leaseholder could extract from such pools, in effect limiting each leaseholder to the approximate amount of oil underlying his land in order to prevent "waste."92

Meeting these less than determinative mandates required careful adjustments of a complex but highly integrated system.93 Drilling

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87. See infra part VI.B.1, particularly notes 437-67 and accompanying text.
89. Id.
91. Id. In the Court's words: "Each leaseholder . . . is at the mercy of all those who adjoin him, since oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts." Id.
92. Burford, 319 U.S. at 320-23. The Court further defined waste as the ultimate loss of oil through means such as excessive production or unwise dissipation of reserves. Id.
93. See id. at 318-24. As to the vague regulatory standards set by the Texas legislature for Railroad Commission implementation, see id. at 323 n.15 ("'We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil producing area should be divided into drilling units and what size and shape the units should be.'" (quoting Patterson v. Stanolind Oil & Gas Co., 77 P.2d 83, 91 (Okla. 1939))).
one well could affect pressure in another miles away;\textsuperscript{94} therefore, providing protection from waste was a complicated matter. The Commission could not always respond cautiously in an abstractly evenhanded way. Doing so could lead to waste, for sometimes pressure decreased rapidly in a region of the pool so that oil not produced immediately would be lost forever.\textsuperscript{95} Exercising the large discretion granted it under the Texas enabling act, the Commission promulgated Rule 37, which mandated minimum spacing between wells, but which also allowed exceptions to prevent waste or the confiscation of property.\textsuperscript{96}

By the best estimate available to the Supreme Court at the time the \textit{Burford} controversy arose, over two-thirds of the approximately 25,000 wells in the East Texas oilfield existed as Commission-granted exceptions to its own Rule 37.\textsuperscript{97} The order attacked by Sun Oil allowed Burford to drill four wells as exceptions to the Rule 37 spacing requirements.\textsuperscript{98} Because it would lose oil as a result of Burford's pumping new wells over the common pool, Sun Oil alleged that it would suffer injury from the exception granted Burford.\textsuperscript{99} The company argued that this injury was actionable on two independent bases: (1) that the Commission order constituted a confiscation of its oil without just compensation in violation of the Fifth Amendment due process protection for property; and (2) that the order was invalid under state law.\textsuperscript{100}

The district court dismissed the suit based on a line of Supreme Court cases it read as relegating most oil and gas conservation cases to the state courts.\textsuperscript{101} In its initial opinion, the Fifth Circuit affirmed, based on its similar reading of those cases.\textsuperscript{102} On rehearing, the circuit court reconsidered the significance of those authorities in the context of a recent Texas case. The court viewed the Texas case as clarifying the task of a Texas court reviewing a decision of the state Railroad Commission, hence making manageable the task of a

\begin{itemize}
\item \textsuperscript{94} Id. at 324.
\item \textsuperscript{95} Id. at 319, 322.
\item \textsuperscript{96} Id. at 322.
\item \textsuperscript{97} Id. at 324 n.17.
\item \textsuperscript{98} Id. at 316-17.
\item \textsuperscript{99} Sun Oil Co. v. Burford, 124 F.2d 467, 468 (5th Cir. 1941), \textit{rev'd}, 319 U.S. 315 (1943).
\item \textsuperscript{100} \textit{Burford}, 319 U.S. at 317, 332.
\item \textsuperscript{101} \textit{Burford}, 124 F.2d at 468. The line of Supreme Court cases the district court referred to culminated in the Court's decision in \textit{Railroad Comm'n v. Rowan & Nichols Oil Co.}, 310 U.S. 573, 577, 583-89, \textit{modified}, 311 U.S. 614 (1940).
\item \textsuperscript{102} \textit{Burford}, 124 F.2d at 468-70.
\end{itemize}
federal court asked to make the same judgment.\textsuperscript{103} The circuit court withdrew its original affirmance and remanded the case to the district court for a decision on the merits as to: (1) the validity of the state administrative action under state law; and (2) if necessary, its validity under the Federal Constitution as well.\textsuperscript{104}

The Supreme Court reversed the court of appeals, initially suggesting that it was upholding the district court's discretion to abstain,\textsuperscript{105} but later indicating that the district court had made the only appropriate choice under the circumstances.\textsuperscript{106} The Supreme Court's \textit{Burford} opinion never endorsed the precise reasoning of the district court but rather supplied its own rambling explanation of why the circumstances warranted abstention.\textsuperscript{107}

The Supreme Court's \textit{Burford} opinion provides no formula for applying this variety of abstention. Any guidance must be extracted from the facts, both physical and institutional, which were emphasized by the Court in reaching its decision. The Court justified abstention on grounds of equitable discretion, stressing the following factors:

(a) Congress left the regulation of oil and gas to the states;\textsuperscript{108}

(b) the state regulation was important because of the significance of conservation of oil and gas generally, but more particularly, in light of the vital importance of those minerals to the Texas economy;\textsuperscript{109}

(c) each oil and gas field had to be regulated as a unit because of great factual complexities;\textsuperscript{110}

(d) because the standards applied in a given case involving oil leases necessarily affected the "entire state conservation system," suits such as \textit{Burford} were seen as public in nature, not merely as suits between private parties;\textsuperscript{111}

(e) because of the public ramifications surrounding private activities within the oil industry, the Texas legislature delegated to the Texas Railroad Commission the task of adjusting the complex rela-
tionships among those with interests in the oilfields; 112

(f) the Commission was given "'broad discretion' in administering the law"; 118

(g) judicial review of decisions of the Railroad Commission was confined to a single expert court, under a statutory directive to acquire a specialized knowledge of oil and gas regulation; 114

(h) by statutory directive, the function of the specialized court was not simply to engage in ordinary judicial review, but also to act as a "working partner" with the Railroad Commission, having some arguably "legislative powers" in "shaping" regulatory policy; 1111

(i) there was a history of mistaken federal court predictions of state regulatory law regarding oil allocation so disruptive that at one point the governor thought it necessary to impose martial law. 116

The opinion did not indicate which of the bewilderingly large number of possible combinations of these factors would be sufficient to warrant abstention. The particularism and lack of formulaic explanation, typical of an opinion based upon equitable discretion, has led to Burford's ambiguity and to its great malleability in the hands of the federal courts, from the lowest to the highest level. 117

112. Id. at 320.
113. Id.
114. Id. at 325, 327.
115. Id. at 325-27.
116. Id. at 327-33 (discussing how federal court interference in the evolving oil allocation regulatory scheme in Texas caused needless reworking of statutes and regulations).
117. See infra part III (discussing how federal courts have interpreted Burford). As will be discussed later, in attempting to define Burford, courts have used a wide variety of combinations of these factors. See infra notes 233-49 and accompanying text. Each such formula can lay claim, with varying degrees of plausibility, to justification in the original Burford opinion. For example, the Burford opinion offers justification for the widely held view among federal courts that federal court scrutiny of a state "administrative" agency's decision is a necessary element of this form of abstention. See infra note 237 and accompanying text. The emphasis many courts place on the "importance" or "transcendent" nature of the state issue also finds great support as a key factor favoring Burford abstention. Additionally, courts often emphasize another Burford abstention rationale: that the appropriateness of such abstention depends on whether the exercise of federal court jurisdiction will disrupt or interrupt the state administrative policy-making process. See infra note 235 and accompanying text. Some courts, subsequent to Burford, have found significant, or even necessary, the presence of a specialized state court in which judicial review of a state agency's decision has been concentrated. See infra note 236 and accompanying text.

The Burford opinion's focus on the great complexity of the Texas regulatory system, and the consequent possibility of disruptive federal court mistakes, provides a basis for those courts which place great weight, when analyzing whether to abstain, on the lack of clarity of state law. Finally, Burford's statement that Congress had left regulation of oil and gas production to the states may have served as the source, however unjustifiably, of the notion possessed by some lower federal courts that the peculiarly local nature of certain matters, by itself, weighs heavily, if not decisively, in favor of Burford abstention. See infra notes 243-44 and accompanying text.
Each of the factors stressed in the Burford opinion, however, has had an effect on future formulations of Burford abstention by the Supreme Court and lower federal courts. Two examples of abstention prerequisites espoused by some lower federal courts that originated in the factors delineated in Burford are the presence of peculiarly "local" issues and the existence of a specialized state court created to review state agency action. These requirements for Burford abstention, among others that trace their origins to the Court's opinion, are discussed and appraised in various sections below.

III. BURFORD'S APPARENT INCONSISTENCY WITH THE CONTEMPORARY LAW OF JUDICIAL FEDERALISM

Burford seems incompatible with the generally recognized constitutional principle that federal courts have no discretion to decline jurisdiction conferred by statute. It also seems inconsistent with some specific inferences drawn from statutes and case law that the exercise of federal question jurisdiction is especially important. While posing some difficulties, these apparent inconsistencies might be seen as easily dissolved by resort to familiar equitable principles.

Two other problems are more difficult. First, reconciling Burford with the regime of Erie Railroad Co. v. Tompkins requires an understanding of parallel developments in federal judicial review of federal administrative agencies. Second, an understanding of federal administrative law is crucial to any convincing attempt to explain Burford's exception to the general rule that state judicial remedies need not be exhausted before seeking federal equitable relief against state administrative action.

As discussed in detail below, Burford's radical adjustment of the Erie regime provided Pullman abstention with a sibling. Bur-
ford’s truly exceptional requirement that state judicial remedies be “exhausted” before a federal suit, when coupled with rules of claim preclusion, paradoxically made the federal suit forever unavailable. In 1943, Burford was the only truly complete major form of abstention. It was the only formally recognized abstention doctrine which resulted in the permanent exclusion from the federal courts of a case over which they had statutory jurisdiction.126

A. How Equitable Discretion Overrode the Usual Rule That Federal Courts Must Exercise Jurisdiction Conferred by Statute

In Cohens v. Virginia,127 Chief Justice Marshall wrote that “[w]e have no more right 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.”128 These well-known statements have been interpreted to mean that federal courts are not generally free to decline to hear cases within their statutory jurisdiction.129 In light of this principle of mandatory jurisdiction, Burford’s permanent exclusion of some diversity and federal question suits from federal court jurisdiction requires justification.

Although the mandatory jurisdiction principle was firmly established, longstanding doctrines of self-prescribed judicial restraint offered the courts leeway to decline a variety of suits within their jurisdiction.130 Burford was decided two years after the Pullman case, where the Court first used the word abstention to describe a situation where a court declined to exercise jurisdiction, although in circumstances different from those of Burford.131 Despite the appearance that the Court was now in the business of creating separate and definable doctrines of abstention, it is not fully accurate to characterize either Burford or Pullman in that way.

The two forms of abstention expressed in Pullman and Burford can just as easily be seen as different applications of a common prin-

126. Nasser v. City of Homewood, 671 F.2d 432, 439-40 (11th Cir. 1982) (characterizing Burford as “perhaps the most potent device” in the area of federal abstention).
127. 19 U.S. (6 Wheat.) 264 (1821).
128. Id. at 404.
130. See David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. REV. 543, 547-61 (1985) (reviewing various judicially created doctrines of abstention or restraint).
131. For a description of the Pullman doctrine, see supra part I.A.
ciple. The Court characterized both the Pullman and Burford doctrines as members of an old family of highly diverse principles of equitable restraint.\textsuperscript{132} Pullman abstention, the precursor of the Younger variety,\textsuperscript{133} and other forms of equitable discretion are listed in Burford as exemplifying the proposition that

\textit{[e]quity's discretion to decline to exercise its jurisdiction may be applied when judicial restraint seems required by considerations of general welfare. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."}\textsuperscript{134}

Equitable discretion, then, seems at least a plausible reason for departing from the usual rule of mandatory jurisdiction. But when Burford is judged against newer, post-\textit{Erie}\textsuperscript{135} principles, some mystery remains as to the rationale behind that form of abstention.

\textbf{B. Burford as an Exception to Entrenched Principles of Judicial Federalism Exemplified by \textit{Erie v. Tompkins}}

Most cases in which Burford abstention has been ordered or seriously considered have been direct challenges to state administrative action.\textsuperscript{136} Many of these cases involved challenges to state action

\begin{itemize}
\item \textsuperscript{132} Burford v. Sun Oil Co., 319 U.S. 315, 332-33 & n.29 (1943).
\item \textsuperscript{133} For a description of the Younger doctrine, see \textit{supra} part I.C.
\item \textsuperscript{134} Burford, 319 U.S. at 333 n.29 (quoting Virginian Ry. v. System Fed'n, 300 U.S. 515, 552 (1937)). Burford cites Pullman, Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941), Watson v. Buck, 313 U.S. 387 (1941), and Douglas v. City of Jeannette, 319 U.S. 157 (1943), as cases which recognized equitable discretion to refuse interference with state criminal proceedings. Burford, 319 U.S. at 333 n.29. These cases are also cited in Younger v. Harris, which crystallizes their underlying rationale into a more firm and distinct abstention doctrine. 401 U.S. 37, 46 (1971).
\item \textsuperscript{135} Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
\item \textsuperscript{136} See, e.g., Bath Memorial Hosp. v. Maine Health Care Fin. Comm'n, 853 F.2d 1007, 1013-15 (1st Cir. 1988) (challenging the state's Medicare reimbursement scheme); Meredith v. Talbot County, 828 F.2d 228, 231-32 (4th Cir. 1987) (challenging the County Planning Officer's denial of a zoning permit); Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38, 43-44 (2d Cir. 1986) (challenging the Superintendent of Insurance's refusal to pay alleged obligations under a reinsurance agreement); Friends of Children, Inc. v. Matava, 766 F.2d 35, 36-37 (1st Cir. 1985) (challenging an order by the state's Department of Social Services); Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n, 753 F.2d 857, 859-62 (10th Cir. 1985) (challenging the Commission's denial of an application for bonus allowable on an oil well); Aluminum Co. v. Utilities Comm'n, 713 F.2d 1024, 1028-30 (4th Cir. 1983) (challenging a Utilities Commission order alleging an interference with federal law); Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993, 997-98 (1st Cir. 1983) (challenging actions of the Puerto Rico Planning Board, the Director of Highway Authority, and the Secretary of the Department of Transportation); Levy v. Lewis, 635 F.2d 960, 963-64 (2d Cir. 1980) (alleging that the Superintendent of Insurance violated ERISA by terminating employee retirement benefits); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 230-34 (1st Cir. 1979) (challenging rates set by the Massachusetts Commissioner of Insurance);
\end{itemize}
brought under federal law, particularly the Due Process Clause of the Fourteenth Amendment to the Constitution. The apparent irony is that decades before Burford, at roughly the turn of the century, the Supreme Court had performed argumentative contortions, in Ex parte Young, to include such suits within the jurisdiction of the federal district courts.

The contortions were necessary because the Eleventh Amendment was read as barring suits against a state both by its own citizens and by citizens of another state. Suits to enjoin state officers from

Construction Aggregates Corp. v. Rivera de Vicent, 573 F.2d 86, 89-97 (1st Cir. 1978) (challenging an order of the State Insurance Fund of Puerto Rico); Holmes v. New York City Hous. Auth., 398 F.2d 262, 266-68 (2d Cir. 1968) (challenging, under civil rights laws, the procedures used by the Housing Authority in the admission of tenants to public housing projects).

137. U.S. Const. amend. XIV, § 1; see, e.g., Bath Memorial Hosp., 853 F.2d at 1013; Meredith, 828 F.2d at 231; Robert-Gay Energy Enters., 753 F.2d at 859; Aluminum Co., 713 F.2d at 1025; Holmes, 398 F.2d at 264.


139. The contortions took the form of creating a fiction that a state officer, enforcing state law alleged to violate federal law, does not represent the state and so is not immune, under the Eleventh Amendment, from injunctive and other coercive orders issued by federal trial courts. Id. at 159-60.

140. U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). The present-day scope of the Eleventh Amendment is complex. Despite the Eleventh Amendment's explicit limitation of immunity to states sued in federal court by citizens of other states, the Court seems to have used the Amendment as a basis for its creation of much broader immunity. In 1890, the Supreme Court determined that the Eleventh Amendment (or possibly a related immunity doctrine) extended to prohibit suits against a state by its own citizens. Hans v. Louisiana, 134 U.S. 1, 21 (1890). The law determining precisely what is a suit against a state prohibited by the Eleventh Amendment (or by the Hans doctrine if it is, in fact, a different doctrine) is extremely complicated. For a comprehensive review of the Eleventh Amendment and sovereign immunity, see Bator et al., supra note 2, at 1159-1221.

Federal suits against local governments and officials are not barred by the Eleventh Amendment. See Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890). Suits against state officials sued in their individual capacities are also not covered. Bator et al., supra note 2, at 1195. However, any suit against a state as a name party is covered. Id. at 1191. Whether suits against state officials in their official capacities are covered depends upon the nature of the claim and the nature of the relief sought. If the relief seeks recovery from the state treasury for a past wrong, the suit is deemed one against the state, although an officer is nominally the only defendant. Edelman v. Jordan, 415 U.S. 651, 663 (1974). If the relief sought against a state officer in his official capacity is a mandatory or negative order compelling the officer to comply with law in the future, the nature of the suit depends upon the source of the law alleged to have been violated. Such a suit is permitted to secure compliance with federal law. Id. at 663-67; see also Ex parte Young, 209 U.S. 123, 155-60 (1908). If, however, the basis of the claim is state law, it is deemed a suit against the state and barred. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). Finally, even if the suit is one deemed to be against the state, it still may be maintained in federal court if the state very clearly waives its Eleventh Amendment immunity or if the suit is one under federal law which expressly overrides the immunity. See generally Bator et al., supra note 2, at 1213-21 (discussing waiver and congressional abrogation of sovereign immunity).
functioning in their official capacities are, from any realistic point of view, suits against states. In *Ex parte Young*, the Court created a fiction to the contrary, laying a framework for suits challenging state action on federal grounds. Under the framework, state officers acting in violation of the Federal Constitution are to be viewed as stripped of their authority under state law, so that suits against them seeking prospective relief are not viewed as suits against the state barred by the Eleventh Amendment.\(^{141}\)

The only way a state can act directly upon the world is through its officers. Hence, the *Young* Court's analysis lacks real plausibility, particularly when it leads to the conclusion that a suit to stop a state officer from complying with the clear command of her legislature is not a suit against the state.\(^{142}\) Nevertheless, the Court applied the fiction in such cases, and its doing so was seen as necessary to meaningful enforcement of the Fourteenth Amendment against the states.\(^{143}\) Without the *Young* decision, enforcement of the Fourteenth Amendment in federal court would have been extremely limited. Certainly state officers would have been subject to none of the rights injunctions (structural and otherwise) which are now familiar parts of the American legal landscape.\(^{144}\)

*Burford* seems odd when viewed against the background of this great effort to include suits challenging state action within the jurisdiction of the federal district courts. This is particularly true in light of the fact that suits in equity were primarily, if not exclusively, the sort of suit for which *Young* carved out its exception to the Eleventh Amendment.\(^{145}\) Why, after great efforts to include suits in equity, did the Court allow their exclusion in a significant subset? *Burford* was decided at a revolutionary moment in both federalism and administrative law. As one of a series of sharp breaks with its prede-

\(^{141}\) *Young*, 209 U.S. at 159-60.

\(^{142}\) *Id.* at 174-76 (Harlan, J., dissenting).

\(^{143}\) See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (stating that the "prospective relief authorized by *Young* 'has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect'" (quoting *Edelman v. Jordan*, 415 U.S. 615, 664 (1974))); BATOR ET AL., supra note 2, at 1182 (suggesting that a contrary holding in *Ex parte Young* would have left constitutional rights with inadequate protection).

\(^{144}\) Certainly, even without *Ex parte Young*, the Fourteenth Amendment could have been used as a defense to state proceedings, as it is today. It also could have formed the incorporated predicate of damage suits by plaintiffs against state officers in their individual capacities, as it does today.

\(^{145}\) See *Young*, 209 U.S. at 161-68 (justifying its decision on the basis that the suit was one in equity, thus triggering the Court's broad equitable discretion).
cessor, the New Deal Court read the Commerce Clause as giving Congress broad powers to regulate any matter affecting the national economy in any significant way.\textsuperscript{146} Perhaps as part of an attempt to underscore the continued vibrancy of state government, the Court expressed intensified respect for the rights of states to govern in the shrinking domain which was left to them.\textsuperscript{147} Congress could regulate, but absent some basis in a federal statute or other textual source, federal courts generally were not to be law-makers.\textsuperscript{148} The background assumption was that state law governed issues left fully open by Congress and the Constitution.\textsuperscript{149}

Five years before \textit{Burford}, the Supreme Court underscored the importance of state court control over the content of state law in \textit{Erie Railroad Co. v. Tompkins}.\textsuperscript{150} According to the \textit{Erie} doctrine, federal courts are required to do everything reasonably within their power to decide state substantive issues in the way that they anticipate the state's highest court would decide them.\textsuperscript{151} It is worth noting that such state law issues can arise both in a diversity suit and in a federal question suit.\textsuperscript{152}

While anticipating state court interpretation had been more or less required of federal courts in a wide variety of cases decided before \textit{Erie},\textsuperscript{153} that case ushered in an era of heightened sensitivity

\begin{itemize}
\item \textsuperscript{146} \textit{Compare} Wickard v. Filburn, 317 U.S. 111, 118-29 (1942) (holding that under the Commerce Clause, Congress has the power to regulate the individual farmer growing wheat for his own consumption) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-43 (1937) (holding that the Commerce Clause gives Congress the power to regulate against unfair labor practices of a steel manufacturer) with Carter v. Carter Coal Co., 298 U.S. 238, 298-302 (1936) (treating manufacturing activities as not a part of interstate commerce and, therefore, not subject to regulation under the Commerce Clause).
\item \textsuperscript{147} See infra note 157 and accompanying text (reading \textit{Erie} as placing greater responsibility on the federal courts for correctly applying state law as to issues not governed by federal law).
\item \textsuperscript{148} Emphasis is on the word "generally." While \textit{Erie} stated that there was no general federal common law, a specialized federal common law survived to deal with issues strongly implicating federal interests. See Henry J. Friendly, \textit{In Praise of Erie — And of the New Federal Common Law}, 39 N.Y.U. L. REV. 383, 421 (1964) (stating that a "not insignificant" part of Justice Story's "general law" already existed under the scope of federal common law and that many other parts could be brought under its reach if "Congress thinks it desirable").
\item \textsuperscript{149} See \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 78-79 (1938); see also 19 \textsc{Wright et al., Federal Practice \\& Procedure} § 4514, at 217-18 (1982) (discussing federal common law after \textit{Erie}).
\item \textsuperscript{150} \textit{Erie}, 304 U.S. at 78-79.
\item \textsuperscript{151} See Meredith v. City of Winter Haven, 320 U.S. 228, 234-35 (1943); see also infra notes 159-63 and accompanying text (discussing the \textit{Meredith} decision).
\item \textsuperscript{152} \textsc{Bator et al., supra} note 2, at 858 n.2.
\item \textsuperscript{153} Philip B. Kurland, \textit{Mr. Justice Frankfurter, the Supreme Court and the \textit{Erie} Doctrine in Diversity Cases}, 67 YALE L.J. 187, 204-05 (1957); see also 19 \textsc{Wright et al., supra} note 149, § 4502, at nn.7-19 (examining the difference between "local" and "general" law).
\end{itemize}
to state control over the content of state law. During the term in which Burford was decided, Justice Stone, writing for the majority in Meredith v. Winter Haven, rejected abstention in the equitable suit before the Court. The Meredith opinion demonstrates the Erie regime's increased concern with federal courts accurately determining state law regardless of the jurisdictional basis of the suit:

_Erie R. Co. v. Tompkins_ . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern._

Considering solely a state's interest, however, one might have predicted that this increased emphasis on state control over state law interpretation would have lead to widespread approval of abstention whenever state law was unclear. Despite its concern with proper federal court interpretation of state law, Meredith rejected abstention as a means to this end. Indeed, of the post-Erie cases, it was Meredith which most clearly established that declining or staying jurisdiction in a federal case, in order to obtain a state court ruling, was not a permissible measure to assure state control of the content of state law. Although abstention was a completely foolproof way of assuring such control, the mandatory jurisdiction principle reflected countervailing considerations favoring the exercise of federal jurisdiction. Exercising jurisdiction over cases like Meredith involving state law, in turn, required federal court fortune-telling as to how state courts would interpret and define state law.

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154. See Kurland, _supra_ note 153, at 204-05; 19 _Wright et al., supra_ note 149, § 4503, at 21.
155. 320 U.S. 228 (1943).
156. _Id._ at 236-38. The plaintiffs in Meredith were municipal bondholders seeking equitable relief, asserting that a state statute prohibited the city from calling in the bonds without paying interest on the deferred-interest coupons. _Id._ at 229-30.
157. _Id._ at 237 (emphasis added). Note that Chief Justice Stone was one of the dissenters in Burford. Burford v. Sun Oil Co., 319 U.S. 315, 348 (1943) (Stone, J., joining in the dissenting opinion of Justice Frankfurter).
158. See Kurland, _supra_ note 153, at 213-14 (suggesting a number of solutions to problems created by _Erie_, including abstention and, most radically, abolition of diversity jurisdiction).
161. _See supra_ notes 127-29 and accompanying text (discussing the mandatory jurisdiction principle).
162. Meredith, 320 U.S. at 234.
The contrast in outcomes further sharpens because *Meredith*, like *Burford*, was a suit in equity.\(^{163}\) If equitable restraint could have been grounded merely on a policy of avoiding federal court guesses as to the meaning of unclear state law, abstention would have been required in *Meredith* as well as in *Burford*. How was *Burford* exceptional? What sort of exception did it establish to the *Erie-Meredith* doctrine? I believe it was the perception of administrative law as an unusual species of law which shaped *Burford*.

C. *Burford*’s Origins in the Developing Body of Federal Administrative Law

While a state’s interest in avoiding federal court errors as to the meaning of state law was generally insufficient to justify abstention, it sufficed in *Burford*. What tipped the scales, I believe, was the administrative nature of the state law involved in that case.

The usual legal guesswork, under what I will call the *Erie-Meredith* doctrine, was of a familiar sort. While the questions of state law were often difficult, both state and federal judges were seen as belonging to something resembling a fraternity of law and equity.\(^{164}\) Theoretically, text and precedent, not policy, drove the resolution of legal issues until the force of those sources of law was expended.\(^{165}\) A federal judge knew what state cases, statutes, and constitutional materials a state judge would find relevant in determining state law. He understood the hierarchy of precedent as seen by state judges, and he “knew how to read a case” and how to interpret a statute at least as well as his state counterpart.\(^{166}\)

The one ability of state judges that a federal judge could not mimic, however, was the *ex cathedra* infallibility of the states highest court, sitting as a body, in determining the meaning of state law. But this disparity could be remedied only at the price of requiring the federal courts to decline all cases involving unsettled issues of state law, a price the *Erie-Meredith* doctrine established as gener-

\(^{163}\) *Id.* at 228.

\(^{164}\) KARL N. LLEWELLYN, THE COMMON LAW TRADITION 17-23 (1960) (discussing steadying factors in our federal appellate courts).

\(^{165}\) See infra notes 414-23 and accompanying text (indicating that, at the time of the *Burford* decision, judges were generally viewed as finding law rather than making it). See generally HUBERT L. HART, THE CONCEPT OF LAW 121-32 (1961) (arguing that a system of legal materials — rules, principles, and policies — is only marginally open-textured and indeterminate).

\(^{166}\) CHARLES E. WYZANSKI, JR., A TRIAL JUDGE’S FREEDOM AND RESPONSIBILITY 22 (1952). “Most of the time [state law] is readily discoverable.” *Id.*
ally too high. In sum, given the general ability of federal judges to deal with state sources, the Supreme Court presumably believed that the inevitable federal court "mistakes" as to the meaning of state law were a small price to pay, in order to avoid dismantling congressionally compelled federal question and diversity jurisdiction in any case turning on unsettled state law.

These background assumptions, however, were not so obviously true with respect to the sort of state law involved in Burford: law developed and applied in administrative actions or in some very specialized varieties of state court "review" of such actions. Well before Burford's time, administrative law possessed an air of unfamiliarity, if not mystery. Those apparently platonic legal forms, the "legislative," "executive," and "judicial," in fact were always less than sharply distinct. During the formation of New Deal administrative law, these theoretically separated powers began to run together in truly perplexing ways. I believe that this intensifying disorientation contributed to the Burford Court's unwillingness to categorize the alternative Texas forum as legislative or judicial, stating instead that "[i]n describing the relation of the Texas court to the Commission, no useful purpose will be served by attempting to label the court's position as legislative or judicial ...."

Burford was written during this formative period of modern fed-

167. See Felix Frankfurter, The Task of Administrative Law, 75 U. Pa. L. Rev 614, 615 (1927) ("But administrative law is hardly yet given de jure recognition by the English-speaking bar although the term has now established itself in the vocabulary of the United States Supreme Court. Until very recently even scholars treated it as an exotic.").


The great ordinances of the Constitution do not establish and divide fields of black and white ....

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments.

Id.

169. As for the possession of legislative power by the executive branch, compare Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (early New Deal, pre-Court-packing plan case striking down § 9(e) of the National Industrial Recovery Act as an unconstitutional delegation of legislative power to the president) with Yakus v. United States, 321 U.S. 414 (1944) (late New Deal case holding that the Emergency Price Control Act's delegation of price-fixing authority to the Executive branch was constitutional). As for the distinction between legislation and adjudication, see infra notes 212-29 and accompanying text (discussing SEC v. Chenery Corp., 332 U.S. 194 (1947)). It is my contention that, in SEC v. Chenery Corp., we see the old distinction between legislation and adjudication, never completely firm, melt further before our eyes.

eral judicial review of administrative action. It presented the Court with difficulties similar to those posed by federal review of federal agencies, but here those difficulties were transposed onto the independently difficult domain of federalism. The problem for federal administrative law at the time was determining the level of deference federal courts should give to decisions of various sorts made by federal administrative agencies. The solution initially was to defer greatly, indeed nearly completely, to federal agencies' decisions of fact and of so called “mixed questions of law and fact.”

In the context of judicial federalism, this issue was viewed, initially, as one of determining how much federal courts should defer to state administrative agencies on decisions within their domain.

171. During this period, the “historical building blocks” of federal court review of federal agency interpretations of law were put into place. Walter Gellhorn et al., Administrative Law, Cases and Comments 379-80 (8th ed. 1987). It was also during this period that the seminal case on federal judicial review of federal agencies' conclusions of fact was decided. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-90 (1951) (requiring court affirmation of agency findings if supported by substantial evidence on the record as a whole).

172. The problems posed by elaborating on Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and determining the existence and scope of remaining federal specialized common law are two closely related examples. Friendly, supra note 148, at 407-09.

173. See infra notes 183-93 and accompanying text.

174. See NLRB v. Hearst Publications, Inc. 322 U.S. 111, 130-31 (1944) (holding that where the question is one of application of a broad statutory term, the agency's determination must be accepted if it has “warrant in the record” and a “reasonable basis in the law”).

175. See Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 583-84, modified, 311 U.S. 614 (1940). In contrast with Burford, Rowan expresses no explicit concern with the effect of federal litigation on state schemes for judicial review of agency action. See id.

It is possible, however, to read Rowan as concerned with that factor sub silentio. Indeed, it seems reasonable to read Rowan as requiring a very limited Burford-style abstention two years before Burford was decided. The abstention recognized in Rowan was narrow. It allowed federal courts to refuse to hear administratively complex state law claims which were pendent to federal claims entertained solely on the basis of federal question jurisdiction. See Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 614, 614-15, modifying 310 U.S. 573 (1940). Rowan, however, did not authorize federal trial courts to avoid resolution of (1) federal questions themselves turning on complex state administrative law or (2) diversity cases in which such state administrative issues arose. Only state claims before the court as pendent to federal claims were covered by Rowan. The Rowan Court's amendment of its original opinion makes it clear that it was not authorizing abstention as to nonpendent state claims. Id. It was with Burford that abstention as to federal question claims and claims made between diverse parties became the proper subject for an administrative variety of abstention. In Burford, which required abstention, both diversity and federal question jurisdiction were present. Burford v. Sun Oil Co., 319 U.S. 315, 317 (1943). Hence, it permitted the two varieties of abstention not approved in Rowan.

Thus, Rowan was a very limited Burford precursor, which also resembled a limited version of today's Pennhurst doctrine. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 103-06 (1984). Pennhurst prohibits federal suits seeking relief against state government on state law claims. See infra notes 341-49 and accompanying text. Rowan reached the subset of such claims
Finally, in *Burford* itself, the issue became whether to suspend the usual rule of federalism, non-abstention under *Erie-Meredith*, so that an administratively expert state court might have the last word on issues of state policy originally resolved in an agency.\(^{176}\) Here federalism, as usually practiced, clashed with the states' interest in having the federal courts extend respect to expert state administrative processes equal to that accorded their federal counterparts.

This Article next reviews the principles developed for federal review of federal agency determinations, and then examines the difficulties involved in applying these principles to federal court review of the decisions of state administrative agencies.\(^{177}\)

1. Federal Review of Federal Agency Determinations

Between 1941 and 1951, the Supreme Court decided the cases constituting the “historical building blocks” of the system of judicial review of decisions made by federal administrative agencies.\(^{178}\) Three of these cases were decided in 1944, within a year of *Burford*.\(^{179}\) These decisions struggle to define the appropriate judicial deference to agency determinations of law and fact. They indicate concerning pendent state claims which might disrupt state administrative processes.

It is important to stress that, as to the federal due process issue presented in *Rowan*, the Court did not suggest that the lower federal courts have no jurisdiction, but rather that they should defer greatly to the state agency's determination of fairness in determining that question. See *Rowan*, 311 U.S. at 615. In other words, I understand the modification of the original *Rowan* opinion as intended to clarify the proposition that state agency determinations may powerfully influence, but cannot completely determine, the outcome of a federal suit claiming a violation of due process.

176. In *Burford*, the state agency's decision was made before the federal suit was brought. *Burford*, 319 U.S. at 316-17. On the surface, the issues of state law before the federal court were issues of Texas statutory and case law that would have been justiciable in a Texas court. Hence, on the surface, a federal court sitting in diversity would have been required to determine these issues under the *Erie* line of cases. However, *Burford* focused on the availability of relief in a specialized state court. The Court treated this Texas court as a special part of the administrative process to which the federal courts should defer much as they would to a state agency itself. Id. at 325-26, 333-34.

177. See infra part II.C.1 (federal agency decisions); part II.C.2 (state agency decisions).

178. The “building blocks” characterization is found in GELLOHORN ET AL., supra note 171, at 379-80. These cases all deal expressly, or by inference, with the appropriateness of judicial deference to administrative decisions which go beyond pure issues of fact to involve questions of law. With the exception of *Packard*, the third of the six cases listed below, all clearly state or strongly suggest judicial deference as to some matters of statutory construction. The cases are: O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); Skidmore v. Swift, 323 U.S. 134 (1944); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941).

that at the time of Burford, the Court perceived a hazy, somehow “mixed” domain existing between pure fact-finding and pure statutory interpretation. 180 Several decades of judicial opinions and scholarship demonstrate the difficulties with the ends of this supposed continuum and with its “mixed question” middle. 181

Some very recent and impressive scholarship makes a strong case that the law and fact categories are manipulable to the point of near incoherence. 182 At the time Burford was decided, however, the Court took this middle “mixed question” ground very seriously, treating it as an area set aside for agency, as opposed to judicial, preeminence. 183 Agency preeminence was accepted by the Court and was not an issue. Instead, the live issues concerned the boundaries of this preeminence, the degree of court deference within it, and the theoretical justification for that deference. 184 The mixed question cases each involved review of a federal agency determination of whether a specific set of facts was covered by a statutory term. 185

180. See, e.g., Hearst Publications, 322 U.S. at 130-31 (noting that statutory interpretation is wholly within the province of the court but that the court’s review is more limited when the issue is one of a specific application of a broad statutory term); Gray, 314 U.S. at 411-13 (acknowledging that the dispute involved an issue other than pure fact-finding, but stating nonetheless that the agency conclusion regarding the scope of the term “producer” in the Bituminous Coal Code warranted deference).

181. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-50 (abr. student ed. 1965) (discussing cases ranging in date from 1941-64 and scholarship ranging in date from 1899-1944). Jaffe states:

The device of characterizing a question as one of fact or as “mixed” permits a court to pretend that it must affirm the administrative action if it is “supported by evidence” or is “reasonable.” But if the question is analyzed and faced as one of law the court cannot thus avoid its responsibility.

Id. at 547-48.

182. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW 96-105 (1990); see also Jaffe, supra note 181, at 546-50 (indicating that there had long been skepticism about the existence of clear-cut categories).

183. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491-92 (1947) (finding that the agency possessed discretion to determine the meaning of a labor statute as applied to a specific fact situation); Addison v. Holly Hill Food Prods., Inc., 322 U.S. 604, 614, 619 (1944) (noting that the Administrator, not the Court, had broad, but not complete, authority to define the term “area of production”); Hearst Publications, 322 U.S. at 130 (noting that Congress delegated the primary authority for defining “employee” to the NLRB); Gray, 314 U.S. at 412-13 (acknowledging that the determination of whether an exemption from the requirements of the Bituminous Coal Code was warranted belonged solely to the agency implementing the statute).

184. See Packard Motor Car Co., 330 U.S. at 491-92; see also Holly Hill, 322 U.S. 611-18 (identifying limits on an agency’s discretion to apply statutory terms).

185. See O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 505-06 (1951) (deferring to an agency determination of whether injuries incurred in attempting to rescue persons not within the employer’s service constituted “accidental injury or death arising out of and in the course of employment,” for purposes of the Longshoremen’s and Harbor Worker’s Compensation Act); Hearst
In the well-known case of *NLRB v. Hearst Publications, Inc.*, the question was whether certain "newsboys," who sold newspapers on the streets and who had a complicated factual and contractual relationship with the publisher, were employees within the meaning of the National Labor Relations Act. In determining the proper standard of review to apply, the Court categorized agency decisions as involving either pure issues of fact, pure issues of statutory interpretation, or "mixed" issues. The latter, the sort of issue before the Court in *Hearst Publications*, involved the application of broad statutory terms to specific fact situations. The Court concluded that nearly complete deference was due agency conclusions of fact, but that broad issues of statutory interpretation were for the courts to resolve, giving due weight to the agency's conclusions. The Court also recognized, however, a middle ground in which the agency's limited interpretations of law were to be given great deference:

> [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [The agency's decision on such a matter] is to be accepted if it has warrant in the record and reasonable basis in law.

The scope of this middle domain proved difficult to ascertain, producing many judicial and scholarly explanations for deference to what, at a minimum, amounted to an agency's interpretation of stat-

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*Publications*, 322 U.S. at 113, 120-21 (deferring to an agency determination of whether newsboys were "employees" for purposes of the National Labor Relations Act); *Gray*, 314 U.S. at 411 (deferring to an agency determination of whether a company was a "producer" of coal and thus qualified for an exemption under the Bituminous Coal Code).

186. 322 U.S. 111 (1944).
187. Id. at 111-21.
188. Id. at 130-31.
189. Id.
190. Id.
191. Id. (citations omitted). The Court prefaced its declaration by observing:

> In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of [the agency].

Id. (citations omitted).
utes defining its own powers. During the period following *Hearst Publications*, the Court itself never adopted a clear explanation of this category and its special treatment. There is a great deal of confusion in the Supreme Court opinions of this period as to whether judicial deference to agency determinations of "mixed questions" was truly based on the inseparable nature of their legal and factual components or was based on policies having nothing to do with inseparability.

The prevalent view today, exemplified by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, is that the legislature's use of broad statutory terms can best be viewed as a delegation to the agency to decide the details of its definition within reasonable limits. Some *Burford*-era Supreme Court opinions suggest a rudimentary acceptance of the delegations theory as justification for deference to "mixed question" determinations, a position supported by the most advanced scholarship of the time.

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192. For a scholarly explanation of judicial deference to agencies' interpretation of their statutory mandates, see Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 473-76 (1950); JAFFE, *supra* note 181, at 548-50.

193. *Hearst Publications* suggests that Congress delegated to the NLRB some of the power necessary to definitively interpret the statutory term "employee." See NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (finding that it was not necessary for the Court to make a "completely definitive limitation around the term 'employee' because that task had been assigned to the agency created by Congress to administer the Act"). In *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the Court deferred to an agency's application of the term "scope of employment," calling it a question of fact but recognizing that that characterization was an oversimplification. *Id.* at 507-08. The opinion in *O'Leary*, however, never suggested that its theory was based on congressional delegation of some definitive power to interpret the statutory term. Indeed, Justice Frankfurter's opinion seems, in Jaffe's words, to "pretend" conveniently that the issue is one of fact. See JAFFE, *supra* note 181, at 547-48.


195. *Id.* at 842-45 (holding that a reviewing court should first look to see if Congress has provided a definition of a particular statutory term, and if it finds that it has not, it must only decide whether the agency's construction of the statute is permissible). The Court seems to have occasionally taken this position regarding "mixed questions" as early as 1944. See *supra* notes 176-78 and accompanying text (discussing the *Hearst Publications* Court's treatment of court deference to agency determinations of "mixed questions"). Indeed, on one early occasion, the Court seems to have deferred to generalized agency statutory interpretations. See SEC v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).

196. For cases and scholarly commentary contemporaneous with *Burford* and accepting the delegation view or something approximating it, see *Hearst Publications*, 322 U.S. at 130 ("It is not necessary in this case [for us] to make a completely definitive limitation around the [statutory] term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act"); *O'Leary*, 340 U.S. at 507-08; *Gray v. Powell*, 314 U.S. 402, 411-12 (1941) (using the word "delegate").

197. See, e.g., JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 144 (1938) ("The interesting problem as to the future of judicial review over administrative action is the extent to which judges
Indeed, the 1947 SEC v. Chenery Corp. decision, discussed below, indicates that within four years of Burford, the Court officially accepted the view that agencies could be empowered to definitively determine, within reasonable limits, the meaning of the very statutes which granted them authority. Authority to make such determination transparently involves a delegation of the power to resolve pure issues of statutory law. Regardless of stated rationale, however, there are two key points. First, when Burford was decided, the Court was in the process of creating a body of rules of review requiring great deference to agency decisions of "mixed questions." Second, these decisions are best understood as reflecting a sense, if not a fully conscious understanding, that the agency possessed some limited delegated power to make law via statutory interpretation in adjudications.

2. Transposing Federal Administrative Review Jurisprudence onto the Domain of Federal/State Relations

It is my contention that, in applying the rules developed for review of federal agencies' decisions to decisions made by state administrative processes, the Burford Court saw itself as confronted with a choice between two less than perfect alternatives. One alternative involved denying the states the full benefits of administrative processes which were permitted the federal government. The other alternative forever denied a federal forum to at least some plaintiffs over whose claims federal judicial jurisdiction would normally lie.

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198. 332 U.S. 194 (1947); see infra notes 212-31 and accompanying text.
199. 332 U.S. at 207-09. The SEC reached the apparently generalized conclusion that the words of a federal statute permitting it to approve only fair and equitable reorganizations did not allow it to approve reorganizations in which corporate insiders participated as buyers. Id. at 207-08. This "interpretation," unlike the interpretation in Hearst Publications, apparently had implications for many future parties as well. What makes Chenery interesting is that the Court made clear that the agency decision made new law. In other words, it was not an interpretation at all but the exercise of delegated authority permitted but not necessarily required by the words "fair and equitable."
200. Antonin Scalia, Judicial Deference to Administrative Interpretation of Law, 1989 Duke L.J. 512-13 (indicating that the Court's implicit acceptance of Chevron-like deference extends as far back as Burford's era).
201. Burford made it reasonably clear that at no stage was the lower federal court to review the action of the Commission or the specialized state court, stating: [If lower federal courts abstain,] judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law,
In order to understand why the Supreme Court saw the choice in these terms, two matters must be explored. The first matter concerns developments in claim preclusion which prohibited an abstaining federal court from rehearing a case once a state court (as opposed to a state agency) had decided it. The second is the increased confusion generated by post-New Deal separation of powers cases calling into question the distinctions between courts and administrative agencies.

a. *Prentis v. Atlantic Coast Line Railway* and state/federal claim preclusion

In *Prentis v. Atlantic Coast Line Railway*, the Court required that federal suits challenging legislative or administrative action be postponed until the completion of the legislative or administrative process. While this rule has been eroded somewhat, another aspect of *Prentis* remains vital to an understanding of *Burford*. In *Prentis* the Court made it clear that although state administrative remedies must be exhausted before a federal suit could be maintained, the same was not true of state judicial remedies. The Court’s reasoning was clear; requiring a party to exhaust state judicial remedies before bringing a federal suit was a contradictory requirement; presumably there could never be a federal suit after exhaustion of judicial remedies because claim preclusion would bar dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here.


203. *Id.* at 226-30. *See generally BATOR ET AL., supra* note 2, at 1347-50 (discussing the exhaustion requirement with regard to state nonjudicial remedies and particularly to administrative remedies).

204. This federal common law rule, often described as one requiring exhaustion of administrative remedies, has been largely cast aside by cases viewing § 1983 actions as overriding it. *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963). A more limited in scope (deference only to important judicial-style administrative proceedings) doctrine resembling an exhaustion requirement has been restored in the form of a variety of *Younger* abstention. *Younger* originally prohibited federal court interference with certain important judicial proceedings brought by a state in state court. *Younger v. Harris*, 401 U.S. 37, 41-42 (1971) (shielding state criminal proceedings from a federal injunction); *Judice v. Vail*, 430 U.S. 327, 333-34 (1977) (shielding important state civil proceedings from a federal injunction). *Younger* has been extended to judicial-style administrative proceedings brought by the state. *See Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626-29 (1986).

205. *Prentis*, 211 U.S. at 228.
relitigation of a case adjudicated by the state courts. Precluding such suits was, however, not an acceptable alternative. It would decimate diversity jurisdiction. More significantly, it would undermine the Court's achievement that same term in Ex parte Young. Its acrobatically flexible reading of the Eleventh Amendment, which allowed federal courts to use injunctions to keep the states within the limits of the Fourteenth Amendment.

On the surface, it seems surprising that the administrative (i.e., nonjudicial) remedy that the Prentis Court required the railroad to exhaust before bringing federal suit was an appeal from the decision of an agency to the Virginia Supreme Court. Justice Holmes, writing for the U.S. Supreme Court in Prentis, noted that the Virginia Supreme Court was not asked to perform its usual judicial function but instead, to substitute its policy judgment for the agency's as to the most desirable content of a rule regulating railroad rates:

But we think it ... plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court ... .

Proceedings legislative in nature are not proceedings in a court [to which claim preclusion would attach] ... no matter what may be the general or dominant character of the body in which they may take place.

This Court pronouncement is in stark contrast with its refusal, nearly four decades later in Burford, to determine the nature of the body (nominally a court) to which review of all Texas Railroad Commission decisions had been entrusted:

In describing the relation of the Texas court to the Commission, no useful purpose will be served by attempting to label the court's position as legislative, ... or judicial ... suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry.

206. Id. at 226-27.
207. 209 U.S. 123 (1908).
208. See supra notes 138-44 and accompanying text (discussing the Ex parte Young decision).
210. Id. at 226. The Prentis Court further stated, "A judicial inquiry investigates, declares and enforces liability as they stand on present or past facts ... . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter ... ." Id.
Why did the *Burford* Court conclude that "no useful purpose would be served by attempting to label the state court as legislative or judicial?" That is precisely the task the Supreme Court undertook in the pre-New Deal *Prentis* case: it made a determination of whether a body which was normally and nominally a court had functioned instead as a policy-making agency. Why not in *Burford*?

I believe the answer lies, at least in part, with developments in federal administrative law which left the federal courts confused about the nature of adjudication and hence, less sure about the meaning of "court" versus agency. This confusion, described immediately below, was more pronounced as to state courts, which unlike federal courts, are not defined in the U.S. Constitution.

b. Uncertainty about which state institutions are "courts" protected from federal court "review" by claim preclusion

In some of the cases dealing with mixed questions of law and fact, federal agencies adjudicating disputes were seen as exercising a new sort of power. They were beginning to be viewed as possessing delegated policy-making authority to define many statutory terms as they applied them.212 The Court's 1947 opinion, *SEC v. Chenery Corp.*,213 most clearly shows both the somewhat tentative acceptance of the newer view and just how haltingly the Court abandoned the old framework in which judicial bodies were seen as law-finders, not law-makers. In *Chenery*, the Court affirmed the SEC's application of a statutory standard requiring that reorganization plans for public utility holding companies be "fair and equitable."214 The SEC had condemned one such plan solely because management had purchased a large amount of stock of the precursor company during the period of its reorganization and, under the plan of reorganization, such stock was to be treated on a parity with such shares held by others.215

This interpretation of "fair and equitable" rested on a policy decision made by the agency, not the finding of some preexisting mean-

212. See *NLRB v. Hearst Publications, Inc.* 322 U.S. 111, 130 (1944); *supra* notes 183-93 and accompanying text (indicating that *Burford*-era federal courts deferred to federal agency determinations of "mixed questions" of law and fact).

213. 332 U.S. 194 (1947). In fact, *Chenery* seems to have taken deference beyond the "mixed question" realm into that of pure legal interpretations. *See supra* notes 198-200 and accompanying text.

214. 332 U.S. at 197-99, 209.

215. *Id.* at 197.
ing. The Court, however, was obviously uncomfortable with the agency's creating, in an adjudication, a new rule which adversely affected property acquired before the rule was announced. This discomfort gives the opinion its wonderful, almost schizoid quality. It sometimes speaks as if the agency were acting in the classically judicial manner of applying preexisting law but, at others times, it speaks as if the agency had attempted to make new law. The Court ultimately acknowledged that the SEC made new law, and approved the agency's decision for reasons that are highly relevant to Burford:

The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. . . . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.

Recall the Burford Court's statement: "In describing the relation of the Texas court to the Commission, no useful purpose will be served by attempting to label the court's position as legislative . . . or judicial." I believe that Chenery's statements about law-making in the context of judicial-style proceedings cast a clarifying light on the nearly contemporaneous Burford Court's unwillingness to determine the status of the Texas court. If federal agencies, not limited by Article III's strict constraints on the scope of federal court power, could make new law in the process of adjudicating a case, any purely functional distinctions between courts and agencies had become highly attenuated.

Surely a federal agency having the characteristics of either the Texas Railroad Commission or the Travis County Court would not be a full-fledged federal court, for it would not meet the tenure, 

216. Id. at 199. Ultimately the Court described its determination as based upon a new principle arrived at, for the first time, in the proceedings before the agency. Id. at 207.
217. See id. at 202-03.
218. See id. at 212-14 (Jackson, J., dissenting).
219. Chenery, 322 U.S. at 207 (citation omitted). The Court continued:

    The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience [and] appreciation of the complexities of the problem . . . . Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

Id. at 209.
salary, and perhaps other requirements of Article III. But Article III does not define, even for federal purposes, which state institutions are "courts." Consequently, I believe the U.S. Supreme Court was uncomfortable in disputing Texas's characterization of the Travis County District Court as a state "court," whose judgment presumably was entitled to preclusive effect in later federal lawsuits. What federal law principle could the Supreme Court use to distinguish state courts from state agencies? Certainly law-making versus law-applying no longer provided a sure litmus test.

Later in this Article, I explore whether the Supreme Court made a mistake in declining to adopt a Prentis-style approach in Burford. There the question will be whether, for purposes of federal abstention, the Court should recharacterize as "administrative" some processes denominated "judicial" by a state. For now I emphasize that Burford rejected this approach.

Once a Prentis-style analysis was rejected in Burford, the choice facing the Court was difficult indeed. The federal district court could review the decision of the Railroad Commission without benefit of the input of the specialized Texas Court. The problem with this approach was that it would effectively deprive Texas of the use of the expert state institution to which final policy-making authority had been delegated. Thus federal courts would interrupt state policy-making processes under circumstances in which federal agencies would be protected from judicial intervention by the general requirement that policy-making end before the commencement of judicial review.

Aside from the affront to federalism that would have been involved in the exercise of federal jurisdiction in Burford, there was a potential separation of powers problem under Article III of the Constitution as well. Burford assumes that the specialized Texas court might have made law and policy in a way going beyond that involved in ordinary statutory interpretation. Consequently, Article III might well have prohibited a federal district court from attempting

222. Article III provides that federal judges shall have lifetime tenure and receive compensation, which may not be decreased during their time in office. Id. art. III, § 1. Additionally, Article III courts are required to refuse nonjudicial-style business. Keller v. Potomac Elec. Power Co., 261 U.S. 428, 442-45 (1923).
223. See infra notes 581-97 and accompanying text.
224. See supra notes 210-12 and accompanying text (comparing Prentis with Burford).
226. Id. at 327.
to replicate the state court’s result, since doing so would have re­
quired a court of the United States to function as a legislative
organ. 227

In Burford, the federalism and separation of powers difficulties
just discussed made the exercise of federal trial jurisdiction seem an
unacceptable alternative. Consequently, the Supreme Court chose a
second alternative: the creation of Burford abstention. A third alter­
native in fact existed. The Court could have made an exception to
the usual issue and claim preclusion rules, thereby allowing the par­
ties to return to federal court for purposes of relitigating any federal
issues resolved by the state court. Such adjustment to the usual
rules could have been justified as necessary to honoring Congress’s
will in granting jurisdiction. It would have made Burford abstention
a “postponement” as opposed to a relinquishment of federal juris­
diction. Such a compensatory adjustment was made roughly twenty
years after Burford, but only for cases involving Pullman abstention,
a limitation never justified by the Court. 228

The original Burford doctrine, as previously described, is the
product of these very specialized concerns and was limited to corre­
spondingly specialized circumstances involving the substantial posi­
bility of federal court interference with a state court which was
serving as part of the state’s administrative process. 229 Below we see
how Burford has broadened, both in Supreme Court dictum and in
action in the lower federal courts.

IV. THE BURFORD DOCTRINE TODAY

The few Supreme Court decisions dealing with Burford abstention
present a clouded picture. Consequently, that doctrine has re­
ceived its real shape in the nearly one thousand lower federal court
cases referring to or discussing it. 230 That shape has varied greatly

Perhaps the Burford Court was prescient; the shuttling back and forth in Pullman cases has been
widely criticized as very expensive. See id. at 425 (Douglas, J., concurring); BATOR ET AL., supra
note 2, at 1363-64.
229. Burford, 319 U.S. at 333-34.
When I began the research for this Article in the summer of 1990, I read all of the approximately
270 Supreme Court and United States Court of Appeals cases mentioning Burford in any way. Of
these, approximately one hundred seemed potentially interesting in that they either contained a
holding as to the scope of Burford abstention or dictum which seriously attempted to define it. I
have updated this Article to include any interesting appellate court cases decided in the interim.
among the circuits. Subsection A, immediately below, presents the broad outlines of Burford abstention's variation in the lower federal courts. Subsection B introduces the Supreme Court cases, particularly the recent decision in New Orleans Public Service, Inc. v. Council of New Orleans,231 laying the groundwork for Section VI of this Article, which explores, descriptively and critically, various aspects of the Burford doctrine as it operates today.

A. Burford's Shape in the Lower Federal Courts

As seen by the lower federal courts, the requirements for Burford abstention have run the extremes from the demanding to the lax. Most opinions discussing the doctrine acknowledge the Supreme Court's clearly stated policy that such abstention is to occur only in extraordinary circumstances.232 Despite this, some courts of appeals have affirmed federal district court decisions to abstain in cases not involving state administrative agencies, based upon the presence of complex and unclear state law.233 At the other end of the continuum is the Court of Appeals for the Ninth Circuit, which narrowly limits the doctrine to cases closely resembling the facts of the original Burford case.234 In that circuit, Burford abstention applies only to cases

232. For general statements of this policy, see County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959) (acknowledging that the doctrine is an extraordinary and narrow exception to mandatory jurisdiction); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (allowing abstention only in "exceptional circumstances"). For cases which both make such statements and consider the application of Burford abstention, see Gordon v. Luksch, 887 F.2d 496, 497 n.2 (4th Cir. 1989) (dismissing Burford in a footnote); Grimes v. Crown Life Ins. Co., 857 F.2d 699, 703 (10th Cir. 1988); Cannady v. Valentin, 768 F.2d 501, 503 (2d Cir. 1985); Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n, 753 F.2d 857, 859-60 (10th Cir. 1985); West v. Village of Morrisville, 728 F.2d 130, 135 (2d Cir. 1984); Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746 (3d Cir. 1982); Ramos v. Lam, 639 F.2d 559, 564 (10th Cir. 1980); Hanna v. Toner, 630 F.2d 442, 445 (6th Cir. 1980); Wynn v. Carey, 582 F.2d 1375, 1380 (7th Cir. 1978); Canton v. Spokane Sch. Dist. #81, 498 F.2d 840, 845 (9th Cir. 1974); Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n, 465 F.2d 237, 242 (3d Cir. 1972); Urbano v. Board of Managers, 415 F.2d 247, 256 (3d Cir. 1969).
233. See, e.g., United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 484-85 (5th Cir.) (citing Thibodaux in affirming the district court's abstention in a diversity case and advising the parties to seek state declaratory relief on the meaning of exculpatory clauses in insurance contracts), cert. denied sub nom., Paul Revere Life Ins. Co. v. First Nat'l Bank, 377 U.S. 935 (1964); Williams v. Hott Shoppes, Inc. 293 F.2d 834, 841-84 (D.C. Cir. 1961) (stating that conflict with a state administrative agency is not sine qua non for application of Burford — conflict with Virginia's legislative policy of racial segregation was sufficient); Cobb v. City of Malden, 202 F.2d 701, 703-04 (1st Cir. 1953) (citing Burford and other unclear law as reasons for abstaining as to pendnet state law issues involving the city's alleged impairment of public school teachers' contracts).
234. See supra note 114 and accompanying text.
in which appeals from a state administrative agency have been concentrated in a specialized state court and in which exertion of federal jurisdiction before such state court has spoken might disrupt the formation of state policy. 235

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. 236 Most courts have continued to apply Burford to cases in which scrutiny of state administrative agency action is sought, often suggesting that Burford has no application beyond such a context. 237 However, some courts seem to use “administrative” in an extremely broad, almost meaningless, sense. 238 A few others seem to dispense entirely with a re-

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235. See Tucker v. First Md. Sav. & Loan, Inc., 942 F.2d 1401 (9th Cir. 1991); Kirkbride v. Continental Casualty Co., 933 F.2d 729, 734 (9th Cir. 1991); Privitera v. California Bd. of Medical Quality Assurance, 926 F.2d 890 (9th Cir. 1991).

Unlike the Ninth Circuit, other circuits stress the presence of a specialized reviewing court as an important, but not controlling, factor in abstention analysis. See Nucor Corp. v. Nebraska Pub. Power Dist., 891 F.2d 1343, 1348 (8th Cir. 1989), cert. denied, 498 U.S. 813 (1990); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233 (1st Cir. 1979); see also Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 903 (6th Cir. 1983).

236. See Bilden v. United Equitable Ins. Co., 921 F.2d 822, 825 (8th Cir. 1990); Nucor, 891 F.2d at 1348 (refusing to abstain on Burford grounds where there was no challenge to a regulatory commission and no centralized state judicial review of agency decisionmaking); Hanlin Group, Inc. v. Power Auth., 703 F. Supp. 305, 308-10 (S.D.N.Y. 1989) (stating that the application of Burford depends on “many factors [with] no one criterion being dispositive”), aff'd mem., 923 F.2d 844 (2d Cir. 1990). For a case describing a special formula, see Silverman v. Barry, 727 F.2d 897, 903 n.4 (D.C. Cir. 1984), which stresses the sensitivity of state policy as the traditional reason for federal court abstention.

237. See, e.g., Alliance of Am. Insurers v. Cuomo, 854 F.2d 591, 601 (2d Cir. 1988) (refusing to apply Burford abstention where there was no challenge to a state administrative order); Meredith v. Talbot County, 828 F.2d 228, 232 (4th Cir. 1987) (concluding that Burford abstention is appropriate only where administrative determinations subject to adequate judicial review are present); Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n, 753 F.2d 857, 860 (10th Cir. 1985) (concluding that Burford abstention is appropriate where there is adequate state court review of an administrative order); Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 903 (6th Cir. 1983) (concluding that Burford abstention is justified only where review of an administrative order would disrupt a complex regulatory scheme); First Am. Bank & Trust Co. v. Ellwein, 474 F.2d 933, 935 (8th Cir. 1973) (concluding that Burford abstention is appropriate where there is adequate state court review of an administrative order); Food Fair Stores, Inc. v. Food Fair, Inc., 177 F.2d 177, 185 (1st Cir. 1949) (concluding that Burford abstention is not warranted where the federal court is not required to determine state policy governing administrative agencies); see also Taffett v. Southern Co., 930 F.2d 847, 854 (11th Cir. 1991) (concluding that Burford abstention is not appropriate where a federal court would not be passing judgment upon an agency decision), vacated, 958 F.2d 1514 (11th Cir.), cert. denied, 113 S. Ct. 657 (1992); Nucor, 891 F.2d at 1349 (concluding that Burford abstention is not warranted where the challenge is not to a decision of an independent regulatory agency).

238. See, e.g., Planned Parenthood League v. Bellotti, 868 F.2d 459 (1st Cir. 1989). In Bellotti, the court was willing to find Burford applicable even though the state “agency” in question was the state judiciary, reasoning that “[t]he core concern here is a federal court’s responsibility
quirement that a case appropriate for Burford abstention have any connection with state “administrative” processes.\textsuperscript{239}

Many of the cases retaining some requirement of an “administrative” element nevertheless omit Burford’s arguably supplemental requirement that the doctrine apply only where review has been concentrated in a special, expert, and potentially policy-making court.\textsuperscript{240} Other cases retaining an administrative decision component require, in addition, that the local law and policy before the federal court have an unclear meaning.\textsuperscript{241} Some stress the peculiarly “local” nature of state law issues before the federal court.\textsuperscript{242} Zoning\textsuperscript{243} and to avoid usurping a state’s authority to supervise its own administrative body, in this case the state judiciary as it implements regulations of minors’ abortions.” \textit{Id.} at 464; see also DuBroff v. DuBroff, 833 F.2d 557, 561-62 (5th Cir. 1987) (ordering Burford abstention in an ex-wife’s suit against her former husband alleging violations of RICO and federal securities laws on the basis that “there is perhaps no state administrative scheme in which federal court intrusions are less appropriate than domestic relations law”); Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1194-95 (1st Cir. 1979) (ordering abstention in an antitrust suit brought by a class of licensed physicians against Blue Shield, where the only administrative connection was the contract between the physicians and Blue Shield, which was subject to approval of the state insurance commissioner); Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3, 13 (1st Cir. 1977) (ordering Burford-Thibodaux abstention in a consumer suit against an insurer for fraud out of concern that “recognizing a cause of action for the recovery of past insurance premiums would affect the state’s ratemaking machinery and policies”).

\textsuperscript{239} See, e.g., West v. City of Morrisville, 728 F.2d 130, 134-35 (2d Cir. 1983) (involving the question of whether an administrative order, not directly challenged, prevailed over a village charter); Pineman v. Oechslin, 637 F.2d 601, 602 (2d Cir. 1981) (involving state employees who alleged that a Connecticut statute governing state employee benefits violated the Contracts Clause of the United States Constitution); Smith v. Property & Liab. Ins. Co., 629 F.2d 757, 758-61 (2d Cir. 1980) (relying on Thibodaux to abstain in a diversity action brought by a beneficiary to recover on an insurance policy); Brown v. First Nat’l City Bank, 503 F.2d 114, 118 (2d Cir. 1974) (stating that a challenge to New York’s banking statute was a proper case for Burford abstention, although no agency determination or administrative scheme was involved); United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 484 (5th Cir.) (relying on Thibodaux to abstain in a challenge involving unclear state law, but no agency), cert. denied sub nom., Paul Revere Life Ins. Co. v. First Nat’l Bank, 377 U.S. 935 (1964).

\textsuperscript{240} See, e.g., Brandenburg v. Seidel, 859 F.2d 1179, 1192 n.17 (4th Cir. 1988); Browning-Ferris, Inc. v. Baltimore City, 774 F.2d 77, 80 (4th Cir. 1985). But see Educational Servs. v. Maryland State Bd. for Higher Educ., 710 F.2d 170, 173-74 (4th Cir. 1983) (describing the provision of specialized state court review as “the salient feature of Burford” and suggesting that it was a requirement for Burford abstention).

\textsuperscript{241} See, e.g., Rogers v. Okin, 738 F.2d 1, 5 (1st Cir. 1984) (finding that Burford abstention did not apply where the certification process resulted in an unambiguous statement of the relevant state law); see also Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 903, 905-06 (6th Cir. 1983) (stressing the disruptive effects of an “erroneous federal court decision as to state law”); Hanlin Group, Inc. v. Power Auth., 703 F. Supp. 305, 309 (S.D.N.Y. 1989) (citing Burford in support of the decision to abstain and stressing that “when a statutory standard lends itself to variation in its application, litigation regarding such statute should not be entertained in a federal forum”), aff’d mem., 923 F.2d 844 (3d Cir. 1990).

\textsuperscript{242} See Browning-Ferris, 774 F.2d at 79; J-R Distrib., Inc. v. Eikenberry, 725 F.2d 482, 486
insurance regulation are often involved in such cases. Despite the wide variation of the Burford doctrine in the lower federal courts, there is broad agreement that its use is inappropriate in certain circumstances. First, a federal statutory preemption attack against a state regulatory scheme is an unlikely candidate for Burford abstention. Indeed, some circuits appear to have adopted a per se rule prohibiting abstention under these circumstances. Second, many cases suggest that federal courts should require a greater showing of need for Burford abstention in suits in which federal rights are asserted, as opposed to typical diversity suits. Some cases also suggest that a plaintiff's claimed denial of a non-


246. See, e.g., American Petrofina Co. v. Nance, 840 F.2d 840, 842 (10th Cir.), modified, 856 F.2d 128 (10th Cir. 1988).

economic constitutional right weighs heavily or perhaps decisively against application of *Burford.* Some such rights may enjoy more protection from abstention than others. For example, at least one court has suggested that *Burford* abstention is never an appropriate response to a federal suit raising substantial questions about the validity of state action under the First Amendment.

Despite statements that a federal district court possesses great discretion in determining whether to abstain under *Burford,* federal appellate courts do reverse abstention decisions of trial courts, both decisions to abstain and decisions not to abstain. Typically, reversals come when lower courts make mistakes about the basic shape of the doctrine as recognized in their particular circuit.

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249. Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 534 (3d Cir 1988); see also Ripplinger v. Collins, 868 F.2d 1043, 1049 n.5 (9th Cir. 1989) (stating that “[a] case involving a first amendment challenge to a state statute is unlikely to implicate purely local issues that the state courts may be especially competent to deal with”); J-R Distrib., Inc. v. Eikenberry, 725 F.2d 482, 487 (9th Cir. 1984) (stating that “abstention is generally inappropriate when first amendment rights are at stake”), rev’d on other grounds sub nom., Brockett v. Spokane Arcades, 472 U.S. 491 (1985).

250. See, e.g., Friends of Children, Inc. v. Matava, 766 F.2d 35, 37 (1st Cir. 1985) (stating that the “decision about whether to abstain, although circumscribed, remains primarily up to the district court”).

251. For cases where the appellate court reversed the trial court’s decision to abstain, see Tucker v. First Md. Sav. & Loan, Inc., 942 F.2d 1401 (9th Cir. 1991); Property & Casualty Ins. Ltd. v. Central Nat’l Ins. Co., 936 F.2d 319 (7th Cir. 1991); Trailer Marine Transp. Corp. v. Rivera-Vazquez, 931 F.2d 961 (1st Cir. 1991); Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), vacated, 958 F.2d 1514 (11th Cir.), cert. denied, 113 S. Ct. 657 (1992); Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991); University of Md. v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991).


252. See, e.g., Tucker v. First Md. Sav. & Loan, 942 F.2d 1401, 1405 (listing the three factors required to be present for *Burford* abstention to apply in the Ninth Circuit). The decision by the district court as to whether a particular case meets the traditional abstention requirements is a matter of law, reviewed de novo by the court of appeals. Peat Marwick, 923 F.2d at 270; see also Kirkbride v. Continental Casualty Co., 933 F.2d 729, 734 (9th Cir. 1991) (recognizing that “the district court must exercise its discretion within the narrow and specific limits prescribed by the *Burford* abstention doctrine” but reversing the district court’s decision to abstain for lack of one of the elements necessary to *Burford* abstention in the Ninth Circuit); 19 WRIGHT ET AL., supra note 149, § 4507, at 106-12 (asserting that the determination of state law is a legal question and
When a federal district court uses the general Burford formula prescribed by its circuit, the court of appeals generally defers to its decision. 253 Such deference often occurs when a district court has concluded, in the context of a state regulatory matrix, that there is or is not an undue risk of disrupting the regulatory scheme. 254 Presumably, the local federal courts are best situated to make discrete distinctions about the content of traditional state law. Accordingly, appellate courts perceive the district courts as especially competent to ascertain the risk of error and consequent disruption when state law takes particularly complex and locally odd forms, especially the forms of administrative law. 255

Lower federal courts almost unanimously take the position that Burford abstention results in a dismissal of the case, which normally will preclude its later relitigation in the federal courts. 256 Burford generally has been contrasted with Pullman in this respect. 257 Under Pullman abstention, the federal case is stayed pending resolution of state issues in state court. 258 As discussed previously, in Pullman cases, the normal rules of claim preclusion have been sus-

that while the considered opinion of a district judge who is experienced in the law of a particular state may command respect of an appellate court, a party is nevertheless entitled to meaningful review of that decision).

253. Once the court of appeals determines that the requirements for Burford have been met, the district court's decision is given deference and reviewed only for abuse of discretion. See Kirkbride, 933 F.2d at 733-34; Peat Marwick, 923 F.2d at 270.

254. The Supreme Court has taken a complex and arguably vacillating position on the degree of deference a superior federal court should display toward an inferior federal court's determination of state law. Compare Salve Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991) (concluding that a court of appeals should review a district court's determination of state law de novo) with Bishop v. Wood, 426 U.S. 341, 346 (1976) (stating that the Supreme Court may accept the appellate court and district court's interpretation of state law "even if an examination of the state-law issue without [guidance from the district and appellate courts] might have justified a different conclusion") and Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 (1956) (stating that "special weight" should be given to the district court's interpretation of state law).

255. See supra note 253.

256. See, e.g., American Bank & Trust Co. v. Dent, 982 F.2d 917, 922 n.5 (5th Cir. 1993); Brandenburg v. Seidel, 859 F.2d 1179, 1195 n.18 (4th Cir. 1988); Griffin Hosp. v. Commission on Hosps. & Health Care, 782 F.2d 24, 25 n.1 (2d Cir. 1986); Bob's Home Serv., Inc. v. Warren County, 755 F.2d 625, 628 (8th Cir. 1985); Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n, 753 F.2d 857, 862 n.5 (10th Cir. 1985); Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 906 (6th Cir. 1983); Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 526 (11th Cir. 1983); Isthmus Landowners Ass'n v. California, 601 F.2d 1087, 1090 (9th Cir. 1979); Baltimore Bank for Coops. v. Farmers Cheese Coop., 583 F.2d 104, 108 (3d Cir. 1978); Construction Aggregates Corp. v. Rivera de Vincenty, 573 F.2d 86, 89 (1st Cir. 1978).

257. See American Bank & Trust, 982 F.2d at 922 n.5; Griffin Hosp., 782 F.2d at 25 n.1; Isthmus Landowners Ass'n, 601 F.2d at 1090; Construction Aggregates, 573 F.2d at 89-90.

258. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501-02 (1941); see also BATOR ET AL., supra note 2, at 1375-78 (discussing procedural consequences of abstention).
pended to allow return to the federal court for litigation of federal legal issues involved in the case.\textsuperscript{259} Generally no such flexibility has been shown in cases involving \textit{Burford} abstention. These cases are usually dismissed in favor of litigation in the state courts, which is in turn preclusive of later federal actions as to the same claims or issues.\textsuperscript{260} It is possible, however, that the Court recently has recognized a subset of \textit{Burford} abstention having procedural consequences identical to those under \textit{Pullman} abstention.\textsuperscript{261}

\begin{itemize}
\item B. An Initial Look at the Supreme Court Cases, Particularly
\item New Orleans Public Service, Inc. v. Council of New Orleans
\end{itemize}

While references to \textit{Burford} are found in many Supreme Court opinions, only three later opinions deal with the \textit{Burford} doctrine in any significant detail. However, two of these opinions, \textit{Alabama Public Service Commission v. Southern Railway Co.} (1951)\textsuperscript{262} and \textit{Colorado River Water Conservation District v. United States} (1976),\textsuperscript{263} along with \textit{Burford} itself (1943), provide little guidance as to the scope and reach of \textit{Burford} abstention.\textsuperscript{264} A third post-\textit{Burford} case, \textit{New Orleans Public Service, Inc. v. Council of New Orleans} (1989)\textsuperscript{265} clarifies some aspects of \textit{Burford}, but adds to the uncertainty in other ways. While some of this certainty has survived last term’s \textit{Ankenbrandt}\textsuperscript{266} case, some has been lost.\textsuperscript{267} Immediately below, these main Supreme Court cases dealing with \textit{Burford} abstention are described.

After \textit{Burford}, the Supreme Court next invoked that case to justify abstention eight years later in \textit{Alabama Public Service Commission v. Southern Railway Co.}\textsuperscript{268} In that case, the state commis-

\begin{itemize}
\item 259. See \textit{supra} notes 53-54 and accompanying text.
\item 260. See \textit{supra} notes 56-59 (discussing procedural consequences of \textit{Burford} abstention and claim preclusion).
\item 261. See \textit{infra} notes 595-97 and accompanying text (discussing \textit{Burford}-type abstention with \textit{Pullman}-type consequences).
\item 262. 341 U.S. 341 (1951).
\item 263. 424 U.S. 800 (1976).
\item 264. For a discussion of other murky cases sometimes associated with \textit{Burford} abstention, see \textit{Redish, supra} note 7, at 243-49 (discussing Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Lumbermen’s Mut. Casualty Co. v. Elbert, 348 U.S. 48 (1954)).
\item 265. 491 U.S. 350 (1989).
\item 266. \textit{Ankenbrandt} v. Richards, 112 S. Ct. 2206, 2216 (1992).
\item 267. See \textit{infra} notes 302-04, 595, and accompanying text (discussing \textit{Ankenbrandt’s} suggestion that some varieties of \textit{Burford} abstention may not be limited to administrative cases and may not require outright dismissal of the federal case).
\item 268. 341 U.S. 341, 345, 350 (1951).
\end{itemize}
sion denied the railroad’s petition to discontinue a line of service on grounds of unprofitability.\textsuperscript{269} The railroad immediately sued for an injunction in federal court, despite the existence of an alternative judicial remedy in state court that the U.S. Supreme Court viewed as adequate.\textsuperscript{270} Normally the availability of an adequate remedy in state court is not sufficient to warrant abstention.\textsuperscript{271} Citing \textit{Burford}, however, the Supreme Court reversed the three-judge district court’s decision to exercise jurisdiction, concluding that the case before it was exceptional and required abstention.\textsuperscript{272}

\textit{Alabama Public Service} may be the origin of the notion, discussed later in this Article, that \textit{Burford} applies only or especially to cases involving matters having some peculiarly local essence.\textsuperscript{273} The Court stressed the states’ “primary authority” over interstate rail operations.\textsuperscript{274} Additionally, as in \textit{Burford}, the Court found it significant that the decision was made by an administrative agency, review of whose orders was concentrated in a court having “supervisory powers.”\textsuperscript{275} Those words suggest that the Alabama court proceeding to which the district court was required to defer could have involved the making of legislative-style policy judgments.

Justice Frankfurter concurred in the result of \textit{Alabama Public Service}, based on his view of the substantive merits of the case.\textsuperscript{276} He vigorously disagreed, however, with the Court’s decision to require abstention, so as not to reach the merits.\textsuperscript{277} He maintained that the federal trial court could hear the railroad’s case without going beyond ordinary judicial activities and even without making interpretations of difficult issues of state law.\textsuperscript{278} In Justice Frankfurter’s view, there was no good reason to depart from the \textit{Erie-Meredith} rule, which requires a federal court to guess the meaning of state law.\textsuperscript{279} \textit{Burford} abstention had grown far too broad, according to Justice Frankfurter, and seemed no longer connected with the

\begin{footnotesize}
\textsuperscript{269} \textit{Id.} at 342-43.
\textsuperscript{270} \textit{Id.} at 343.
\textsuperscript{271} See supra notes 205-08 and accompanying text.
\textsuperscript{272} \textit{Alabama Pub. Serv.}, 341 U.S. at 345, 350-51.
\textsuperscript{273} See supra notes 242-44 and accompanying text and infra notes 517-25 and accompanying text.
\textsuperscript{274} \textit{Alabama Pub. Serv.}, 341 U.S. at 345.
\textsuperscript{275} \textit{Id.} at 348.
\textsuperscript{276} \textit{Id.} at 351-55 (Frankfurter, J., and Jackson, J., concurring).
\textsuperscript{277} \textit{Id.} at 355-62.
\textsuperscript{278} \textit{Id.} at 356, 360-61.
\textsuperscript{279} \textit{Id.} at 355 n.2, 356-57, 361.
\end{footnotesize}
possibility of actual disruption of state policy-making. With alarm, in *Alabama Public Service*, he observed that “if [this decision] means anything beyond disposing of the particular litigation it means that hereafter no federal court should entertain a suit against any action of a state agency.”

After *Alabama Public Service*, the remaining noteworthy discussions of *Burford* in Supreme Court opinions occurred twenty-five years later in *Colorado River Water Conservation District v. United States*, four years ago in *New Orleans Public Service, Inc. v. Council of New Orleans*, and finally last term in *Ankenbrandt v. Richards*. Because *New Orleans* attempts a comprehensive formulaic description of *Burford* abstention, while *Ankenbrandt* does not, the former will serve as the focus of the discussion of all three cases.

The plaintiffs in *New Orleans* attacked a ratemaking decision of the New Orleans City Council in federal district court on the ground that it was preempted by a decision of the Federal Energy Regulatory Commission. The district court refused the case on a number of grounds, *Burford* abstention included. On review, the court of appeals conceded that the case below involved no unclear state law. Presumably, this was true because the state administrative action under attack was complete and its nature so clear that the only substantial question in the case was the federal question: whether state action of that sort was preempted.

Despite this, the court of appeals approved the trial court’s abstention under *Burford*, explaining that the case involved a complex regulatory scheme of “paramount local concern and a matter which demands local administrative expertise.” The lower courts’ results and opinions in *New Orleans* typify the mysterious approach to *Burford*.

280. *Id.* at 362.
287. *Id.* In addition to the preemption claim, *New Orleans* also refused to apply *Burford* to a separate argument for relief on the ground that no disruption of state regulatory processes could reasonably be expected to occur in the process of federal adjudication. *Id.*
288. *Id.* at 862.
ford's administrative law requirement displayed in some circuits. In these cases, the origins of a controversy in the state administrative process go far toward justifying Burford abstention without any indication that a federal court decision poses any real threat to that process.

The Supreme Court reversed the court of appeals, concluding that Burford abstention was unwarranted:

Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an “essentially local problem.”

This portion of New Orleans clarifies the nature of the requisite connection between state administrative law and a case appropriate for Burford abstention. The Court stated that Burford abstention is warranted only if the state administrative law material is “entangled in a skein” of the federal suit. This most likely means that remote or talismanic connections between a federal case and a state's administrative process will no longer justify abstention under Burford. In short, a Burford case is one that cannot be resolved by the federal court without running the unacceptable risk of error as to matters of state law which have been entrusted by the state legislature to an expert administrative body.

This view explains why Burford abstention was ruled out in the New Orleans case itself. In New Orleans, the appropriate expert state agency had already determined state policy beyond peradventure, and the only issue before the federal court was the significance of the clear state action under federal law. Under this view, New Orleans largely restores Burford to its original province — concern with federal court usurpations and disruptions of state law and policy-making. In this respect, New Orleans already seems to have had a real and desirable effect on the shape of lower federal court cases.

290. Id. at 361. The Court noted that the case did not involve a contention that the federal claims were “in any way entangled in the skein of state law” that would require untangling before the federal case could be resolved. Id. (quoting McNeese v. Board of Educ., 373 U.S. 668, 674 (1963)).
291. Id. at 364.
292. Id. at 363. The New Orleans City Council had already reached its final decision; the only issue before the Court was whether the order was facially preempted by the Federal Power Act, a Federal Energy Regulatory Commission allocative decree. Id.
grappling with Burford.293

Justice Scalia's opinion for the New Orleans Court seems restorative in a number of other ways as well, though this restoration may not be as desirable. The restorative features are suggested by the general formula which the Court offered as a “distillation” of the requirements for Burford abstention. Essentially, the Court identified two distinct circumstances under which Burford abstention would be appropriate:

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.”294

The “restorative” formula seems to limit Burford abstention to suits seeking equitable relief. Suits in equity were the original province of all varieties of abstention, including the Burford variety. Restoring the original equitable relief limitation provides a rationale (equitable discretion) for harmonizing abstention with the arguably mandatory nature of the statutory grants of jurisdiction to the federal courts. This rationale may appeal to Justice Scalia, a separation of powers purist.295 Perhaps it even augurs repudiation of the extension of other abstention doctrines, particularly Pullman, to cases at law.

More strikingly, the New Orleans Court seemed to change the basic scope of Burford abstention. Describing that doctrine as designed to avoid “interference with the proceedings or orders of state administrative agencies,”296 the Court appeared to limit its use

293. See, e.g., Melahn v. Pennock Ins., Inc., 965 F.2d 1497, 1504-05, 1507 (8th Cir. 1992); University of Md. v. Peat Marwick & Main Co., 923 F.2d 265, 272 (3d Cir. 1991); see also CHEMERINSKY, supra note 4, at 111-12.
295. Scalia, supra note 200, at 514-15 (“Now there is no one more fond of our system of separation of powers than I am.”); see also Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (“Art. II, Section 1, Cl. 1 of the Constitution provides ‘The executive power shall be vested in a President of the United States.’ . . . This does not mean some of the executive power, but all of the executive power.”).
296. New Orleans, 491 U.S. at 361 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), which did not mention the presence of administrative agencies as a requirement for this variety of abstention) (emphasis added).
to cases involving such entities. This is surprising, because the very words used in New Orleans to define one category of “Burford” abstention appear in the earlier Colorado River opinion, where they are exemplified by citation to a case involving no administrative agency at all. 297 That case, Louisiana Power & Light Co. v. City of Thibodaux, 298 was a state eminent domain proceeding which, absent federal court involvement, would have proceeded entirely in state courts, not in state administrative bodies. 299 No language in Colorado River requires the involvement of state administrative agencies to justify Burford abstention. 300 Later, in New Orleans, where such a requirement was imposed, all references to the non-administrative Thibodaux case were dropped as support for the Court’s formulation of the doctrine. 301

The New Orleans formula appears to be a serious attempt at a comprehensive statement of the doctrine, and yet just last term the Supreme Court offered dictum suggesting some movement back toward Colorado River’s earlier broader view that Burford abstention extends to some purely judicial state proceedings. 302 In Ankenbrandt v. Richards, the Court said that it was “not inconceivable” that Burford abstention would be applicable in certain cases involving state domestic relations law. 303 Such proceedings typically occur in state courts and not agencies. 304 It is possible that this reading of Ankenbrandt is the considered view of a majority of Justices. It seems more likely that it is one more in a series of not-so-careful statements. New Orleans statements seem more comprehensive and

297. Compare New Orleans, 491 U.S. at 361 (stating that Burford abstention is appropriate where there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar” (citing Colorado River 424 U.S. at 814)) with Colorado River, 424 U.S. at 814 (citing Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959)).


299. Id. at 30 (approving a federal district court’s stay of its proceedings to allow the Louisiana courts to interpret a statute, the construction of which was necessary to resolve the eminent domain dispute); see also Kaiser Steel Corp v. W.S. Ranch Co., 391 U.S. 593 (1968) (permitting abstention in a nonadministrative case to leave sensitive issues of state water rights law to the state courts). Only the dissenters in Kaiser Steel explicitly considered Thibodaux or Burford. Id. 594-95.

300. See Colorado River, 424 U.S. at 814.

301. See New Orleans, 491 U.S. at 361.


303. The Court stated, in dictum, that “it is not inconceivable” that Burford could apply to require federal court deference to state determinations of “elements of a domestic relationship” presumably yet to be made in pending divorce, alimony, or custody proceedings. Id.

304. See supra note 15 and accompanying text.
carefully crafted and they accord with the general view of Burford abstention as "administrative abstention." For these reasons, I proceed below on the assumption (except where the contrary is made clear) that Burford applies only to cases involving state administrative agencies. In one section below, I criticize such a limitation, expressing hope that Ankenbrandt's cryptic statements portend the end of Burford's senseless limitation to administrative cases.805

Aside from the possible return to earlier understandings, as suggested by New Orleans's interpretation of Burford, mystery remains as to the scope of the doctrine. One such mystery is the meaning of the two-part general formula originating in Colorado River and offered by Justice Scalia for the New Orleans Court as a distillation of "the principle now commonly referred to as the 'Burford doctrine.'"806 The Court sees Burford abstention as a distinct doctrine in a list including Pullman, Younger, and Colorado River as other separate and distinct abstention doctrines. Unlike the other doctrines, though, the Burford doctrine itself includes two somewhat distinct categories.807 But the words of the New Orleans formula do not adequately convey what these two categories are and how they differ.

There are two possible ways of proceeding with this inquiry into the meaning of the Burford doctrine. The first focuses initially on the words defining the two Burford categories and only then on the universe of other doctrines of judicial federalism in which they operate. The second, my choice, is to reverse the order. It is easier to search for the meaning of such an abstract formula after achieving a better understanding of the doctrinal world in which it functions.

For what follows we need only a working definition of Burford abstention. As mentioned above, I proceed on the assumption that Burford abstention is appropriate only in cases turning on difficult issues of state law entrusted by state legislatures to administrative agencies. My criticism of this likely restriction is discussed in another section below.808

Immediately below, using this rough-cut, working notion of Burford abstention, I attempt to determine Burford abstention's scope

305. See infra part IV.B.1.
307. See supra part VII (discussing the two-part Burford formula as expressed in New Orleans).
308. See infra part VI.B.1.
of practical application. In particular, the focus is on its place in the constellation of doctrines of judicial federalism, including other abstention doctrines. Once this grounding is established, I return to the language of Burford to argue against its limitation to an administrative law sphere, and to examine the differences between Burford's two categories.

V. How NEW ORLEANS Narrows the Practical Scope of the BURFORD Doctrine from the Inside While Other Doctrines Narrow It from the Outside

The limiting effects of New Orleans's reformulation of Burford abstention and the expansion of other doctrines of federal judicial restraint most likely leave Burford with a significantly narrowed field of operation, particularly in federal question cases. As described in the previous section, New Orleans required more than a remote connection between a troubling issue of state administrative law and a federal case. On this view, Burford abstention is appropriate only for cases in which a difficult issue of state law is "entangled" in the merits of the federal suit. Even where this requirement is met, however, Burford will not make a real difference if other doctrines of judicial federalism more clearly preclude resolution on the merits. Below I explore both sorts of limits on the practical scope of Burford. I proceed on the assumption, supported by language in New Orleans, that Burford is limited to cases actually or potentially involving state administrative action, although I criticize that limitation in a later section.

A. Some Basic Distinctions Among Cases in Which Burford Abstention Might Operate: Review Pattern Cases Versus Primary Jurisdiction Cases

After New Orleans narrowed Burford abstention to cases in which disruption of an administrative scheme might occur, there appear to be two patterns of cases in which the doctrine is most likely to apply.

In the first pattern, a federal district court is confronted with state administrative agency action and the need to determine its va-

309. See supra notes 289-93 and accompanying text.
310. See supra notes 289-93 and accompanying text.
311. See infra part VI.B.1.
lidity under an unclear state law. The function of a federal court in undertaking this task resembles its function in reviewing the decision of a federal agency under federal law. Therefore, this pattern will be referred to as the "review pattern." It is not confined to suits involving governmental entities as parties but extends to suits between private parties where rights turn on the validity or invalidity of state administrative action.

The second pattern in which a federal suit threatens to disrupt a state administrative agency's regulatory efforts occurs when two circumstances converge: (1) there is no administrative action to be reviewed, but (2) the federal court concludes that receiving state agency input will help it decide a case in a way not harmful to important state regulatory interests. This pattern will be referred to as the "primary jurisdiction pattern" because of its resemblance to a doctrine developed to permit federal courts to defer to federal agencies in similar circumstances.

Aside from these two patterns, no other pattern is likely to warrant deference. By definition, almost any other case is one in which the federal court reasonably concludes that there is no need to give weight to a state agency's views in order to resolve the matter before it.

The review pattern is easy to identify and analyze. The focus is on the validity of some action the agency did or did not take. For a variety of reasons, the main focus below is on these review cases. First, Burford itself, and many of the federal cases approving Burford abstention, involved challenges to completed agency action.

312. I intend the statement to encompass both an agency decision to take action and an agency decision not to take action.

313. For a brief discussion of the primary jurisdiction doctrine, see Taffet v. Southern Co., 930 F.2d 847, 854 (11th Cir. 1991); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1309-11 (2d Cir. 1990).

314. A third pattern — where an agency has finally addressed the issue now relevant to a federal proceeding by promulgating a rule or issuing an order — could possibly be viewed as a candidate for Burford abstention. In this pattern, the federal court is asked only to interpret or enforce an agency action, the validity of which is not challenged. By hypothesis, no review is involved, and there is no longer a need to defer to the agency's primary jurisdiction because it has already exercised it. Where the cognate state proceeding which will interpret or apply the agency's order or rule will be confined to a specialized state court, Burford concerns about the appropriateness of a federal suit seem justified. I will call this the specialized application pattern. Because I believe that the application pattern is of little importance, I deal with it in this footnote.

This is, however, a problematic Burford category. If action of a state agency is not under review (review cases), and if further input from the agency is not required (primary jurisdiction cases), federal review almost certainly does not threaten disruption of the state regulatory processes.
Second, the very few federal courts which address the doctrine of "primary jurisdiction" in the context of state administrative action treat it as a separate doctrine, distinct from Burford abstention.318 Third, the very sort of case the New Orleans Court described as a candidate for Burford abstention involved state agency action alleged to have been in violation of state law.316 In fact, the New Orleans Court itself used the word "review" in its formula defining the second type of Burford abstention.317 As a result, the importance of the primary jurisdiction pattern seems relatively limited.

The issue addressed throughout the sections below is the likelihood that the need to consider Burford abstention will be mooted by some clearer doctrine of judicial federalism. In a later portion of this Article, I assume that some such suits successfully run the gauntlet of other doctrines, and I ask how such suits pose the risk of disruption necessary to trigger Burford.

B. How Other Doctrines of Judicial Federalism Reduce Burford's Significance in Federal Cases in Which the Validity of State Agency Action Is Reviewed

This section discusses review pattern cases to see how frequently doctrines of judicial federalism which are clearer than Burford abstention will filter potential Burford cases out of the jurisdiction of federal courts. Section 1 is general, examining the limits common to federal question cases and to diversity cases. Section 2 deals specifically with federal question cases, while section 3 deals specifically with diversity cases.

1. Alternatives to Burford Abstention Which Are Common to Federal Question and Diversity Cases

Both in the early and late stages of any state law matter involving

315. See Taaffet, 930 F.2d at 854; Long Island Lighting, 907 F.2d at 1309-11.
Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of [the petitioner's] pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem."
administrative action, doctrines of federalism other than Burford are likely to provide more certain and justifiable grounds for federal court deference to state decisionmaking bodies. This is true whether the federal suit is grounded on diversity or federal question jurisdiction. If state administrative action threatens but has not yet started, someone asserting a federal law objection to the anticipated action is likely to be barred from a federal suit by the doctrine of ripeness.\footnote{318 See, e.g., Gilbert v. City of Cambridge, 932 F.2d 51, 66-67, 67 n.21 (1st Cir. 1991) (avoiding consideration of Burford by finding the claim unripe); Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 535-38 (3d Cir. 1988) (finding Burford inapplicable but dismissing on ripeness grounds where it was not clear that the plaintiffs' conduct was likely to run afoul of the ethics rules they sought to challenge).}

If the state administrative proceedings have started but have not yet concluded, many federal cases otherwise raising Burford issues will generally be dismissable on grounds of ripeness and some on grounds of failure to exhaust administrative remedies.\footnote{319 See, e.g., Illinois Commerce Comm'n v. Thomson, 318 U.S. 675, 686 (1943) (reversing the district court's grant of a permanent injunction against the Illinois Commerce Commission and state officials from increasing passenger railway fares where appellee-plaintiff failed to first pursue the available administrative remedy).} This is true not only for diversity suits under state law but for many federal suits as well. Civil rights suits under section 1983 are an important subset of federal question suits.\footnote{320 See Civil Rights Act of 1871, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (providing for a civil action for state deprivation of rights, privileges, or immunities secured "by the Constitution and laws"). Civil rights suits are a major subset of the federal question caseload of the lower federal courts. Of the 98,747 private civil cases litigated under that jurisdictional grant in 1986, 40,199 (including 20,071 prisoners' rights cases) were civil rights cases. BATOR ET AL., supra note 2, at 51. A good many, but not all of these, were § 1983 actions. Id. at 1242; see also Peter W. Low et al., Civil Rights Actions: 1983 and Related Statutes 16 (1988) ("[I]n 1981, nearly 32,000 suits were brought under the civil rights acts (chiefly 1983 actions) . . . .").} While section 1983 suits under the federal civil rights laws are generally exempt from exhaustion requirements,\footnote{321 See Patsy v. Board of Regents, 457 U.S. 496, 502-12, 516 (1982) (relying on the legislative history of § 1983 and concluding that exhaustion of state administrative remedies should not be a prerequisite to a § 1983 civil rights action).} there is a significant limit to this exemption. Recent case law extending Younger abstention makes it clear that such an exemption from exhaustion requirements does not cover defendants in some state judicial-style administrative proceedings who bring section 1983 suits to preempt the state proceedings.\footnote{322 See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986) (holding that the Younger rule prohibiting the injunction of state criminal proceedings other than to prevent "great and immediate irreparable injury" applies equally to other types of state proceedings, including state administrative proceedings which are judicial in nature (i.e., proceedings . . . .").}
these state regulatory proceedings are among the parties having the greatest incentive to bring a federal suit subject to Burford, and they will normally be required to present defenses to the state agency before federal trial courts are open to them. In such cases, a form of the administrative remedy exhaustion requirement, styled as Younger abstention, will continue to act as a bar to federal suits, at least temporarily mooting the issue of Burford's application.323

Just as early federal court involvement is more plausibly covered by doctrines other than Burford abstention, the same is also true of late federal court involvement. After the conclusion of state court proceedings reviewing state administrative action, federal law issue and claim preclusion comes into play.324 In most states, once a court has ruled, its decision is accorded res judicata effect until properly overturned.325 If this is true under the law of the state whose courts rendered the judgment, federal courts must accord that judgment preclusive effect.326 Consequently, if a state court has ruled on a

of the Ohio Civil Rights Commission) so long as the plaintiff has a "full and fair" opportunity to litigate constitutional claims).

323. In these cases, Younger will require postponement of Burford abstention at least until after the administrative proceedings have concluded. After that, the administrative proceedings may or may not preclude a federal legal claim, but determinations of fact made in them are likely to be binding in a later federal court proceeding. University of Tenn. v. Elliott, 478 U.S. 788, 794-99 (1986), rejects federal court claim preclusion as to the specific state agency determination before it but suggests that such preclusion may be appropriate in somewhat different circumstances. It also requires that the federal courts below give preclusive effect to issues of fact determined by the state agency, indicating that such issue preclusion is appropriate in a wide variety of cases coming from the state courts. Id.

324. As for statutory preclusion, see 28 U.S.C. § 1738 (1988), which requires the lower federal courts to give preclusive effect to state court determinations. For an explanation of § 1738, see Allen v. McCurry, 449 U.S. 90, 96 (1980), which held that Congress, under § 1738, "has specifically required all federal courts to give preclusion effect to state-court judgments whenever the courts of the state from which the judgments emerged would do so. For a discussion of federal common law claim preclusion not grounded on § 1738, see University of Tenn. v. Elliott, 478 U.S. 788, 794-95 (1986), where the Court noted that courts frequently fashion federal common law rules of preclusion in the absence of a governing statute.

325. Smith v. Malouf, 597 So. 2d 1299, 1301 (Miss. 1992) (collecting the cases and stating that "[t]he various states have ruled with virtual unanimity that a judgment is 'final' for res judicata and collateral estoppel purposes even though pending on appeal")


For a case using res judicata to moot consideration of Burford abstention, see Evans v. Dale, 896 F.2d 975, 977-79 (5th Cir. 1990) (using the doctrine of res judicata instead of Burford abstention to reject all claims to which it was applicable and considering and rejecting Burford only as to claims to which res judicata had no application — those involving exclusive federal
case involving a *Burford* issue, issue or claim preclusion may well bar a federal lawsuit.

To the extent a lower state court’s decision is not sufficiently preclusive under state law to trigger federal preclusion, another doctrine, *Rooker-Feldman*, will almost certainly bar the federal suit. Briefly, *Rooker* is the product of the view that the lower federal courts are parallel to the state courts and cannot exercise the functional equivalent of appellate review over state court decisions.

Finally, once the state’s highest court has reviewed a lower court’s case or the time for its doing so has expired, any lower federal court review of a potential *Burford* case, without question, will be barred by claim preclusion.

The prime candidates for *Burford* abstention are cases in between those not yet ripe and those in which a federal action is barred by preclusion or by *Rooker-Feldman*. These are predominately cases of completed state agency action either actually or potentially under review in the state courts.

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327. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86 (1983) (holding that unlike the United States Supreme Court, federal district courts have no jurisdiction to review final judgments of a state’s highest court arising out of judicial proceedings, even if it is alleged that the state action was unconstitutional); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (holding that once a state court decision has been affirmed by its highest state court, only the United States Supreme Court has appellate jurisdiction over a federal law challenge to this decision).

328. *Feldman*, 460 U.S. at 482-86; *Rooker*, 263 U.S. at 415. These cases have been described as the basis of the *Rooker-Feldman* doctrine. *See* *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 7-8 (1987).

329. The *Rooker-Feldman* doctrine is founded on the following reasoning. First, 28 U.S.C. § 1257 (1988), which gives the Supreme Court appellate review of certain state court decisions, is the only federal statute explicitly providing for federal review of state court decisions. Second, Congress intended to foreclose all other forms of federal court review of state court decisions, whether presented forthrightly as attempts at review or in the guise of suits for injunctions and other relief. *See* *Feldman*, 460 U.S. at 482-86; *Rooker*, 263 U.S. at 416. Presumably, the second inference is aided by the sensitivity of the issue of federal review of state judicial decisions. After the framing of the Constitution, many states argued that that document did not permit federal review of state court decisions. *Bator et al.*, *supra* note 2, at 516.

One could argue that federal habeas corpus under 28 U.S.C. §§ 2241, 2254 (1988) is a disguised form of federal review of state court judgments, but if so, like § 1257, it is one permitted by statute.

330. *See* 18 *Wright et al.*, *supra* note 326, § 4469, at 659-60 (discussing federal courts honoring the res judicata effect of state court judgments).

331. *See*, e.g., *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm’n*, 791 F.2d 1111, 1114 (3d Cir. 1986) (involving a suit for relief from a final order of an agency filed almost simultaneously in Pennsylvania state and federal district courts); *Gregg v. Winchester*, 173 F.2d 512, 515 (9th Cir. 1949) (requiring a federal district court to abstain from enjoining enforcement of a
diversity or federal question jurisdiction, the Eleventh Amendment will often provide a clearer ground for refusing a case than will Burford.\textsuperscript{332}

Current interpretation of the Eleventh Amendment covers a significant portion of the territory to which the Burford doctrine applied.\textsuperscript{333} Suits against a state (as distinguished from local governmental entities\textsuperscript{334}) to recover damages for past wrongs are almost always flatly forbidden by Eleventh Amendment "sovereign immunity."\textsuperscript{336} Such a suit is so clearly inappropriate under current law that there is no need for consideration of the applicability of the discretionary and difficult Burford doctrine.

Not all suits aimed at state action seek damages from the state treasury.\textsuperscript{336} Some, such as Burford, seek coercive relief against state officers in their official capacities to compel future compliance with federal or state law, or both.\textsuperscript{337} Until early in the last decade, these suits were not viewed as suits against the state for Eleventh Amendment purposes, even though their purpose and effect were to thwart state policy.\textsuperscript{338} The Supreme Court's conclusion was that such suits were not suits against the state, because officers violating the law were to be seen as stripped of their authority to represent the zoning variance permit where a "practically . . . duplicate" action was pending in state court).  

\textsuperscript{332} U.S. Const. amend. XI.  

\textsuperscript{333} In fact, it is a strong possibility that Burford itself would today be dismissed on the dual grounds that the federal question presented was insubstantial and that the remaining suit impermissibly sought federal court relief against the state on state law grounds. See infra notes 350-53 and accompanying text.

\textsuperscript{334} For cases holding that local government is unprotected by the Eleventh Amendment, see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890); see also Bator et al., supra note 2, at 1172. On at least one occasion, the Court seems to have suggested the possibility that this doctrine may be extended to cover suits brought against local governmental entities. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123-24 & n.34 (1984); Bator et al., supra note 2, at 1172 & n.19.

\textsuperscript{335} Bator et al., supra note 2, at 1172 n.12.

\textsuperscript{336} A common example is the category of suits to enjoin state officials from enforcing unconstitutional state policy. See, e.g., Ex parte Young, 209 U.S. 123 (1908) (determining, in an appeal from a habeas corpus decision, the validity of a federal court's injunction against a state officer's enforcing state law).

\textsuperscript{337} See, e.g., Association for Retarded Citizens v. Olson, 713 F.2d 1384, 1387 (8th Cir. 1983) (involving an action to compel the state to take specific actions to rectify violations of constitutional rights of mentally retarded residents of state institution); Simmons v. Jones, 478 F.2d 321, 322 (5th Cir. 1973) (involving an action to compel the jury commissioners to perform their official duties in accordance with state law); Magaziner v. Montemuro, 468 F.2d 782, 783 (3d Cir. 1972) (involving a suit for an injunction against a state judge's order vacating an ex parte appearance of appellants' counsel); Hill v. Victoria County Drainage Dist. No. 3, 441 F.2d 416, 416 (5th Cir. 1971) (involving an action to enjoin the enforcement of state statutes).

\textsuperscript{338} Young, 209 U.S. at 159.
This reasoning was the constitutional legal fiction the Court created in *Ex parte Young* to permit federal court enforcement of Fourteenth Amendment rights.  

Between the decision of *Ex parte Young* in 1908 and the *Pennhurst* case in 1984, the Court employed that fiction to allow suits against state officers both under federal law and under state law. In other words, state officers violating either state law or federal law or both were viewed as not representing the state. Before hearing any state claim, the federal trial court, of course, had to be satisfied that it had jurisdiction. Jurisdiction to hear state claims was present in all diversity cases and in those federal question cases where a state claim could be heard under pendent jurisdiction because of its close relationship to a federal claim pending before the court.  

*Pennhurst* put an end to the use of the *Ex parte Young* fiction to enforce claims under state law against state officers in their official capacities. The *Pennhurst* majority recognized that *Ex parte Young* was a fiction and held that such a fiction could be justified only as a means of enforcing important federal rights. Henceforth, suits against state officers to enforce state law would be acknowledged to be suits against the state. This is true not only where

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339. *Id.* at 159-60.  
342. See, e.g., Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683-92 (1982) (holding that the Eleventh Amendment did not bar a suit to obtain property against state officers who had no claim to the property under state law).  
343. *See Cory v. White*, 457 U.S. 85, 90-91 (1982); *see also Pennhurst*, 465 U.S. at 130-39 (Stevens, J., dissenting) (discussing prior decisions which might be considered as establishing that the Eleventh Amendment did not bar suits against state officials when they were alleged to be acting contrary to state law).  
344. Federal trial courts are courts of limited jurisdiction and may exercise jurisdiction only if specifically authorized by the Constitution and by a federal statute. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (stating that because Congress was vested with constitutional power to create the lower federal courts, Congress has the authority to control their jurisdiction).  
345. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) ("Pendent jurisdiction ... exists whenever there is a claim 'arising under [federal law]' ... The state and federal claims derive from a common nucleus of operative fact."). Formerly the creation of judicial decisions such as *Gibbs*, the pendent jurisdiction doctrine has now been codified under the broader umbrella of "supplemental jurisdiction." 28 U.S.C. § 1367 (Supp. II 1990).  
348. *Id.* at 104-06.
the state claim is a pendent claim in a federal question suit, but in a
diversity suit as well. Consequently, such claims are barred by the Eleventh Amendment.

Today it is likely that Burford itself would be dismissed under Pennhurst, and not its namesake doctrine. There was some suggestion that the federal challenge in Burford lacked any real support in federal law. Thus, it might have been dismissable for want of a substantial federal question. At the time, this alone would not have warranted dismissal of the entire case, because it also was grounded in diversity jurisdiction and sought an injunction against the Texas Railroad Commission’s action on the additional ground of violation of state law. The Eleventh Amendment, at that time, did not bar such relief; today it does. Consequently, today, a court wishing to dismiss the suit might be tempted to find the federal ground insubstantial, since that would leave no independent claim for relief which could be heard by a federal court.

While the Eleventh Amendment may occasionally bar a diversity suit which otherwise would have been a candidate for Burford, this is unlikely to happen often. A state is not a state citizen for purposes of diversity, so a suit against the state as a named defendant would also fail for want of subject matter jurisdiction. A suit against a state officer in her official capacity seeking either damages or an injunction on state law grounds would almost certainly be seen as a suit against the state for purposes of determining the existence of diversity.

349. Id. at 120-21 (stating that the Eleventh Amendment “is an independent limitation on all exercises of Article III judicial power” (emphasis added)).

350. The Court was not very receptive to constitutional claims of the sort asserted in Burford. See Railroad Comm’n v. Rowan & Nichols Oil Co., 311 U.S. 570, 575 (1941) (“Nothing in the Constitution warrants a rejection of [the Texas Railroad Commission’s] expert conclusions [as to the proration order in question].”); see also Railroad Comm’n v. Rowan & Nichols Oil Co., 310 U.S. 573, 580-81 (1940) (reaching a similar conclusion as to the constitutionality of the Texas Railroad Commission’s actions in a later case), modified, 311 U.S. 614 (1940).

351. See Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933) (“[J]urisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial.”).


353. United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966) (holding that if the federal claim is dismissed prior to trial, the state claim should be dismissed as well). For a discussion of pendent claim jurisdiction, see Bator et al., supra note 2, at 1046-47. Recently, the Gibbs doctrine has been codified. See supra note 345 and accompanying text.


There is, however, a category of cases in which the Eleventh Amendment can block a diversity suit which might otherwise be declined on Burford grounds. Suits against a local governmental entity have not typically been seen as barred by the Eleventh Amendment, so they will survive for consideration under Burford.\textsuperscript{356}

Finally, in addition to the other doctrines or techniques of federal judicial restraint discussed above, certification of pivotal state law issues to the state courts occasionally might offer a clearly preferable alternative to Burford abstention.\textsuperscript{357}

2. A Particular Focus on Alternatives to Burford Abstention in Cases Grounded on Federal Question Jurisdiction

By "federal question cases" I mean to include not only cases actually grounded on such a jurisdictional basis, but also those brought solely as diversity cases, although qualifying for federal question jurisdiction as well. If such a federal question case slips through the doctrines common to diversity and federal question jurisdiction, which are likely to screen out a case, there are other doctrines specially affecting federal question cases which may foreclose application of Burford.

The number of ways in which an issue of state law can arise in connection with a claim for relief under federal law is limited. First, because federal question jurisdiction will not lie unless the plaintiff's

\textsuperscript{356} See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890); BATOR ET AL., \textit{supra} note 2, at 1172. There is, however, some indication that the Court may broaden the scope of the Eleventh Amendment to cover such suits. \textit{Id.} at 1172 n.19.

\textsuperscript{357} The general view has been that certification-style abstention, as encouraged in Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974), has no application to circumstances warranting Burford abstention. 17A \textsc{Wright ET AL., supra} note 37, § 4248, at 158-59. This view seems clearly justifiable as to "category 2" Burford abstention, which is not defined in terms of the possibility of mistake as to pure and significant issues of state law, but rather in terms of the potential for warping state law by a series of smaller scale errors. See \textit{infra} part VII.B (dealing with category 2 Burford abstention). "Category 1" Burford abstention, however, is defined in terms of the possibility of federal court error as to important state law issues. At least occasionally in such cases, certification should be available as an alternative approach. See \textit{infra} part VII.A (dealing with category 1 Burford abstention). For a general discussion of certification and its frequent unavailability to federal district courts, see BATOR ET AL., \textit{supra} note 2, at 1381-83. Where state courts, as they frequently do, refuse certification from federal district (as opposed to appellate) courts, certification is unlikely to offer a substitute for Burford abstention of either sort. \textit{Id.} at 1381.
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own case is in some sense based on federal law, a plaintiff's federal case will not normally raise state law issues of any sort.388 Second, state law claims may be pendent to the federal claim. Third, on rare occasions, state law "incorporated" in federal law may be instrumental in defining a federal law claim or a defense to such a claim.389 Immediately below I discuss doctrinal alternatives to Burford abstention in connection with each of the three ways that a state issue may surface in a suit grounded on federal question jurisdiction.

a. Pendent state law claims under supplemental jurisdiction

This category can be dispatched quickly after our discussion of Pennhurst above.390 To the extent that an unclear issue of state law is raised in a pendent claim seeking relief against a statewide agency, it cannot be heard by a federal court, so there is no serious question of Burford abstention. If, however, relief is sought against local government or its agencies, consideration of Burford abstention is not mooted by the Eleventh Amendment.391

b. Federal law attacks on state administrative action

One principal way a question of the meaning of state law can arise in a federal case is in the context of an attack on a state statute or some other product of state action in which it is necessary to fix the meaning of the object of attack in order to determine whether it violates federal law. It is frequently said that Burford

358. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (stating that a suit "arises under the Constitution and laws of the United States only when the plaintiff's statement of his cause of action shows that it is based upon [such] ... . It is not enough that the plaintiff alleges some anticipated defense" raising a constitutional question). I use the word "normally" because a federal law defining a cause of action occasionally will "incorporate" state law, making it an instrumental part of a plaintiff's case. Cf. Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 206-07 (1946) (reading a federal statute as incorporating by reference some rules of state property law). For a more direct example, see Vitek v. Jones, 445 U.S. 480 (1983) (recognizing that state law can generate liberty protected by the Due Process Clause); Perry v. Sinderman, 408 U.S. 593 (1972) (recognizing that due process often protects interests created and defined by state law).

359. State law cannot override valid federal law, but occasionally federal law incorporates state law as determinative of federal rights to some degree. When this is true, a defendant may dispute a state issue in defending the federal claim. For a discussion of this pattern, see infra part V.B.2.c.

360. See supra notes 341-53 and accompanying text.

361. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Bator et al., supra note 2, at 1172.

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abstention is less favored in suits under federal law, particularly in cases asserting personal constitutional rights against state action. There is some indication that First Amendment cases have been designated as particularly inappropriate candidates. Consequently, cases of this sort begin with a greater likelihood that Burford will not be the doctrine of choice.

Beyond this general reluctance to use Burford in this category of cases, the availability of other forms of restraint further decreases the importance of Burford. Younger abstention screens out one significant segment of cases attacking state action under federal law so clearly that these cases are not even serious candidates for Burford abstention. Clearly covered by Younger are federal suits to enjoin certain judicial proceedings brought by the state in its own courts to further “important” state interests. These protected state proceedings should include some brought in state court to enforce state administrative orders. Beyond this, Younger has recently been extended to protect certain judicial-style administrative proceedings against federal court injunctions — once again, those commenced by the state to vindicate important interests. Although the requirement of “importance” leaves the application of Younger unclear in marginal cases, as time passes, areas of clarity will continue to emerge. To the extent a candidate for Burford abstention falls into an area clearly covered by Younger, that doctrine is the one of choice because of its relative clarity.

For cases making it past Younger — primarily cases involving nonjudicial-style administrative action or insufficiently important judicial-style action — Pullman abstention has a broad potential to render Burford otiose. In considering Pullman, it is important to distinguish broad scale facial attacks on state law from attacks on state law as applied and on other forms of state action.

362. See supra note 247 and accompanying text.
363. See supra note 248 and accompanying text.
364. See supra note 249 and accompanying text.
365. See supra part I.C.
366. See supra note 66 and accompanying text.
368. See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (holding that abstention is appropriate where it is in the public interest to "avoid needless friction with state policies that may result from tentative decisions" and "premature constitutional adjudication"); supra part I.A.
An attack on state law as unconstitutional on its face is a less likely candidate for *Burford* abstention for precisely the reason that that doctrine failed in the *New Orleans* case. In *New Orleans*, it was unnecessary to resolve a difficult question about the meaning of unclear state law in order to resolve the claim that such law was preempted. The meaning of state law was clear; the only serious question was whether it was preempted by federal law.\(^{369}\) By its very nature, a facial attack on state law often will succeed only where no reasonably imaginable limiting construction is likely to save it.\(^{370}\) The key is that determination of facial invalidity often turns not on pinning down the precise meaning of state law, but on federal standards of vagueness or overbreadth. For that very reason, *Burford* is less likely to be applicable in such cases.

Other doctrines often will apply to the more usual nonfacial attacks — attacks on state law as applied. It is precisely where the presence of unclear state law militates in favor of *Burford* abstention that *Pullman* abstention often becomes available as an alternative ground.\(^{371}\) This is so precisely because unclear state law is an element of both sorts of abstention.

However, there may be cases where unclear state law is attacked on federal grounds but in which *Pullman* does not operate. This is true because it is difficult to calibrate the possibly different degrees of uncertainty as to state law required respectively by the *Pullman* and *Burford* doctrines. In particular cases, courts may require a lesser degree for *Burford* or even be willing to rebuttably presume lack of clarity where administrative law is involved.\(^{372}\) Hence, while *Pullman* should screen out a significant number of cases, a need to determine *Burford*'s applicability may often survive a determination of *Pullman*'s inapplicability.

What sorts of unclear issues of state law are likely to be involved in such surviving cases? If *Burford* is limited to an administrative realm, normally the issue would be the validity of state administra-

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369. See supra notes 284-93 and accompanying text.
371. For a case favoring *Pullman* abstention, see Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 841-42 (9th Cir. 1979). Similarly, the following case, while recognizing the appropriateness of both *Burford* and *Pullman* abstention, seems to favor the latter by requiring that the federal trial court follow essentially *Pullman*-style procedures so as to retain the case on its docket while the state questions are pursued in state court: West v. Village of Morrisville, 728 F.2d 130 (2d Cir. 1984).
372. See infra part VII.B.
tive action attacked under state law. Justice Scalia nearly says as much in *New Orleans* in suggesting *Burford's* applicability to cases where a state agency "misapplied its lawful authority" or considered improper factors. 373 Indeed, *Burford* itself raised such issues. *Pennhurst*, however, places a federal judge, asked to strike down state administrative action under *federal* law in a surprisingly difficult position. Certainly the Eleventh Amendment does not forbid this sort of federal law attack, and yet the judge confronts a dilemma. If the state administrative action was clearly correct under state law, then the need to determine its validity under federal law will not warrant *Burford* abstention. But our concern is precisely with state administrative action which might be based on a misconstruction of state law or its arbitrary and capricious application.

It is in this context that *Pennhurst* creates an odd situation. If the federal judge could deploy a conclusive presumption that state administrative action was correct under state law, she could simply measure that action as it occurred against the Federal Constitution. If this were the protocol, *Burford* abstention would not be an issue because there would be no need to guess state law. There are, however, strong reasons for not deploying such a presumption. It would be unfair to accord preclusive effect to a federal court judgment based on a presumption of correctness which neither correlates highly with correctness in fact nor is rebuttable.

On the other hand, a problem with *Pennhurst* arises if the federal judge actually determines the validity of state administrative action under state law. If she determines that a state agency has violated state law, what should she do? Assuming the challenged action has been taken by an agency of the state and not of local government, the Eleventh Amendment as interpreted in *Pennhurst* prohibits her from striking it down under state law. 374 Can she decline to strike it down under federal law because of her assessment that it violates state law? She cannot do that in a way which assures that the determination of state law invalidity will bind the parties in a later state court action. Doing so would violate the Eleventh Amendment as construed in *Pennhurst*. 375 Since this is true, dismissing the federal claim on the merits is unjust to the plaintiff because the agency action may survive any challenge in state court. Given these premises,

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374. *See supra* notes 341-49 and accompanying text.
375. *See supra* notes 341-49 and accompanying text.
not necessarily to my liking, abstention of some sort is the only answer. In this light, Burford may be seen as particularly useful in solving a portion of a problem posed by current Eleventh Amendment law.

c. State law incorporated in federal law

Occasionally federal law is designed so that some of its meaning is derived from state law. Under these circumstances, Burford abstention may be warranted to determine the content of the state law incorporated in the federal measures. This is true under a variety of federal statutes. For example, the antitrust laws make available an exemption for certain private activities required by state law. In some federal antitrust cases, Burford abstention has been ordered to determine whether state law required the conduct in question. This sort of statutory incorporation case is of particular interest because it usually involves no constitutional question. Hence, Pullman abstention is usually unavailable to obviate the need for a consideration of Burford.

The incorporation pattern can occur, however, in constitutional cases as well. The Contracts Clause, within limits defined by federal law, defers to the law of the appropriate state to determine whether a “contract” has come into existence so as to be entitled to federal constitutional protection. Likewise, numerous cases under the Fourteenth Amendment defer to state law to some degree in order to determine whether an asserted “property” interest entitled to constitutional protection actually has come into existence. One

376. See, e.g., Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 901, 903-06 (6th Cir. 1983) (applying the Burford doctrine to avoid determination of whether all necessary state environmental permits had been issued, an issue made relevant by the fact that the Federal Resource Conservation and Recovery Act made its operation dependent upon whether all state permits had been granted); Brown v. First Nat'l City Bank, 503 F.2d 114, 117-18 (2d Cir. 1974) (stating that abstention was permissible but not required where federal banking law, under which the suit was brought, had no independent provisions and merely incorporated state law); Kartell v. Blue Shield of Mass., Inc, 592 F.2d 1191, 1193-94 (1st Cir. 1979) (ordering abstention on Burford-Thibodaux grounds so that state courts could determine whether the activities in question were required by state law and thus exempt from federal antitrust law).

377. See, e.g., Kartell, 592 F.2d at 1193-95 (ordering abstention to avoid the need to determine state law incorporated in federal antitrust law).


380. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (looking to the specific nature of university employment contracts under state law to determine if an untenured teacher
pattern involving state administrative law involves the assertion, often true, that where life, liberty, or property is affected, federal due process requires a state to comply with its own laws and administrative regulations.\footnote{See Weiser v. Koch, 632 F. Supp 1369, 1372, 1381-82 (S.D.N.Y. 1986) (presenting a due process claim grounded in a state-defined right to shelter).} Thus, it is possible for the meaning of a state administrative regulation to be a crucial element in a federal due process case. In such a case of constitutional incorporation, the Pullman doctrine may screen out some Burford candidates because both forms depend upon lack of clarity of state law.\footnote{Unclear state law is an element of the Pullman doctrine. See supra notes 46, 51, and accompanying text. Burford as well depends on unclear state law. This is explicit in the Court's definition of the first category of Burford abstention. See infra part VII.A. The requirement of unclear state law is implicit in the second Burford category. See infra part VII.B. A federal court applying clear state law could not disrupt "state policy formation" in any sense of those words. See infra part VII.B.}

In many "incorporation" cases reasonably considered under the Burford doctrine, the state law issue will be one of the interpretation, and not the validity, of state administrative action. These cases are considered in Section C below, where it is suggested that they would be considered as "primary jurisdiction" cases and not true Burford cases.

3. A Particular Focus on Alternatives to Burford Abstention in Review Cases Grounded on Diversity Jurisdiction

For purposes of the analysis below, the meaning of "diversity" suits is limited to those which can be maintained in federal court only on the basis of diverse citizenship. Excluded are suits actually founded on diversity jurisdiction but asserting a federal claim, thereby making federal question jurisdiction an alternative but uninvoked ground. Courts have not expressed the same disfavor for Burford abstention in such suits as they have in those asserting a federal cause of action.\footnote{See supra note 247 and accompanying text.} Still there are other roadblocks, besides the Burford abstention doctrine, which are likely to exclude such a case. If the suit is against the state itself, not only will the Eleventh Amendment bar relief, but so will lack of subject matter jurisdiction, because the state is not a citizen for purposes of ordinary diver-
sity of citizenship jurisdiction. Likewise, suits against state officers and administrative officials will ordinarily be viewed as suits against the states for purposes of diversity of citizenship jurisdiction. Some local government entities, however, can be diverse parties. Even in such cases, other doctrines occasionally may be the ground of choice.

The analysis of subcategories of review cases now ends. The Article turns to the other pattern, primary jurisdiction.

C. How Other Doctrines of Judicial Federalism Reduce Burford’s Significance in Primary Jurisdiction Pattern Cases

By definition, in all of the review cases discussed above, the question has been the state law validity of something the agency has done or not done. There is another category of cases which might be counted among those covered by the Burford doctrine — those similar to cases in which federal courts defer to federal agencies on the basis of an agency’s “primary jurisdiction.”


385. Today it should be rare for a state regulatory agency, in its regulatory capacity, to be viewed as a state citizen for purposes of diversity jurisdiction. Ordinarily such agencies are not independent of the state in any meaningful sense, but are arms of the state used for governance. Cases in which state agencies qualify as citizens have a different flavor. The court in Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314, 1318 (11th Cir.1983) stated:

The district court used a multifactor analysis in holding that the Trustees are sufficiently separate and independent from the state so as to confer “citizen” status upon them. These factors have been approved by this circuit and are as follows: (1) whether the agency can be sued in its own name; (2) whether the agency can implead and be impleaded in any competent court; (3) whether the agency can contract in its own name; (4) whether the agency can acquire, hold title to, and dispose of property in its own name; and (5) whether the agency can be considered a “body corporate” having the rights, powers and immunities incident to corporations.

Id. At the time of Burford, I suspect, that this position was less clear, hence the dual diversity/federal question basis of a suit involving the Texas Railroad Commission. It is also possible that the diversity recognized in that case existed solely between Burford and Sun Oil Co. and that jurisdiction over the Commission was based on federal question jurisdiction alone or on some implicit acceptance of the Commission as properly before the trial court as a nondiverse “pendent party.” The materials I have located provide no resolution as to what was the well-thought out basis for diversity jurisdiction in Burford, if there was one at all.

Local government, and presumably their agencies, are citizens of the states in which they are located except in the truly unusual circumstances in which they have no almost no independent policy-making role. Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973).

In cases confronting the primary jurisdiction of federal agencies, federal courts and those agencies share power to make decisions involving a regulatory scheme. Occasionally, although not explicitly required by statute, a federal court will stay its proceedings in order to obtain a federal agency ruling on a regulatory issue confronting it. Federal courts do this when they conclude that obtaining uniformity or bringing agency expertise to bear on the issue is likely to produce benefits worth the costs. Often the benefit invoked is uniformity in application of the agency's enabling act. An example of this involves a court with the authority to award damages to a consumer allegedly charged a price in excess of a tariff written by an agency. Assume the court finds the tariff ambiguous as applied to the particular case before it. In such situations, courts have stayed their proceeding in order to obtain a ruling on that issue. Note again that, unlike the review pattern cases discussed extensively above, there is no claim that an agency has acted improperly.

If there is no allegation that a state agency has behaved unlawfully in some relevant way, the most likely significant "entanglement" of a federal case with state regulatory law involves precisely the circumstances of primary jurisdiction cases. In other words, such entanglement arguably occurs where a freestanding court action nevertheless involves issues having an impact on a regulatory scheme and where appropriate input from an agency would be helpful to insure that the scheme is not frustrated.

Is federal judicial restraint appropriate when it is aimed at securing input from a state administrative agency? If so, should it be seen as an instance of Burford abstention? Few federal courts have addressed these issues. Those which have addressed it treat pri-

388. See 4 Davis, supra note 387, § 22:2; Jaffe, supra note 181, at 119-23.
389. See 4 Davis, supra note 387, § 22:4, at 89; see also Jaffe, supra note 181, at 124 (explaining primary jurisdiction in terms of statutory purpose, of which expertise and uniformity are only portions of a broader analysis).
391. See Western Pacific, 352 U.S. at 76; Gellhorn et al., supra note 171, at 1138-39.
392. There is one other feature of the primary jurisdiction pattern which is worth noting. A court's decision to defer to the primary jurisdiction of an agency is a highly particularized one depending on the nature of the issue of regulatory law and the context in which it is set. Richard J. Pierce et al., Administrative Law and Process 210 (1985).
393. Two federal circuit court cases make clear their view on the relationship of the two doc-
mary jurisdiction as a separate doctrine that overlaps with Burford but which should be analyzed separately. There are reasons for this, stemming from obvious differences between such a case and the more usual case implicating Burford. First, in these primary jurisdiction pattern cases, there has been no agency action. Hence there is a concern that a state administrative agency itself (and not just a specialized state reviewing court) will be deprived of a chance to address an issue of vital importance to an area it superintends. Second, a consequence of this is that finality or ripeness, in any traditional sense, is not available as a preferred ground of disposition. There is no relevant administrative proceeding whose conclusion is necessary to having a ripe case. Third, federal courts rarely dismiss their proceedings when deferring to the primary jurisdiction of federal agencies under the doctrine of primary jurisdiction. Normally, they hold them on their dockets pending receipt of the input sought from the agency. Traditionally, the result of Burford abstention has been outright dismissal of the case.

For these reasons, one might argue that a federal court which defers jurisdiction while seeking state agency input would be apt to characterize its action in primary jurisdiction terms instead of Burford abstention terms. Still, there are arguments for characterizing some of these cases as variant forms of Burford. By hypothesis, a court deferring to the primary jurisdiction of an agency has jurisdiction: it merely exercises a form of restraint. Likewise, abstention is

394. See Taffet, 930 F.2d at 854; Long Island Lighting, 907 F.2d at 1309-11.
395. Both Taffet and Long Island Lighting conclude that primary jurisdiction does not apply to cases involving federal courts and state agencies, for the reason that the doctrine is based largely on a presumed congressional intent favoring uniformity of interpretation as to matters entrusted to federal agencies. Taffet, 930 F.2d at 854; Long Island Lighting, 907 F.2d at 1310. My claim, however, is not that the primary jurisdiction doctrine, in its classical form, applies to require federal court deference to state agencies. It is rather that one should consider whether Burford as applied in some circumstances, is analogous to the federal primary jurisdiction doctrine.
396. In review pattern cases, by contrast, the state agency will have already made that judgment and any interference will be with state courts (possibly expert courts) but not the original agency itself. This follows from my definition of such cases. See supra note 312 and accompanying text.
397. GELLHORN ET AL., supra note 171, at 1138.
398. See supra notes 56-58 and accompanying text. But see Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 n.8 (1992) (suggesting that retention of a case may be warranted in some circumstances).
the word generally used to characterize a federal court's abjuring, based on grounds of federalism, jurisdiction which it does possess. While a choice between the labels "abstention" and "primary jurisdiction" seems of little importance in a diversity case, speaking in terms of abstention seems particularly appropriate in federal question cases.

In a diversity case, there may be some possibility that the state law action supplanted would be one in which a state court would defer to the primary jurisdiction of an administrative agency. The force favoring abstention is a state's interest in not having a regulatory scheme disrupted. If it is clear that state courts would find no need for agency input, then no state interest is frustrated by exercise of diversity jurisdiction.

If the federal court is certain that such deference either would occur or would not occur, it should generally attempt to anticipate the probable state outcome. For example, a state might not recognize the doctrine of primary jurisdiction, in which case the federal court should decide without agency input as would its state court counterpart. Or the state courts might recognize the doctrine and have ruled it clearly applicable or inapplicable in a virtually indistinguishable case. For this purpose, it does not matter whether the state law action supplanted would or would not have been in a specialized state court. The issue is whether the state courts would initially abjure their statutory jurisdiction in favor of an initial agency

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399. For a discussion of the doctrine of primary jurisdiction in state courts, sometimes termed the prior resort doctrine, see 2 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 562-71 (1965).

400. The court is, of course, not bound to abstain. Cases such as Railway Co. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871), make clear that a federal court is not obligated to honor state laws which would deprive it of jurisdiction in favor of specified state courts. If the state court's doctrine of primary jurisdiction seems unnecessarily broad, the federal court can refuse to apply it, concluding that the federal interest in exercising diversity jurisdiction outweighs the state rule. Occasionally, however, it will be appropriate for the federal courts to abjure jurisdiction in favor of specialized state courts if the balance of state and federal interests so dictates. The original Burford doctrine, requiring deference to state courts for review of certain administrative action, provides one example. In cases not reviewing state administrative action, federal court deference to state agencies themselves will also be warranted in circumstances analogous to the federal primary jurisdiction doctrine. While the practice of state courts to defer or not defer to state agencies should be strongly persuasive as to federal court deference, it cannot be dispositive. Occasionally, it may be true that while a state's primary jurisdiction rule is abstractly reasonable, it does not protect sufficiently important state administrative interests against sufficiently likely disruption to warrant abstention. As the text above makes clear, I believe that less deference is warranted when a federal rights plaintiff seeks a federal forum. At bottom, I can explain this only as based on my belief that the federal question jurisdictional grant is much more important in today's world than the diversity grant.
determination. Where the answer is unclear, the federal court must do its best to balance the factors — delay versus expertise — as would a state court in a close case.

Federal question cases are similar in some ways, different in others. The initial inquiry should be similar. The federal court should determine whether a state court, hearing a similar state law claim, would defer to an administrative agency's primary jurisdiction. If the answer is no, then there is no state interest in an initial agency decision which warrants ousting holders of federal rights from federal courts. If the answer is yes, the calculus is not the same as for diversity cases. The court must itself weigh the reasons suggesting that state courts would defer against the importance of providing a federal forum in the case in question. The latter step must be done from the perspective of federal law. This makes it clear that, especially in federal question cases, the federal court is itself independently balancing state and federal interests in ways characteristic of abstention decisions on federalism grounds.401

While there have been few true primary jurisdiction pattern Burford cases, should a case meet the requirements outlined above, it is unlikely to be rendered useless by any of the doctrines which may make Burford practically meaningless in cases falling within the review pattern. The key to this difference is that no agency action is challenged in primary jurisdiction cases. Therefore, lack of ripeness or finality of agency action can provide no alternative ground to Burford. Because no order is sought striking down state action, the Eleventh Amendment likewise provides no alternative ground. The same is true of Younger abstention. Younger, as applied to administrative judicial style proceedings, requires an administrative proceeding which, by hypothesis, does not exist within the primary jurisdiction pattern. Again, by hypothesis, there is no administrative decision or state court affirmation of such a decision which may be protected from federal review by claim or issue preclusion or by the Rooker-Feldman doctrine. Pullman might be seen as possibly applicable where the product of deference might be the avoidance of a constitutional decision, but Pullman requires deference to state judicial constructions. To the extent a federal court stays proceedings on grounds that further agency input is desirable, state primary jurisdiction doctrine is the most forthright explanation.

401. See supra note 400 (indicating limitations on federal court deference to state laws which would limit federal jurisdiction).
D. Summary of the Effect of Other Doctrines on Burford Abstention

Once New Orleans rejected Burford abstention for cases in which there was no need to resolve a troublesome issue of state law, a significant number of potential Burford cases were eliminated. These were cases, like New Orleans itself, in which any connection of complicated state regulatory law to the merits of the federal suit was remote at best.

The doctrines of ripeness and claim preclusion, operating at opposite ends of state processes, eliminate a large number of potential Burford cases. Federal law attacks on state action are the main category of the remaining nondiversity cases. The ranks of these cases are further thinned out by other doctrines of restraint. What is left is a much narrowed group of cases in which a federal court, asked to strike down state agency action on federal grounds, is unsure of the desirability of doing so, given the possible invalidity of the agency action under state law.

To a large extent the remainder consists of diversity cases. These are limited by virtue of the fact that a federal court cannot grant relief under state law against a statewide agency. Thus what remains, even of these, are: (1) suits against agencies of local government and (2) suits between private parties somehow dependent upon state administrative action which must be appraised for legality or at least construed in order to resolve the merits.

VI. The Administrative/Nonadministrative Distinction Under the Microscope

This section discusses the meaning and justifiability of the apparent limitation of Burford abstention to cases involving state administrative law. In Section A, I attempt to pin down the probable meaning of “administrative” as used by the Court to define the Burford doctrine. In Section B, I argue that such a limitation of Burford abstention to a solely administrative realm is not justified today if one adopts the perspective that courts and agencies have become less distinguishable than they were when Burford was decided. In Section C, I return to the more conventional perspective from which the law and policy-making roles of courts and agencies are seen as differing greatly. I explore whether limiting Burford to administrative cases was justifiable, even when based on that more conventional assumption prevailing at the time it was decided.
A. What Is Meant by "Administrative Agencies" in the New Orleans Formulation?

While at least some doubts are raised by the recent Ankenbrandt case,\(^{402}\) the weight of the case law and the language of New Orleans seem to limit Burford abstention to cases involving state administrative agencies.\(^{403}\) A threshold issue is what "administrative" means in the New Orleans Court's formulation. In a narrow sense, it might simply mean that some officer, other than (1) a judge on a court or (2) a member of a legislature, is carrying out official duties.

I exclude classical judicial and legislative officers because including them would lead to a bizarre and uselessly broad definition.\(^{404}\) The Federal Administrative Procedure Act (APA)\(^{405}\) affirms this as the traditional way of classifying organs of government. The APA defines "agency" as "each authority of the Government of the United States" but excludes both Congress and the federal courts in its definition of agency.\(^{406}\) Consequently the definition includes both executive branch and independent agency officers exercising authority under federal law.\(^{407}\) It is unlikely that Justice Scalia, a master of federal administrative law, would use the word administrative in such a peculiar way as to include courts and legislatures. States generally define agency in a way roughly similar to the Federal APA's definition, excluding courts and legislatures.\(^{408}\) Thus, the meaning of

\(^{402}\) Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992); see supra notes 14-15 and accompanying text.

\(^{403}\) See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (describing Burford as aimed at avoiding "interference with the proceedings or orders of state administrative agencies"); Bator et al., supra note 2, at 1364 (noting that Burford abstention is often called "administrative abstention").

\(^{404}\) The defining feature of administrative agencies, whether of the executive branch or independent, is that they pursue legislatively defined programs. In some broad sense, they execute statutes as ultimately and definitively interpreted by courts. The fact that in doing so, agencies both make law and adjudicate in subordinate ways may seem to blur the very distinction stressed here. But from a conventional perspective, the distinction between agencies on the one hand and legislatures and courts on the other remains basic. This is demonstrated by the ingenious efforts which have been required to constitutionally legitimate legislative and judicial activities by administrative agencies. If executive branch agencies were viewed as possessing all the powers of Congress and the judiciary, a large portion of the Supreme Court's separation of powers cases would have been more easily decided.


\(^{406}\) 5 U.S.C. § 551(1).

\(^{407}\) Analogously, see Buckley v. Valeo, 424 U.S. 1 (1976), which suggests that "officers of the United States" are persons performing a "significant governmental duty exercised pursuant to a public law." Id. at 140-41.

\(^{408}\) See Model State Administrative Procedure Act (1981), 15 U.L.A. 1 (1990) [here-
state "administrative action," for purposes of the Burford doctrine, is likely to be no broader than the APA's definition of agency. Is it narrower? What precisely are the "authorities" of the state government (other than courts and legislatures) which qualify? If the answer is that all such authorities are included, then it is no surprise that such abstention applies "only" in an administrative realm. Under that assumption, virtually any case challenging actions by state officials is an administrative case.

In fact, in New Orleans, Justice Scalia must have used "administrative" in a sense even narrower than the broadest it may possess under the Federal APA. It is unlikely that the Court's statements limiting Burford to cases implicating administrative action meant to use it in such a weak sense that it is present in the lion's share of cases against state executive action cognizable in federal court under Ex parte Young. Presumably the limitation was meant to add something substantial to the definition of a relatively circumscribed abstention doctrine.

There is a narrower sense of "administrative" with more exacting criteria which seems more likely to be what the Court has in mind. According to this view, an action is administrative if it is taken by a body other than the legislature or a court and involves the use of delegated power to make state law and policy in some significant way, although within limits set by the state legislature. This, of course, was the preoccupation of the original Burford decision — the avoidance of federal court intervention in the process of the making of state policy.


409. 209 U.S. 123, 159 (1908); see supra notes 138-44 and accompanying text (discussing Young).

410. Cf. Buckley, 424 U.S. at 4, 140-41 (defining an "officer of the United States" as a person performing a significant governmental duty pursuant to a public law).

411. The clearest statement of this concern with federal court meddling in state policy formation appears in Justice Douglas's concurring opinion in Burford. Burford v. Sun Oil Co., 319 U.S. 315, 335 (Douglas, J., concurring) (stating that where federal courts "sit in review" of the state administrative agency, they "in effect actively participate in the fashioning of the state's domestic policy").
B. Is Limiting Burford to Administrative Law Cases Justifiable?

Assuming that I have captured what Justice Scalia's opinion means by administrative, is it justifiable to limit application of the broader Burford category to cases involving state administrative law in that sense? There are two perspectives on this question. The first is a more traditional one, from which the roles of courts and agencies are seen as very different. The second is less traditional, in which courts and agencies are seen as functioning in very similar ways. It recognizes that courts, as well as legislatures and administrative agencies, make law and policy.

Below, in Section III.C, I first deal with the latter, presenting my view that differences between courts and agencies can no longer satisfactorily justify a form of abstention limited to cases involving state administrative agencies. Then, in Subsection 2, I demonstrate how someone not accepting my position might plausibly, if not entirely satisfactorily, justify the traditional limitation: If the state court dealing with agency action is specialized, it can function as part of an agency process which needs to be exhausted before resorting to federal court. These are the circumstances of the Burford case itself. However, even if the state court is not specialized, abstention might be viewed as justifiable. A specialized court's review of agency action requires it to deploy administrative "scope of review" law, which arguably is not as ascertainable as most law federal courts are required to determine under Erie-Meredith.

1. The Limitation as Seen from a Modern Perspective Stressing the Similarities of Courts' and Agencies' Powers to Make Law

Is the traditional perspective, differentiating between law-making and law-finding, supportable today? Is the distinction between examples of administrative law and policy-making, on the one hand, and some standard judicial decisionmaking, on the other, now too diminished to be useful in determining whether a court should abstain? In short, should federal courts defer to some purely judicial state court processes just as much as to processes involving administrative agencies?

Our view of both judicial and administrative decisionmaking has changed greatly since Burford was decided. At that time, courts were just beginning to recognize that agencies make law in a way
resembling legislation.\textsuperscript{412} This was seen as true not only when agencies engaged in rulemaking, but also when they enforced statutory terms in an adjudication.\textsuperscript{413}

At that time, however, judges generally continued to view and present themselves as functionally different from administrative officers, even those officers who acted judicially. Judges generally presented themselves as finding the law when they interpreted statutes and as doing something less freewheeling than pure legislating when they extended case law doctrine. This was true despite the recognition that administrative officers, even when adjudicating cases, make law resembling legislation.\textsuperscript{414} As late as 1949, Jerome Frank described this as the conventional, if erroneous, view of what judges do:

\begin{quote}
Law is a complete body of rules existing from time immemorial ... unchangeable except to the extent that legislatures have changed the rules by enacted statutes. Legislatures are expressly empowered thus to change the law. But judges are not to make or change the law but to apply it.\textsuperscript{415}
\end{quote}

Now of course this is a complicated story. Intelligent judges were never completely unaware of the large discretion provided them by vague statutory and common law formulations. Still, the sort of judicial law-making recognized by Benjamin Cardozo in his path-breaking 1921 book was limited to a modest filling of small gaps in the law.\textsuperscript{416} Even this limited recognition caused an uproar.\textsuperscript{417}

\begin{itemize}
\item \textsuperscript{412} See supra notes 182-93 and accompanying text.
\item \textsuperscript{413} See supra notes 212-22 and accompanying text (discussing SEC v. Chenery Corp., 332 U.S. 194 (1947)).
\item \textsuperscript{414} See supra notes 214-20 and accompanying text (discussing SEC v. Chenery Corp., 332 U.S. 194 (1947)).
\item \textsuperscript{415} Jerome Frank, Law and the Modern Mind 32 (1949).
\item \textsuperscript{416} Benjamin N. Cardozo, The Nature of the Judicial Process 113-15 (1921). Cardozo notes:
\begin{quote}
Here, indeed, is the point of contact between the legislator's work and the [judge's] ... Each is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him on a chart. He must learn it himself as he gains the sense of fitness and proportion that comes with years of habitue in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, ... hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.
\end{quote}
\item \textsuperscript{417} Id. at 113-14.
\item \textsuperscript{417} Grant Gilmore, Ages of American Law 76-77 (1977).
\end{itemize}
In the 1930s and early 1940s, the Realists challenged the prevailing view, insisting that judges made law in the broadest possible sense.\textsuperscript{418} The Realist view, however, had certainly not gained official or general acceptance by the time of \textit{Erie} and \textit{Burford}. Perhaps there is some element of caricature in Frank's statements, quoted immediately above, that the prevailing view was that of judges as law-finders.\textsuperscript{419} Still, in 1949, he strongly insisted that it prevailed.\textsuperscript{420} One year after Frank's statement, Karl Llewellyn made a similar point when he concluded that in the period from 1880 to 1910, courts adopted the stance of pure law-finders.\textsuperscript{421} He noted that since 1920, an older style, which had considered the legislative wisdom of a decision, was working its way back into judicial process, but he found that the language of opinions "moves still dominantly" in the style which views law as a closed system.\textsuperscript{422} Even as late as 1960, an eminent scholar concluded that the older Blackstonian pose of judges as law-finders, not law-makers, remained a problem for American jurisprudence.\textsuperscript{423}

But by \textit{Burford}'s time, the seeds of change were already sown by Holmes,\textsuperscript{424} Cardozo, and the Realists.\textsuperscript{425} In the law review issue in which Llewellyn published the statements described above, Charles Curtis presented a view of statutory interpretation as an exercise of law-making authority which was delegated to the courts by the legislature.\textsuperscript{426} The next decade brought the Warren Court and a much greater recognition, in federal constitutional cases and in others, of

\textsuperscript{418} G. Edward White, \textit{The American Judicial Tradition: Profiles of Leading American Judges} 268-75 (1976). See in particular page 274 describing Jerome Frank, a leading Realist, as endorsing creative law making by judges. \textit{Id.} at 274.

\textsuperscript{419} Frank, \textit{supra} note 415, at 32.

\textsuperscript{420} \textit{Id.} at 32-33.


\textsuperscript{422} \textit{Id.}


\textsuperscript{424} "It is at this moment [publication of Oliver W. Holmes, \textit{The Path of Law} (1897)] that the idea that law was discovered and not made was dealt its most powerful blow in American thought." Morton J. Horwitz, \textit{The Transformation of American Law, 1870-1960} (1991). As the text above makes clear, the blow took decades to dispatch its victim. \textit{See also} Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (finding that "judges do and must legislate, but they can do so only interstitially").

\textsuperscript{425} Cardozo, \textit{supra} note 416, at 113-15.

\textsuperscript{426} Charles P. Curtis, \textit{A Better Theory of Legal Interpretation}, 3 VAND. L. REV. 407, 425-37 (1950) (explaining that in determining the meaning of words in legal documents, the "question before the court is not whether [the addressee] gave the words the right meaning, but whether or not the words authorized the meaning he gave them").
the fact of judicial law-making.\textsuperscript{427} Indeed, in the last several decades, attacks on and defenses of judicial law-making have been a preoccupation of American jurisprudence.\textsuperscript{428}

Today "[n]o serious scholar treats the lawmaking power of judges as anything but an established fact."\textsuperscript{429} Beyond recognition of the courts' power to make substantive law within reasonable limits defined by statute and constitution, much judicial action is increasingly recognized to resemble administrative decisionmaking (both rulemaking and adjudication) in other ways as well. The new public law litigation, whether or not it involves "administrative agencies" in any strong sense of those words, is no longer "bipolar" and oriented toward discrete occurrences in the past.\textsuperscript{430}

[\textit{I}n actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.\textsuperscript{431}]

Such litigation is often what Professor Lon Fuller termed polycentric, involving, as did the administrative action in \textit{Burford}, a spider web of relationships between diverse parties and even nonparties whose interests must be considered.\textsuperscript{432} Such suits often require expertise, in the form of expert witnesses and court-appointed experts, and they often require managerial creativity in the fashioning of relief and ongoing supervision of compliance and adjustment of the court's order to meet changed circumstances.

The distance between agency law-making and some forms of

\textsuperscript{427} See Henry P. Monaghan, \textit{The Supreme Court 1974 Term, Foreword: Constitutional Common Law}, 89 Harv. L. Rev. 1, 1-10 (1975) (recognizing the Court's power to make rules — such as the Fourth Amendment exclusionary rule — to supplement and effectuate those explicitly traceable to the text of the Constitution).

\textsuperscript{428} See \textsc{Richard A. Posner}, \textsc{The Problems of Jurisprudence} 17-23 (1990).

\textsuperscript{429} \textsc{Lawrence M. Friedman}, \textsc{The Republic of Choice} 21 (1990); \textit{see also} Fallon & Meltzer, supra note 25, at 1759-60 (concluding that the prevailing modern view recognizes judicial law-making).

\textsuperscript{430} \textit{See generally} Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 Harv. L. Rev. 1281 (1976) [hereinafter \textit{The Role of the Judge}] (discussing the transition from traditional adjudication-style decisionmaking to a process that increasingly resembles administrative decisionmaking). My citation is to the whole article, but see pages 1300-02 in particular. \textit{See also} Abram Chayes, \textit{The Supreme Court 1981 Term, Foreword: Public Law Litigation and the Burger Court}, 96 Harv. L. Rev. 4 (1982) [hereinafter \textit{Public Law Litigation}].

\textsuperscript{431} \textit{The Role of the Judge}, supra note 430, at 1302.

\textsuperscript{432} \textit{See id.; Public Law Litigation}, supra note 430, at 4-6; \textit{see also} Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 Harv. L. Rev. 353, 394-404 (1978) (explaining the notion of polycentric problems and discussing the appropriation of adjudication as a means of solving them).
purely judicial decisionmaking narrowed as each end approached the other. While law-making by state and federal courts became more clearly recognized, both in the traditional case law and in statutory contexts, earlier claims for agency expertise began to seem extravagant. As a consequence, it seems necessary to recognize that some state cases which do not involve agency action can make equally forceful claims for Burford-style abstention. Some nonadministrative law — some "regular" law of the sort traditionally covered by the Erie-Meredith doctrine — can present the same problems of federal interference with policy-making and complexity that were generally limited to cases involving administrative agencies when Burford was decided.

These facts suggest that the Court in Colorado River acknowledged something important when it recognized a kinship between Burford and Thibodaux, a case approving abstention despite the lack of state administrative agency involvement. In the latter, the federal court was permitted to abstain in order to allow state courts to determine sensitive issues of state eminent domain policy. Thibodaux may or may not be an extremely limited precedent. Up until Colorado River, the Supreme Court opinions discussing that form of abstention were consistent with its narrow limitation to cases involving state eminent domain. Colorado River suggested three things. First, it suggested that Thibodaux was closely related to Burford and perhaps even part of the Burford doctrine. Second, the Colorado River statements, considered in context, called into question a widely held view that Thibodaux abstention is applicable only to diversity cases. Third, by offering the formula that Thibodaux applies where state issues transcend the result in a particular case, it suggested that Thibodaux is not limited to eminent domain issues but rather has application to a variety of cases involving diverse subject matters. A number of post-Colorado River cases using Thibodaux as a precedent read it to apply generally to cases where statutory law is so unformed and sensitive that its elab-

433. Edley, supra note 182, at 48-52.
436. Burford abstention is less favored in federal question cases but nevertheless has been viewed as applicable to some of them. See supra note 247 and accompanying text.
oration is an important act of governance.\textsuperscript{438}

As a result, one could make the argument that Burford abstention reflects broader concerns, not properly confined to the administrative realm, that any substantial risk of federal court mistake regarding certain sensitive matters of state law may be too great to tolerate. Indeed one could argue that the first category of Burford abstention should be seen as a subset of a broadened Thibodaux category, in which abstention is permissible if there is an unclear and particularly sensitive matter of state public law that must be determined in the process of the federal litigation. Cases involving state agencies would form an important part of such a category, but they would hardly exhaust it.

\textit{Kelly Services, Inc. v. Johnson}\textsuperscript{439} is an example of a case invoking Burford, or Thibodaux-Burford, outside the context of threats to state administrative law-making.\textsuperscript{440} In \textit{Kelly}, state agencies affected by a general state regulatory statute actually argued against abstention and in favor of having the federal court construe a broad statute which applied to them.\textsuperscript{441} The issue was one of construction of a general statute regulating employment agencies, a statute not within the area of specialized expertise of any of the agencies it affected.\textsuperscript{442} In fact, none of the agencies involved in the litigation asserted a primary authority to impart a definitive interpretation to the statute. Indeed, they first sought an opinion from the state attorney general as to the meaning of the statute.\textsuperscript{443} Nevertheless, the Seventh Circuit reversed the trial court, ordering Burford abstention.\textsuperscript{444} The court's grounds were that the state interest in this sort of consumer protection was both great and traditional and that the particular

\textsuperscript{438} See infra notes 439-66 and accompanying text. The paradigmatic Erie case was a common law case, for example, torts or contract. Usually, from the state's perspective, it is nearly inconsequential that federal decisions of particular cases have a preclusive effect on the parties. The public consequences of erroneous individual federal court decisions of state law in suits between private parties would be quite limited. There will be no impact on future cases involving different parties: the state does not have to accord stare decisis effect to a decision of state law by a federal court.

As the volume of newer forms of litigation increases, problems mount. The res judicata effect of federal public law litigation (e.g., a class action under a state constitutional provision, grounded on an erroneous federal court interpretation of state law) could be enormously harmful.

\textsuperscript{439} 542 F.2d 31 (7th Cir. 1976).
\textsuperscript{440} Id. at 32-33.
\textsuperscript{441} Id. at 32.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
\textsuperscript{444} Id. at 33.
issues "[had] not been subject to scrutiny by a state court."\textsuperscript{445} The court continued: "Thus it compels federal courts to stay their hand lest they provoke needless conflict with the administration by a state of its own affairs."\textsuperscript{446} There was no suggestion that what was, at best, a peripheral involvement of an administrative agency was crucial to the outcome.

Two other cases offer examples of abstention outside a state administrative law context on the ground that sensitive and uncertain state law was involved. Both of these invoked \textit{Thibodaux} more directly than \textit{Burford} itself, although the latter was cited.\textsuperscript{447} However, they did so in the period between 1976 and 1989, when the Supreme Court's last statement on the matter, in \textit{Colorado River}, clearly connected the two forms of abstention.

\textit{Smith v. Metropolitan Property \\& Liability Insurance Co.}\textsuperscript{448} was an appeal to the Second Circuit in a diversity action.\textsuperscript{449} The plaintiff sought a declaration of the validity of certain insurance contract clauses under state statutory law.\textsuperscript{450} There was no state agency decision involved, and the opinion does not advert to the possibility that under state law there existed an agency having primary jurisdiction to impart a presumptively correct interpretation to the state statute.

The district court in \textit{Smith} abstained,\textsuperscript{451} and the Second Circuit affirmed that court on \textit{Burford-Thibodaux} grounds.\textsuperscript{452} The Second Circuit found abstention satisfied because of the confluence of two factors — great uncertainty regarding state law and the importance to the state of the issue which was governed by that law:\textsuperscript{453}

Both the branches — unclear state law and broad impact on state policy — must be satisfied; neither alone is sufficient. . . [W]e have "no real idea" how the Connecticut courts would decide this question.

Connecticut, which is home to four of the ten leading carriers of property/casualty insurance, surely has as strong an interest in the doctrinal in-

\textsuperscript{445} Id. at 32.
\textsuperscript{446} Id.; see \textit{Rindley v. Gallagher}, 719 F. Supp. 1076, 1080-81 (S.D. Fla. 1989) (abstaining where, similar to \textit{Kelly Services}, no agency was involved), rev'd, 929 F.2d 1552 (11th Cir. 1991).
\textsuperscript{447} \textit{West v. Village of Morrisville}, 728 F.2d 130, 135 (2d Cir. 1984); \textit{Smith v. Metropolitan Property \\& Liab. Ins. Co.}, 629 F.2d 757, 759 (2d Cir. 1980).
\textsuperscript{448} 629 F.2d 757 (2d Cir. 1980).
\textsuperscript{449} Id. at 758.
\textsuperscript{450} Id.
\textsuperscript{452} \textit{Smith v. Metropolitan Property \\& Liab. Ins. Co.}, 629 F.2d 757, 761 (2d Cir. 1980).
\textsuperscript{453} Id. at 760-61.
tegrity of its regulatory scheme as does Louisiana with respect to eminent
domain . . . . 454

While the Second Circuit was concerned about the doctrinal inte­
griety of a complex regulatory scheme, that scheme, or at least the
portion at issue in Smith, was superintended by the courts and not
by a traditional administrative agency. 455 Smith seems wrong under
classical Burford formulations, but here we see the weakness of the
formulations themselves. The court’s intuition — that it should not
get involved in defining part of the complex spider web of relation­
ships formed by Connecticut insurance law — seems just as plausi­
ble, although no administrative agency is involved.

In 1984, we see the Second Circuit again in West v. Village of
Morrisville, 456 assimilating Thibodaux to the Burford doctrine and
characterizing this sort of Burford case as one applying where
“there are ‘difficult questions of state law bearing on policy
problems of substantial import whose importance transcends the re­
sult in the case . . . at bar.’” 457 This language, found in Colorado
River and New Orleans, was used to define a category of abstention
closely associated with Burford abstention in the former case and
explicitly described as Burford abstention in the latter. 458

The force of West in favor of my argument is somewhat weak­
ened by virtue of the fact that Pullman abstention was an alterna­
tive ground 459 and by the fact that an order of an administrative
agency played a part. 460 The court, however, was clear that Burford
was an appropriate ground and the question was not one of regula­
tory law in any standard sense. 461 It was rather a question of
whether a statewide agency’s decision prevailed over a village char­
ter. 462 This in turn involved questions of state constitutional law and
statutory interpretation, but again no regulatory policy in any tradi­

454. Id. (citations and footnotes omitted).
455. Id.
456. 728 F.2d 130 (2d Cir. 1984).
457. Id. at 135 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S.
800, 814 (1976)).
458. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976);
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989); see supra
notes 296-301 and accompanying text.
459. See West, 728 F.2d at 134.
460. The case involved an order of the Vermont Public Service Board. Id. at 133.
461. See id. at 135 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)).
462. Id. at 134.
tional sense of the term. The West court noted, among other things, its view that abstention is often justified where there are unclear issues of state organic law. The court made no attempt to force West into the set of regulatory cases.

These and other cases similar to them suggest that the difficulty in distinguishing meaningfully between the perils of intervention into agency affairs and into sensitive policy-making by courts has created pressures on the original Burford doctrine. The courts just described have responded to such pressures by eliminating the requirement of an administrative element or by diluting it almost out of existence. The recent tentative statements by the Court in Ankenbrandt v. Richards may indicate movement toward this view, which expands Burford abstention, or it may just be one more in a series of confusing statements by the Court on abstention. On the former reading, Ankenbrandt permits Burford-Thibodaux style deference not just to state court proceedings involving administrative agencies or to state court proceedings involving eminent domain, but to any case in which the federal court is asked to make sensitive and uncertain decisions of policy better made by the state judiciary.

This approach seriously erodes the Erie-Meredith doctrine, by virtue of the great discretion it would place in district courts to determine sensitivity and lack of clarity of state law. It seems difficult for the Court to develop clear guidelines as to what combination of sensitivity and lack of clarity warrant abstention. Despite this problem it would be worthwhile to experiment with allowing federal district courts to exercise much greater discretion, particularly in diversity cases, to decline jurisdiction because of the presence of uncertain and very important issues of state policy. The Supreme Court could monitor the experiment, adjusting the doctrine if federal district courts grossly abuse it in order to lighten their caseloads. As discussed at length later in this Article, such broaden-

463. Id.
464. Id. at 135.
465. Id.; see also Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1193-95 (1st Cir. 1979) (holding that Burford-Thibodaux abstention was necessary to allow the state courts to address difficult policy questions concerning the state's statutorily created system of providing low cost medical insurance).
466. 112 S. Ct. 2206, 2216 (1992) (stating in dictum that it is "not inconceivable" that Burford could apply to require federal court deference to state determinations of "elements of a domestic relationship" presumably yet to be made in pending divorce, alimony, or custody proceedings). The type of proceedings discussed in Ankenbrandt presumably would take place in state court and not in a state agency. See supra note 15 and accompanying text.
ing of the scope of Burford makes sense, but only if the results of its application can be softened by allowing a return to federal court as under Pullman abstention.\textsuperscript{467} In Thibodaux itself, the Court approved a stay rather than a dismissal of the trial court’s proceedings,\textsuperscript{468} and, more recently, Ankenbrandt v. Richards suggests that a Pullman approach may now be authorized in at least some Burford cases.\textsuperscript{469}

With respect to diversity cases, this approach is less drastic than abolition of that variety of federal jurisdiction, an approach which has been urged by many.\textsuperscript{470} With respect to federal question cases, the Burford doctrine already takes federal rights into account by requiring greater justification in such cases.

2. A Conventional Perspective in Which Judicial Law-Making in Statutory Interpretation Is Denied or Downplayed

Despite the possible encouragement offered by Ankenbrandt, I doubt that the arguments made above will prevail any time soon. For one thing, the New Orleans Court’s statements limiting Burford abstention to cases involving agencies seem more carefully considered. For another, there has been what one distinguished legal scholar describes as a “recrudescence of formalism” on the Court.\textsuperscript{471} For example, Justice Scalia has said such striking things as “[a]djudication deals with what the law was; rulemaking deals with what the law will be.”\textsuperscript{472} In the administrative sphere, this seems a repudiation of the foundational holding of SEC v. Chenery Corp.,\textsuperscript{473} that an administrative agency can make law in the process of adjudicating a case.\textsuperscript{474} The Supreme Court as a whole continues to disparage judicial law-making,\textsuperscript{475} and a recent case dealing with deter-

\textsuperscript{467} See infra notes 582-602 and accompanying text.
\textsuperscript{469} See Ankenbrandt, 112 S. Ct. at 2216 n.8 (“Moreover, should Burford abstention be relevant in other circumstances, it may be appropriate for the court to retain jurisdiction to insure prompt and just disposition of the matter upon the determination by the state court of the relevant issue.”).
\textsuperscript{470} See infra note 602 and accompanying text.
\textsuperscript{471} POSNER, supra note 428, at 21 n.3.
\textsuperscript{472} Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 221 (1988) (Scalia, J., concurring). The discussion is of administrative adjudication versus administrative rulemaking, but the point seems the same. Id.
\textsuperscript{473} 332 U.S. 194 (1947).
\textsuperscript{474} Id. at 202-03.
\textsuperscript{475} See Teague v. Lane, 489 U.S. 288, 304 (1989) (“[T]he Court’s assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of
ominations of state law under *Erie* indicates the movement back toward a more mechanical view of judging, at least in that context: "The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." 476

For these reasons, in what follows I assume that the arguments made in the previous section are not the current Court's view. If I am correct, then *Thibodaux* abstention, if it still exists, is a very limited doctrine and *Burford* abstention applies only when a federal court is asked to determine the meaning of some state law whose development is entrusted to an administrative agency. Can this view be justified based on unique characteristics of administrative law?

Under assumptions that law is generally discoverable by courts, are administrative cases really different? Can we justify treating the legal standards, applied in dealing with state administrative action, as different from the usual questions of state law governed by the *Erie-Meredith* doctrine? As I made clear in Section VI.B.1 above, I do not believe that such a distinction is fully satisfactory. Still, I conclude that such a distinction is not wholly irrational. Its plausibility rests largely on the arguably peculiar nature of "scope of review" law applied by a court reviewing decisions of administrative agencies.

a. Federal court interpretations of state agency action not challenged as unlawful: primary jurisdiction

Sometimes a lawsuit within the jurisdiction of the federal district courts will raise issues as to the meaning of state regulatory law superintended by an agency, although there is no challenge to any action taken by the agency. If the issue is whether the state agency itself should be accorded a first opportunity to interpret some law within its area of special responsibility, the issue is one of "primary jurisdiction" as discussed in detail above. 477

b. Federal court "review" of state agency action

But if the issue is whether the federal court should defer in favor

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appellate review is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)).


477. See *supra* part V.C; *supra* notes 312-13, 387-401, and accompanying text.
of a state court proceeding in which the state administrative action will be reviewed, the matter has a different cast. Above we have seen that Burford itself was a review pattern case. We have also seen that while many such suits today are excluded from federal jurisdiction by other doctrines, some will survive these pitfalls for consideration under Burford. From a conventional perspective, does a state law challenge to completed state agency action implicate the concerns of Burford?

On the surface, at least, it would seem that after the state agency has acted, the issues confronting a court would be conventional issues of pure law, pure fact, and so-called mixed questions of law and fact. Normally the fact that questions of this sort are difficult to determine does not warrant abstention under the Erie-Meredith doctrine. When such issues are controlling in a diversity suit or, less typically, in a federal question suit, the federal court is required to exercise jurisdiction, doing its best to anticipate the probable disposition of such state law issues in the state court system.

Burford is rather easy to justify in its original circumstances where the state court which would hear the matter is an expert court and viewed as part of the policy-making process. Under such circumstances, the state court can be viewed as a higher level of the agency whose potential remedy must be exhausted. Suppose, however, that judicial review of an agency’s action occurs in regular state courts which cannot be classified as specialists in the agency’s regulatory scheme. Is there some justification for deferring to a regular state court’s determination of questions of law, of fact, and of so-called mixed questions under these circumstances? I believe that there may be such justification, even from the conventional perspective of Burford’s time, which saw courts as having very limited law-making power. There is at least an argument to be made against federal court review of state administrative action on the ground that it involves issues of law unsuited to federal court guessing under Erie.

i. Review of administrative action in general

Justice (then Professor) Scalia once said that much of the mate-

478. This seems to have been at least part of the rationale of the original Burford case itself. See supra notes 114-15 and accompanying text.

479. In these review pattern cases, either a federal or a state cause of action is asserted in federal court under diversity or federal question jurisdiction. In other words, these are lawsuits in
rial dealing with scope of review in an administrative law course "could have been purloined from a long-vanished course called 'Poetry in the Law,'" meaning that scope of review standards convey mood more than precise meaning. Indeed, his suggestion was that scope of review is better explained by reading the cases (agency by agency, context by context) rather than by any formula. In a similar vein, Professor Schotland said: "Different judges approach administrative review with perhaps even more variety than they approach other areas of law because administrative law is such a varied bag, involving so many different aspects of attitude and value."

These views suggest the possibility that the state law which determines the scope of judicial review of administrative action is justifiably seen as different from other state law under *Erie-Meredith*. In such state law standard of review cases, the plausibility of the premise that state law is tolerably replicable by the federal courts may have met its limits. Below I deal individually with the variety of issues review of agency action entails to see whether the standards of review deserve to be treated as ineffable.

ii. Pure issues of law

In this subsection, I assume that the basis on which abstention is urged is the federal court's need to decide an unclear state law issue, which can be characterized as a pure issue of law. By "pure...
issue” I mean one the resolution of which has reasonably clear and strong implications for the decision of future cases.\textsuperscript{483} In this discussion, pure issues are distinguished from so-called mixed questions of law and fact. An example of a pure issue of law is whether tomatoes are fruit within the meaning of a federal statute putting limits on the importation of fruit.\textsuperscript{484} A decision on that issue has clear, present implications for a large number of cases not currently before the tribunal. An example of a mixed question of law and fact is whether a complicated fact pattern, unlikely to be replicated exactly, constitutes negligence. The answer to that question has unclear and weak implications for the decision of future cases.\textsuperscript{485}

Attempting to anticipate a state court’s reaction to a state agency’s generalized interpretation of a state statute may be a more difficult matter than the usual guess required under \textit{Erie-Meredith}. In a case which does not involve an agency, there is a need for a guess only about how a state court will react to ordinary state legal materials (e.g., a statute or case law). Under the premises of the \textit{Erie-Meredith} doctrine, federal courts should be able to make such a guess acceptably well. In the case involving review of an agency’s decision, however, the federal court must also deploy the difficult body of state policy dealing with deference to agency interpretations of regulatory statutes.

A state’s policy of judicial deference to an agency’s interpretation of a statute it administers is unlikely to be set clearly by one guideline decision. Indeed, that policy may remain enigmatic even after a series of decisions elaborating the formula. The federal experience is illustrative. In \textit{Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,}\textsuperscript{486} the Supreme Court recast the theory of agency interpretation of statutory terms. Its current view is that ambiguous phrases in agency enabling acts generally should be seen as delegations by Congress to the agency involved to make law — to \textit{impair}


\textsuperscript{484} A less readily intelligible but real world example of a pure issue of law is whether Congress intended the words “stationary source” in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7502 (b)(6) (1988) to include only individual pollution-emitting devices or whether a whole industrial plant having many such devices could be treated as a single source. This was the issue confronting the Environmental Protection Agency, the lower federal courts, and the Supreme Court in \textit{Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,} 467 U.S. 837, 849 n.22 (1984).

\textsuperscript{485} \textit{See} Robert A. Anthony, \textit{Which Agency Interpretations Should Bind Citizens and the Courts}, 7 \textit{YALE J. ON REG.} 1, 8-10 (1990); Monaghan, \textit{supra} note 483, at 235-36.

\textsuperscript{486} 467 U.S. 837 (1984).
meaning to those words within the rather loose limits of "reason."\textsuperscript{487} There has been great disagreement among judges and scholars about how \textit{Chevron} is to be interpreted.\textsuperscript{488} For example, it might be seen as applying only to middle level technical questions and not at all to issues of jurisdiction, of fundamental policy, or to those with constitutional implications.\textsuperscript{489}

Even under pre-\textit{Chevron} federal law, it was difficult to predict whether a federal court would disagree with a federal agency's interpretation of its statutory mandate. The degree of deference due a federal agency's interpretation of its enabling act was difficult to pin down. Louis L. Jaffe, the most sophisticated modern commentator on judicial review of agency action, thought that the most accurate description was that each judge must simply determine if he believes the agency clearly wrong.\textsuperscript{490} Jaffe added five factors to help determine close cases.\textsuperscript{491} Even with the guidance of these factors, the decision of scope of review cases remained hard to predict.

Some states, in effect, have adopted a \textit{Chevron}-style approach. Other state systems for judicial review of agency action resemble the federal system in existence before \textit{Chevron}. Even as far back as the \textit{Burford} era, great deference was accorded agency interpretations of statutes on the basis of expertise, although the deference was not always explicitly justified on grounds of presumptive delega-

\textsuperscript{487}. See id. at 842-45.


\textsuperscript{490}. JAFFE, supra note 181, at 575-76.

\textsuperscript{491}. Id.
Today the states offer a wide variety of approaches. First there are those states that give extreme deference to agency actions. The states in this category seem to have adopted, either explicitly or implicitly, a straight reading of *Chevron*, and afford great weight to agency determinations. At the other end of the spectrum are those states that grant no deference to agency action. The third, and largest, group consists of states that vary the level of deference to agency action with the type of problem decided by the agency. A fourth group has no set rules as to the scope of judicial review on questions of law.

The fifty states are entitled to reject *Chevron*, reviewing state agency interpretations de novo, or, as they often seem to do, adopt some doctrine of deference resembling *Chevron* in various ways. In the end, even within one jurisdiction, the adoption of one position on the continuum strikes a mood more than it provides a rule of decision communicable to other courts under *Erie-Meredith*. The ineffability of state views on scope of review makes it at least plausible to view this troubling issue of statutory interpretation as sufficiently different from the usual questions of state law facing district courts to warrant abstention.

iii. Mixed questions of law and fact

There is understandable skepticism in the literature about the accuracy of describing questions as mixed. Theoretically, the legal and factual components of a mixed question can be disentangled. Despite this, there are good reasons for a court to defer greatly to an agency’s application of a statutory term to the highly specific facts of a case. In many such cases, the stakes are low since the decision is confined to the meaning of a statute as applied to a situa-

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492. See supra notes 193, 196, and accompanying text.
494. *Id.* at 763.
495. The device of characterizing a question as one of fact or as mixed permits a court to pretend that it *must* affirm the administrative action if it is "supported by evidence" or is reasonable. But if the question is analyzed and faced as one of law, the court cannot avoid its responsibility. JAFFE, supra note 181, at 547.
496. A. Martin Tollefson, *Administrative Finality*, 29 MICH. L. REV. 839, 843 (1931) (stating generally the rules for courts to follow in deciding whether to review certain administrative decisions); see also infra note 499 and accompanying text (noting especially the quotation).
497. Tollefson, *supra* note 496, at 843 (stating that the consequence of a different rule would be to flood the courts with appeals to review decisions of the administrative bodies in every instance).
tion unlikely to be repeated.\textsuperscript{498} I believe, however, that upon close examination, review of this sort of administrative decision is adequately covered by the analysis of review of pure issues of law discussed immediately above. As Tollefson states:

\begin{quote}
[T]he courts generally adhere to the rule that where there is a such a mixed question [of law and fact] and the court can not so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.\textsuperscript{499}
\end{quote}

Tollefson is right. Almost universally, when a reviewing court overturns a determination which was presented as a mixed question by the agency, the court identifies some generalized interpretation of a statute that the agency has violated. Thus, in any case where a federal court is asked to \textit{review} a state agency's decision of a so-called mixed question of law and fact, its doing so involves precisely the problem discussed in the previous section. That is the problem of determining whether the reviewing court can identify a pure issue of law which requires reversing the agency's decision, given the factual findings made by the latter.

If, however, \textit{Burford} is viewed as extending beyond its original circumstances to include cases I have termed primary jurisdiction cases and perhaps some others involving no administrative agency at all, then matters are different. In these cases, the federal court would not be reviewing an agency decision but would be applying state law as an original matter. State scope of review law is therefore not involved, and the difficulties involved in a federal court's applying such law cannot serve as a justification for abstention. Justification for such a doctrine would have to be found in concern about allowing a federal court itself originally to apply sensitive state statutory standards to facts before them in ways which do not always identify pure issues of law. Here a federal court's misapplication of state standards could arguably warp the application of state regulatory schemes in ways not apparent until the conclusion of a long series of decisions. This seems to be a concern of the sort addressed by \textit{Burford}'s second category, which applies in cases involving no truly important legal issue, but where federal review in a whole "series of cases" may disrupt "state efforts to establish a coherent policy."\textsuperscript{500}

\begin{itemize}
\item \textsuperscript{498} Monaghan, \textit{supra} note 483, at 235-36.
\item \textsuperscript{499} Tollefson, \textit{supra} note 496, at 843 (footnote omitted).
\end{itemize}
iv. Factual review

In the unusual situation in which the validity of state agency action turns on the accuracy of determinations of pure fact, the federal courts seem capable of applying the greatly deferential review accorded these determinations. Federal courts sitting in diversity are constantly required to determine facts made relevant by state law, and the federal standards for review of agency fact-finding resemble the state standards.\(^{501}\)

v. Arbitrary and capricious review

The *New Orleans* opinion suggests that cases in which federal courts are asked to determine whether state agencies considered the relevant factors are candidates for *Burford* abstention.\(^{502}\) Indeed, it is often said that a part of "arbitrary and capricious" review of agency decisions is to make sure that the agency has considered "the relevant factors."\(^{503}\) I believe that statements such as these are confusing, but correct, at least if properly clarified.

Assume that a particular statute either requires or prohibits an agency’s consideration of certain factors, specific to that statutory scheme, in the process of reaching its decision. For example, a statute might require that the agency balance cost against safety, requiring consideration of both "factors." Or it might require that a degree of safety be achieved regardless of cost, thereby making cost a prohibited "factor." An agency that ignores such a statutory command violates state statutory law, which is a sufficient reason for overturning the action without resort to any separate doctrine. There simply is no need to invent an arbitrary and capricious doctrine to condemn an agency decision which violates a statute as interpreted by a court. The Federal Administrative Procedure Act lists an agency’s exceeding its statutory mandate and its acting in an arbitrary and capricious way as two separate defects of agency action amenable to remedy by judicial review.\(^{504}\) Consequently, I believe that if arbitrary and capricious relevant factors review adds anything to a reviewing court’s arsenal, it must authorize something

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quite different from standard scrutiny for action which is ultra vires an agency's enabling act. I believe that the factors referred to in arbitrary and capricious analysis are factors of practical reasoning and not direct statutory requirements.

For example, in the well-known air bag case, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court overturned an agency's decision on the grounds that certain factors were not explored. The problem was not that the agency had misunderstood the general factors that its enabling act required it to explore, which I will call "statutory factors." The error, rather, was that, given the agency's correct view of those statutory factors, it had ignored "factors" of another sort. These were factors of practical reasoning which the Court expected any solid analyst to explore in determining whether a result was warranted by the statutory factors in light of the factual record.

In *State Farm*, the agency had reasoned that a rule requiring automatic but detachable seat belts was properly rejected because the safety cost-benefit standard required by the specific statute it administered was not met. In so concluding, the agency had generalized from data concerning how seldom those with standard seat belts used them. The Court reversed the agency's decision, concluding that the agency must consider the "human nature" factor it called inertia (i.e., that those who failed to buckle up might also fail to detach an automatic belt). One can hardly say that this factor was contemplated by Congress when it wrote the National Highway and Safety Transportation Act. Instead, the problem was the failure of the agency adequately to explore and reason through the appropriate application of the statutory goals to a particular problem and the materials relevant to its resolution.

An arguable gap in reasoning that one court finds egregious, another may find forgivable, if defective at all. Bringing this analysis back to *Burford*, it seems difficult for a federal court to predict how a particular state court would deal with reasoning of the sort presented in *State Farm*. Apparently, "[p]resent state judicial for-

506. Id. at 46-51.
507. Id.
508. Id. at 38-39.
509. Id.
510. Id. at 54.
mulations of the scope of review for agency policy decisions [under
the arbitrary and capricious test] reflect the incoherence and diver­
genence of federal case law."512 The determination of arbitrariness
and capriciousness of this sort simply may not be the kind of conclu­
sion of state law found tolerably predictable under *Erie-Meredith*.

3. Summary

For the reasons discussed above, I believe that *Burford* abstention
can be reconciled at least respectably even with a traditional view of
the *Erie-Meredith* doctrine. Any case involving judicial review of a
pure issue of law or a mixed question decided by a state agency
involves state scope of review law which may not be tolerably deter­
niminalable by a federal court. Arbitrary and capricious review of a
state agency's reasoning about a complex problem is even more diffi­
cult to reduce to a formula.

VII. FURTHER DIFFICULTIES WITH *BURFORD*: THE TWO
PROBLEMATIC *NEW ORLEANS* CATEGORIES

The *New Orleans* Court identified two species of what it called
*Burford* abstention:

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."513

The highly abstract language of this formula makes it difficult to
understand. As a result, this Article first explored other aspects of
*Burford* in an attempt to provide as much concrete context as
possible.

What follows is an attempt to determine the probable meaning of
each of the two categories and to explore difficulties with the picture

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512. McGrath et al., *supra* note 493, at 778; *see also id.* at 773-87 (discussing review of ad­
mnistrative agencies' policy decisions in both federal and state court contexts).

ing and quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814
(1976)).
that emerges. Below, we see that the first category is intended to resemble the form of abstention approved in the *Thibodaux* case. 514 It is concerned with the possibility that a federal court will make an error as to an especially sensitive or important issue of state law. My analysis of this category is not dependent upon which way one resolves the matter debated in the previous section, rather it is written to apply whether or not *Burford* abstention is limited to cases involving state administrative agencies.

The second category is intended to deal with cases resembling the *Burford* case itself. There is a significant question as to how it intelligibly and justifiably differs from the first category. These problems are discussed below. To the extent this category is intelligibly separate, it is concerned not with avoiding any single important federal misinterpretation of state law, but rather with the cumulative warping effect of a series of smaller scale errors on an important state regulatory scheme. This category and my discussion of it more naturally apply to cases involving state agencies, but conceivably they could cover regulatory schemes superintended only by specialized courts.

A. Category One: "Difficult Questions of State Law Bearing on Policy Problems of Substantial Public Import Whose Importance Transcends the Result in the Case Then at Bar . . ." 515

The *New Orleans* formula is taken nearly verbatim from a formula for *Burford* abstention offered by the majority opinion in *Colorado River*. 516 In that opinion, the Court referred to *Thibodaux* as the case exemplifying this first of two *Burford* categories. 517 In *Thibodaux*, the Supreme Court permitted a federal district judge to abstain in an eminent domain proceeding on the ground that unclear and sensitive issues of state law had to be resolved in order to decide the case. 518 As a consequence of this reference to *Thibodaux*, the first *Burford* category seems almost certainly designed to cover cases resembling *Thibodaux*. 519 In short, *Burford* abstention in this

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514. See supra part I.E (discussing *Thibodaux*).
517. *Id.*
519. It was after presentation of the precursor of this formula that the Court in *Colorado River* cited *Thibodaux*. See *Colorado River*, 424 U.S. at 814. But, after the recent *New Orleans* case, this category most likely has narrowed to cover only those *Thibodaux*-style cases which arise out
first category is concerned with the possibility that a federal court will make an error regarding a particularly important issue of state law.

What does the "substantial public import" portion of the formula mean? Both lower courts and the Supreme Court occasionally have described an issue warranting Burford abstention as "local" in nature. Some of the issues so described have involved insurance regulation and zoning. Perhaps the word "public" in "substantial public import" is simply intended as a synonym of "local" as it appeared in earlier statements of the Burford doctrine.

There are difficulties with interpreting "substantial public import" as "local" if it means that, apart from its importance, an issue must have some peculiarly local essence in order for it to warrant Burford abstention. Any attempt to classify some matters as truly local in ways that insulate them from federal judicial review seems less than promising. Analogous efforts at creating enclaves of state power proved unworkable. These were the failed attempts to define certain substantive area matters as so local or so essential to state governance as to be insulated from federal legislation under the Commerce Clause. State laws are always local in the sense that

of a state administrative processes. See supra notes 296-305 and accompanying text.

520. See supra notes 243-44 and accompanying text.


524. Any attempt to classify some matters as truly local in ways that insulate them from federal judicial review seems suspect for reasons analogous to those which doomed similar attempts to recognize local enclaves under the Tenth Amendment. See U.S. CONST. amend X ("The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people."). In National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court interpreted the Tenth Amendment to create enclaves of state governmental activities so central to a state's functioning as a state as to be immune from federal regulation under the Commerce Clause. Id. at 840-52. Nine years later, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985), overruled National League. Apparently post-National League cases convinced the Garcia Court that it was impossible to develop a satisfactory definition of what is and is not of sufficiently local essence to warrant protection. Garcia, 469 U.S. at 537-47. This conclusion was facilitated by the availability of another means through which the states could protect their prerogatives, specifically their representation in the political processes. Id. at 556.

Certainly there may be differences between Tenth Amendment jurisprudence and judicial fed-
they are produced by law-making organs of state government, rather than those of the federal government. When such laws are at issue in a federal question or diversity suit it is hard to claim that one is more local than another. There is no intelligible essence of "localness" for purposes of insulation from federal jurisdiction under Article III.

Perhaps the absence of the word local in the *New Orleans* formulation signals an awareness of the difficulties described above. Even so, *Burford* abstention, both as practiced and as defined by the Supreme Court, apparently continues to require the recognition of something resembling state enclaves from federal judicial power.

Most naturally, the first portion of the *New Orleans* formulation — applying to cases in which difficult questions of substantial public import transcend the result in the case at bar — identifies cases in which the importance of the issue to a state outstrips a party's and

eralism. The Court's Tenth Amendment jurisprudence seems to be based on its view of requirements of that amendment itself. Most varieties of judicial federalism discussed in this Article, (i.e., the abstention doctrines) are prudential doctrines created and often adjusted by the Court without need to overrule statutory or constitutional interpretation. But there are similarities as well. One could see *Burford* abstention as unworkable and unnecessary in ways similar to the regime under *National League of Cities*. First, *Burford* jurisprudence, which often plucks zoning and insurance regulation out of a myriad of state interests equally worthy of protection, see supra notes 243-44 and accompanying text, seems to see bright lines where there are none, as did the now defunct Tenth Amendment jurisprudence. As with the Tenth Amendment, the states have power here too, by way of congressional representation, to legislate *Burford* abstention, using Congress's great powers to limit the jurisdiction of federal trial courts. See supra note 2 (discussing Congress's powers over the jurisdiction of the lower federal courts). Post-*Garcia* Supreme Court cases suggest a slight pendulum swing back toward *National League's* concern with protection of the state but recognize nothing resembling enclaves defined in terms of federally untouchable areas of regulation. See *New York v. United States*, 112 S. Ct. 2408, 2453-57 (1992) (holding that the provision of the Low-Level Radioactive Waste Policy Act, requiring states to accept ownership of "waste" or to regulate in accordance with congressional instructions, is inconsistent with the restriction on congressional power embodied in the Tenth Amendment); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2402-03 (1991) (recognizing a presumption that federal legislation does not intend to intrude on essential political functions and requiring a plain statement in order for Congress to effect such a purpose). It seems likely, but not entirely clear, that Supreme Court appointments by President Clinton, at a minimum, will arrest any further swing of the pendulum back toward the *National League* approach.

Pre-New Deal Commerce Clause jurisprudence also presents a failed attempt to define substantive categories free from regulation under the Commerce Clause. This line of cases prohibited Congress from regulating mining, manufacturing, and horticulture among others on the theory that they possessed a "local" essence no matter how much they affected interstate commerce. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895). This approach was rejected during the New Deal. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38-39 (1937).

525. While the word local appears in the Court's opinion, it does not appear in the formula defining the doctrine. *New Orleans*, 491 U.S. at 361-62. In context, the use of the word local seems to suggest concern with federal court difficulties in understanding complex and regionally diverse regulatory systems and not mystical concerns with inviolable state sovereignty.
the federal government’s interests in the availability of a federal forum. Such an interpretation of New Orleans avoids resort to some supposed transcendent principles defining “local.” But it has the substantial, though different, disadvantages of involving the federal courts in assigning weights to a hierarchy of state interests in turn to be weighed against the harm caused by loss of a federal forum. Burford jurisprudence, which often plucks insurance regulation and zoning from a myriad of state interests, seems to have implicitly recognized such a hierarchy but not to have explained the choices made.

However difficult it is to draw these lines in a satisfying way, Burford abstention is not unique in its dependence on the recognition of a hierarchy of state interests. The Court supervises the development of a vaguely similar hierarchy under the Younger abstention doctrine. In the Younger line of cases, the Court first decided that state criminal processes were central to state sovereignty and thus exempt from federal judicial interference. Next, the Court decided that “important” civil judicial proceedings brought by the state likewise should be exempt. This, of course, requires the development of a hierarchy of importance of state interests.

Burford, like Younger, requires the Court to weigh the state interest against the “result in the case then at bar.” I take this passage to mean a weighing of the state’s interest against the importance of the assertion of a federal right in the federal forum which Congress has opened for its vindication. I have great concern that such a weighing process can never be more systematic than a listing of intuitive reactions to cases.

Assuming, however, that the difficulties of such an intuitive sort-

526. See Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 535 n.7 (3d Cir. 1988).
527. See supra notes 243-44 and accompanying text.
528. See Younger v. Harris, 401 U.S. 37, 43-54 (1971); infra notes 529-31 (citing cases therein).
530. Judice v. Vail, 430 U.S. 327, 334-35 (1977) (holding that the principles of Younger (i.e., federalism and comity) are not confined to the type of action involved in that case (criminal prosecution) but also apply to sufficiently important civil actions such as the state’s civil contempt processes).
531. For a case holding a state interest insufficiently important to warrant Younger abstention, see First Alabama Bank v. Parsons Steel Inc., 825 F.2d 1475, 1482-83 (11th Cir. 1987).
ing are not insuperable, there are other problems. Burford requires an even larger and more difficult undertaking than the sorting under Younger. The weighing process under Younger promises to be more confined.

This is true because Younger abstention is designed to protect only the most potent state interests as the court weighs them. I say this because the applicability of Younger is defined, and hence limited, by the type of proceeding (adjudication brought by the state) and its importance to the state.\textsuperscript{533} The clarity of state law involved in the proceeding is not a factor. By contrast, Burford abstention is not so limited. Read as a Thibodaux-style abstention\textsuperscript{534} applying to cases involving unclear and important issues of state law, Burford's first category is broader than Younger in one way. It covers the set of cases presenting state law issues as to which a federal court mistake might be unacceptably harmful.

This feature not only demonstrates the greater potential breadth of Burford, but also shows the difficulty of the calculus required to determine its applicability to any particular case. Under Burford, a determination of a state's interest requires some multiplication of the importance of an issue by the risk that a federal court will resolve it incorrectly. Only once this is done, however intuitively, will the product of that multiplication be weighed against various interests in the availability of a federal forum. Within its already more limited domain of state judicial proceedings, Younger analysis is additionally freed from consideration of any risk of mistake. This is true because, under Younger, lack of clarity of state law is virtually irrelevant to the decision to abstain.\textsuperscript{535}

As I have interpreted it, the almost frighteningly abstract formula defining the first Burford category offers lower courts little guidance in meeting the wide variety of highly particularized cases they will confront. Still, I leave this first category not with the view that I have proven it unworkable or even unwise. I leave it, rather, with the conviction that the decision to abstain under the first category will often be based on the reaction of a federal trial judge to a highly particularized situation, not readily amenable to appellate re-

\textsuperscript{533} See supra notes 528-31 and accompanying text.

\textsuperscript{534} In Thibodaux, it was the combination of the lack of clarity and the public importance of an issue which justified abstention. See supra part I.E.

\textsuperscript{535} Younger v. Harris, 401 U.S. 37, 44 (1971) (citing federalism and comity as the reasons underlying the Younger abstention doctrine).
view. In the conclusion to this Article, I suggest that the Supreme Court monitor the case law produced by this formula, adjusting it to achieve the desired results.\textsuperscript{536}

B. Category Two: "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."\textsuperscript{537}

The second category of \textit{Burford} abstention recognized in \textit{New Orleans} is intended to reflect the original doctrine as embodied in \textit{Burford} itself and in \textit{Alabama Public Service Commission v. Southern Railway Co.}\textsuperscript{538} The recent \textit{New Orleans} Court's formula for this category of \textit{Burford} abstention, quoted immediately above, is almost a word-for-word version of one appearing in the earlier \textit{Colorado River} opinion.\textsuperscript{539} After presenting the formula, the \textit{Colorado River} Court stated:

\begin{quote}
In \textit{Burford v. Sun Oil Co.} for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and \textit{future cases}, where the system had established its own elaborate review system for dealing with the geographical complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields.\textsuperscript{540}

In this passage, the \textit{New Orleans} Court makes it clear that the particular agency determination in \textit{Burford} itself was not of transcendent importance,\textsuperscript{541} hence the appropriateness of second, rather than first, category treatment.

If the first category does not draw bright lines, at least the nature of the lines it intends to draw is intelligible: some issues of state law are both so unclear and so important to a state's interests as to render federal court's guessing about them unacceptable. The second category not only presents difficulties similar to those of the first

\begin{footnotes}
\item[536] See infra p. 981.
\item[538] 341 U.S. 341 (1951).
\item[540] \textit{Id.} (emphasis added) (citation omitted).
\item[541] \textit{New Orleans}, 491 U.S. at 360.
\end{footnotes}
(e.g., the problem of determining the relative importance of state regulatory efforts), but the resemblance leads to a more fundamental difficulty: Is the second category intelligibly distinct? It is simply not clear what sorts of cases the Court intends to cover by this category which are not adequately covered by the first.

Certainly if a federal court mistake as to a pure issue of law (e.g., a fundamental misconstruction of a state agency's enabling act) threatens to disrupt an important state regulatory scheme, then the New Orleans test is met. But such circumstances can be dealt with just as easily under category one of the formula as under category two. Presumably such a mistake of law is of transcendent importance precisely because of the importance of the regulatory scheme it threatens to disrupt.

The second category is described as covering cases in which "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." This suggests that the concern is with the harm caused, not by a federal court mistake as to a single "transcendent" issue of state law, but rather by the cumulative disruptive effect of a series of possibly erroneous federal decisions. It is worth thinking carefully about how a series of federal decisions might disrupt state efforts to "establish a coherent policy."

It will be useful to distinguish between establishing and realizing a policy. No single federal decision, nor series of such decisions, can stop a state from establishing a policy, if the latter is within the domain left to the states by the Constitution and laws of the United States. Erie guarantees the states that much. While a decision or series of federal decisions as to state law may be wrong, the states are free to refuse to follow them and, in doing so, clarify state policy in ways that are binding on the federal courts.

There is, however, a way in which federal decisions might be seen as "frustrating" state attempts to form policy: by depriving the states of a case or a series of cases to be used as vehicles for the determination and declaration of policy. This analysis seems convincing, however, only if federal court cases hearing state contract and tort law claims could be likewise described as frustrating state policy formation. These too deprive state courts of the opportunity to elaborate policy. Erie-Meredith, however, clearly forbids abstention in such common law cases on the basis of unclear law alone. It seems, then, that loss of decision-opportunities can hardly be the ba-
sis for a category of Burford abstention.

Additionally, one could argue that part of state regulatory policy is the equal treatment of regulated interests under state law, and that federal mistakes disrupt that equality. Consider, for example, an implicit county policy that all similarly situated welfare recipients should receive the same treatment from a county agency providing funds to the poor. One could argue that federal court mistakes might result in inequality of treatment between those seeking state court review of an agency eligibility decision and those bringing federal suits raising comparable issues. This, however, would be insufficient to justify abstention. Arguments similar to those made against a decision-opportunity rationale for Burford also indicate that the equal treatment rationale does not suffice to ground that variety of abstention. The equality of treatment argument could be made for victims of federal court misconstruction of state contract and tort law. Presumably the state would desire that those similarly situated in tort litigation receive equal treatment, but under Erie-Meredith that has never sufficed to oust diversity jurisdiction. Something more must be required to distinguish category two cases from the usual contracts or tort case in which the possibility of inequality must be tolerated under the rule of Erie-Meredith.

Perhaps what the New Orleans Court meant to deal with is not state policy formation, but rather the realization of state policies going beyond those aiming at equal justice to individual litigants. If there is a state public interest going beyond those interests, it could suffice. City planning provides the clearest example in which a state is concerned, not just about justice or equal justice to individual litigants, but also about the overall pattern of development which emerges. Individual decisions are not only significant in themselves. Each building permit decision is like a move in an elaborate game of tic-tac-toe, blocking off space and constraining future development. The focus here is not on the making of policy, but on the effects of real world decisions on its realization. I will call regulatory schemes of this sort “developmental regulatory schemes.” Certain sorts of familiar regulatory schemes may be developmental, depending on what animates them. The pattern is hardly limited to zoning. A state may care about the structure of an industry, wanting the right combination of banks or insurance companies to offer the public the right array of features. Missteps caused by federal court mistakes of state law can make it difficult to achieve a desirable pattern. On the
other hand, any conventional state welfare scheme is not "developmental" in my sense.

Burford itself may have been developmental, if what was at stake was plausibly the state's power to control the overall pattern of production of an oil field as opposed to simply a fair allocation among individual claimants. A portion of such control is lost with each erroneous decision and, as a result, future decisions have a different meaning in the context shaped by earlier ones. Except on such a rationale, the Burford decision itself and category two, which it is meant to exemplify, are hard to justify.

Assuming that the second category is aimed at avoiding the disruption of developmental regulation, then in each case, two sorts of issues will govern the applicability of the second category. First, is the regulatory program sufficiently important to warrant abstention? Second, is it threatened with a sufficiently serious possibility of the sort of disruption I have identified above as developmental?

Like the problems discussed in the preceding section, which are created by the need to determine what questions of law are of "transcendent" importance, similar problems result from the description of the second category: the need to determine which state regulatory schemes are of substantial public importance and which are not. It may be difficult for the federal courts to work out a hierarchy of state regulatory schemes in terms of importance. I will not offer my own way of determining a hierarchy of schemes, except to suggest that encouraging honest input from individual states as to the relative importance of their statutory schemes is desirable, even in cases where the state is not a party. An authoritative concession that a scheme is not important or is not threatened by a particular federal lawsuit, should normally suffice to preclude Burford abstention. Short of that, statements by authoritative state organs as to the relative importance of regulatory schemes should be taken into consideration, however skeptically, by the federal courts.

For present purposes, I assume that, despite the difficulties involved, the federal courts can determine, in some at least satisfactory way, which state schemes meet the requirement of substantial public importance.

The next issue is whether federal court intervention poses the sufficient threat of disruption that Burford abstention seeks to avoid. If the analysis earlier in this section is correct, the next question is whether federal court "review in [this] case and, in similar cases"
would disrupt "developmental" regulation. First, this requires a determination of whether the portions of the regulatory scheme before the court are "developmental" in the sense used above. Assuming that this can be determined satisfactorily, the court must guess about the aggregate disruptive effects of review in a group of cases, many of which are hypothetical when the court decides whether to abstain under Burford. More importantly, it requires a decision about the degree of prophylactic generality to be used in defining a category of similar cases.

There is a continuum of possible ways for a federal court to resolve these issues, defined by the degrees of generalization and probing a federal court should engage in to determine the risk of warping a regulatory scheme. Both ends of the continuum are absurd and unsatisfactory. At the most deferential end, the remotest possibility of mistake as to any portion of a developmental regulatory scheme warrants abstention in all cases involving that scheme.

In a moment of exaggeration, Justice Frankfurter characterized Burford as occupying this end of the continuum. Citing the Burford case decided eight years earlier, the Court in Alabama Public Service abstained on the ground that a complex state regulatory scheme was involved. Although Justice Frankfurter concurred in the result, he objected to Burford abstention on the ground that there was no risk of disruption to the state's regulatory scheme: "[I]f [Burford] means anything beyond disposing of this particular litigation it means that hereafter no federal court should entertain a suit against any action of a State agency." Pushed so improbably to the wall, Burford would require abstention as to any decision made by a state agency if its work was of substantial importance and if some portion of its functioning might be disrupted in some case, even if the case at bar could in no plausible way contribute to the disruption.

At the other and least deferential end of the continuum, courts would not presume disruption. They would need to make a careful review of the state law portion of a case before them in order to determine whether to abstain. Weeks of substantive work could result in a conclusion that the state regulatory materials were suffi-
ciently unclear, thereby warranting abstention and rendering the work largely wasted. In the real world of decided cases, this does not seem to happen.

I believe that the Burford doctrine lies closer to, but not quite at, the deferential end of the continuum. It allows a court to err on the side of avoiding any real possibility of disruption through mistake of state law. All of the Supreme Court cases that I have read discussing Burford abstention suggest that a federal judge need not delve deeply into the workings of a state administrative scheme before abstaining. They suggest that the federal courts may, by looking at surface characteristics, recognize categories of decisions under a particular state administrative scheme where the risk of error as to state law is too great to tolerate. Indeed, I know of no case in which a federal court has made any sort of relatively deep inquiry into the workings of an administrative scheme in order to make a guess about the predictability of various agency determinations.

Still, it is possible that the proper disposition of some issues within an otherwise confusing administrative scheme are so clear on the surface that abstention is not warranted. By analogy, New Orleans itself shows that deference is not always required. In cases such as New Orleans, where state administrative action which is apparently clear on its face is attacked on federal preemption grounds, Burford abstention has been rejected at all levels of the federal judiciary.

Still some inquiry into the likelihood of federal court mistakes as to state regulatory law must be required. As the Seventh Circuit recently put it, "abstention in favor of pure speculation cannot be what Burford had in mind." Even outside the contexts of broad-scale attacks made on preemption grounds, it seems possible that a rule of order of a state administrative agency, running a program of substantial public importance, might be sufficiently clear so that a federal court should undertake to deal with it without awaiting further elaboration.

545. After the Colorado River Court's description of Alabama Public Service and Burford itself, the Court says that Colorado River does not fall within the "impermissibly disruptive" category exemplified by them because "[w]hile state claims are involved in the case, the state law to be applied appears to be settled." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 (1976).
546. See supra notes 245-47, 291-92, and accompanying text.
It is difficult to devise standards to specify: (1) what degree of risk of what level of harm to an administrative process of what degree of importance is unacceptable and (2) what degree of probing is required by the district court to determine the risk of harm in a particular case. Burford abstention has been and remains a murky doctrine precisely because its appropriateness is not determined by gross identifiable features of a case (as is often true in Younger abstention) but by a formula whose terms can never be specified with anything approaching real clarity. Perhaps the best that can be said is that a federal court should not abstain under Burford if the meaning of state agency action is clear beyond reasonable doubt on the surface of state legal materials.\(^\text{548}\)

To return to Burford's oil well theme, if the agency denial of a permit is based upon the application of an indisputably clear and applicable regulatory mathematical formula (three wells to an acre) to undisputed facts (one acre), Burford abstention should not block a federal court challenge under some applicable federal law. This proposed standard leaves room for dispute about what is clear beyond reasonable doubt in a particular context and as to what is a sufficiently important regulatory scheme.

I believe that federal appellate courts ought to defer greatly to the district courts' judgments of lack of clarity, reversing only if there is a clear error of judgment as to whether state law is clear beyond reasonable doubt. As for district courts' judgments as to which state regulatory schemes are "developmental" and sufficiently important, it may be possible for the federal appellate courts, over a period of years, to provide guidelines which will limit district court discretion to some degree. Again, I refer the reader to my conclusion suggesting that the Court monitor the real world results of its formula.\(^\text{549}\)

VIII. SOME GENERAL THOUGHTS ON BURFORD AND FEDERALISM: SHOULD BURFORD BE RETAINED, MODIFIED, OR ABANDONED?

Below, this Article considers the compatibility of the current Burford doctrine with the values immanent in the largely court-made

\(^{548}\) Redish, supra note 7, at 246. Redish suggests that Burford should apply only if, among other things, the federal court would be required to "immerse itself in the technicalities of the state regulatory scheme." Id. He also would require that the subject matter be of significant concern to the state and, in fact, detailed and complex. Id.

\(^{549}\) See infra p. 981.
law of judicial federalism. The main focus is on federal question cases. A second short section deals with diversity cases.

A. Federal Question Cases

This Article began with the observation that the critical features of judicial federalism have been drawn not by Congress, but by the Supreme Court. Whether in the form of interpretations of extremely malleable statutory language or in the form of relatively freestanding federal common law, these major features, determining whether federal claims will have a federal trial, have been designed by the Supreme Court. Much of this architecture has been put in place during the years of the Burger and Rehnquist Courts.

Sections 1331 and 1441 of the Federal Judicial Code are aimed at determining the circumstances under which reliance on federal law brings a case within the jurisdiction of federal trial courts. Section 1331 states that the federal district courts shall have jurisdiction over "cases arising under the Constitution, Laws and Treaties of the United States," tracking the constitutional language which brings such cases within the federal judicial power. Section 1441 permits a defendant to remove a case to federal court only if the plaintiff might have brought the case there originally but chose instead to file in state court.

One significant feature of judicial federalism is the Supreme

550. See supra notes 1-2 and accompanying text.
552. 28 U.S.C. § 1331 (1992) (federal question); id. § 1441 (1992) (actions removable generally). These are the general federal question jurisdiction statutes. There are others. For example, in a small subset of cases, federal statutes make removal possible on the basis of a federal defense alone. See, e.g., 28 U.S.C. § 1442(3) (1988) (affording removal to federal court to federal officers sued in state court for "acts done under color of his office or in the performance of his duties").
553. 28 U.S.C. § 1331 (1992). Section 1331 reads in full as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Id.
554. The Constitution states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . ." U.S. Const. art. III, § 2, cl. 2.
555. 28 U.S.C. § 1441(a) (1992). Section 1441 states in relevant part:

Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.
Court’s interpretation of Section 1331 federal question jurisdiction to cover only those cases where the plaintiff raises a federal issue central to her cause of action. As a result, a segment of those who wish to assert federal rights in federal court — defendants with federal defenses to state lawsuits pending against them in state court — cannot do so.

While it can be argued that this result is compelled by statutory language, there is no doubt that other significant doctrines of judicial federalism have little or no basis in statutory law. Current rules governing the availability of federal habeas corpus relief against state criminal conviction are based loosely, if at all, upon the federal habeas corpus statute and largely represent the Court’s compromise of what it sees as the interests of the state on the one hand and, on the other, the interests of the federal sovereign and the habeas petitioner.

556. The general proposition is that the assertion of a federal defense is not sufficient to ground federal trial jurisdiction under §§ 1331 and 1441. The plaintiff's well-pleaded complaint must depend upon a federal issue of law. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); see Bator et al., supra note 2, at 997-98. Most suits fitting such description involve causes of action created by federal law. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9 (1983) (noting that the "vast majority" of cases fitting within the "arising under" limitation arise under the federal law creating the plaintiff's cause of action). Some, however, have involved state-created causes of action "incorporating" federal law in some way. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) ("[W]here it appears . . . that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the [federal courts have] jurisdiction . . . ."); see also Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 214 (1934) (concluding that certain questions arising in a state court action to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Alliance Act are federal questions for purposes of grounding federal question jurisdiction). More recent case law tends to eliminate or, more plausibly, limit the sorts of cases in which a state cause of action incorporating federal law will be deemed to be within the federal question jurisdiction of the lower federal courts. See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 817 (1986) (holding that where Congress has determined that there is no private federal cause of action under the Federal Food, Drug, & Cosmetic Act (now the FDA), a violation of the Act, when an element of a state cause of action, does not give rise to a federal question).

557. See Mottley, 211 U.S. at 152.

558. See Shapiro, supra note 130, at 568, 577-89.

559. Do principles of finality similar to issue preclusion bar federal habeas corpus relitigation of federal issues fully raised in state criminal prosecutions? To a large degree, such relitigation was barred before Brown v. Allen, 344 U.S. 443 (1953), and was not thereafter. See id. at 457-58. This change made possible modern habeas corpus, which uses the lower federal courts as surrogate supreme courts largely replacing the Supreme Court itself, which was too overburdened to assure correct application of federal law in every case coming from the state courts. See Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 513-15 (1963). This redesign, based upon no statutory provision whatsoever, resulted in a truly major increase in the power of the federal courts to supervise the state courts and hence is
The contours of state sovereign immunity from federal suit under the Eleventh Amendment have been worked out by courts with more of an eye toward creating an acceptable and balanced judicial federalism than toward text or history. The same is true of largely Court-made doctrine under the Anti-Injunction Act. The abstention doctrines discussed above, not remotely generated by statutory law, are even more clearly the creatures of Court a major piece of the architecture of judicial federalism. Recent cases effectuating a partial restoration of finality for state court determinations of federal issues in criminal cases are of course not closely tied to the language of the federal habeas corpus statutes. See Stone v. Powell, 428 U.S. 465, 480-82 (1976). Teague v. Lane, 489 U.S. 288, 299-310 (1989), also reduces the variety of claims to which federal habeas corpus relief is available in connection with state criminal cases.

The Eleventh Amendment is enigmatic. It prohibits federal court suits against a state brought by citizens of other states. U.S. CONST. amend. XI. Despite the language strongly suggesting the contrary, the Court extended Eleventh Amendment-based protection to suits brought against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1 (1890). Hans has been read by the Court to prohibit suits seeking money damages against the states. See Edelman v. Jordan, 415 U.S. 651, 663-64 (1974). Hans does not, however, preclude those seeking injunctions against state programs and other state action. See Ex parte Young, 209 U.S. 123, 159-60 (1908). The latter exception is built on a fiction created by the Court to permit meaningful enforcement of the Bill of Rights against the states. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). The Pennhurst case itself reversed a longstanding pattern of allowing federal courts to hear suits seeking injunctive relief against the states based on state law as long as there was proper diversity or pendent federal question jurisdiction. Id. Some judges and commentators see the amendment as more limited, applying only to certain diversity-based suits and not to those grounded on federal question jurisdiction. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 299-302 (1985) (Brennan, J., dissenting); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 2004-05 (1983). While never embracing this position, the Court has recognized congressional power to override the Eleventh Amendment and subject states to monetary liability to United States citizens as long as Congress legislates under the Fourteenth Amendment or the Commerce Clause and makes its decision to override express. See Pennsylvania v. Union Gas Co. 491 U.S. 1, 19-20 (1989) (Commerce Clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Fourteenth Amendment). All of this suggests just how malleable this constitutionally based part of the design of judicial federalism has been in the Court's hands.

28 U.S.C. § 2283 (1988). Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id.

Mitchum v. Foster, 407 U.S. 225 (1972), concludes that the broad spectrum civil rights statute, 42 U.S.C. § 1983 (1988), is an express exception to § 2283 even though neither it nor its legislative history mentions § 2283. Mitchum, 407 U.S. at 242-43. This statutory interpretation has the advantage, from the courts perspective, of eliminating an absolute barrier to civil rights suits and making court-designed doctrines of judicial federalism, such as standing, ripeness, and the abstention doctrines, the principal devices for screening out cases troubling to federalism. Needless to say, making these doctrines the crucial ones leaves the court in direct control of judicial federalism. Changing the rules requires no overruling of a decision as to the meaning of the Constitution or a federal statute, but rather an adjustment by a judicial regulator to a judicial regulatory scheme.
creativity.\textsuperscript{562}

I agree with David Shapiro that judicial discretion regarding jurisdiction is not entirely bad.\textsuperscript{563} There are good reasons to allow the federal courts to fine tune their jurisdiction.\textsuperscript{564} But I also agree with his conclusion that discretion as to the exercise of jurisdiction ought to be principled.\textsuperscript{565} There is no principle in a contradiction. Over its lifetime, \textit{Burford} has often seemed close to a contradiction, at least as it has been reflected in the lower court decisions before the \textit{New Orleans} decision. One could read \textit{New Orleans} and \textit{Ankenbrandt}, decided just three years apart, as making directly contradictory statements about the applicability of \textit{Burford} abstention to cases not involving state administrative agencies. At one pole, most \textit{Burford} cases allude to the \textit{Cohens v. Virginia}\textsuperscript{566} view that statutorily conferred federal jurisdiction is mandatory.\textsuperscript{567} At the other pole, the \textit{Burford} formula has often proved so malleable that virtually any case involving unclear state public law arguably fits its mold.

Does the \textit{Burford} doctrine make any sort of principled sense in the larger current scheme of judicial federalism? The problem initially involves finding a critical perspective from which to examine these current doctrines, including \textit{Burford}. When should the federal courts be open and when should they be closed to a litigant with federal issues relevant to the outcome? The problem is, of course, one of balancing competing values, context by context.\textsuperscript{568} Some examples of those contexts are: federal suits to enjoin state administrative proceedings or decisions; federal injunctive suits to abort state criminal proceedings; habeas proceedings to review state criminal proceedings; and federal civil suits involving unclear state law.

In each context where federal jurisdiction has an effect on state institutions, unless the grants of jurisdiction are to be read as mandatory in the fashion of the \textit{Cohens} Court,\textsuperscript{569} the values underlying the existence of those grants of jurisdiction must be balanced against the state interests.\textsuperscript{570} The Court has offered its own implicit

\begin{itemize}
\item \textsuperscript{562} The various main abstention doctrines are discussed throughout the text above. For a brief summary of these doctrines, see \textit{supra} part I.
\item \textsuperscript{563} Shapiro, \textit{supra} note 130, at 545.
\item \textsuperscript{564} \textit{Id.} at 579-89.
\item \textsuperscript{565} \textit{Id.} at 575.
\item \textsuperscript{566} 19 U.S. (6 Wheat.) 264 (1821).
\item \textsuperscript{567} \textit{Id.} at 404.
\item \textsuperscript{568} \textit{See infra} notes 569-70 and accompanying text.
\item \textsuperscript{569} \textit{Cohens}, 19 U.S. (6 Wheat.) at 404.
\item \textsuperscript{570} This is, of course, the theme common to all abstention doctrines but less so to \textit{Pullman}
\end{itemize}
weighing, context by context, as it decides cases. I am not sure that either the members of the Court or other concerned judges or lawyers have worked hard enough to find some common ground as to the proper weight of state interests in these contexts or to understand the real threats to those interests which are posed by various sorts of federal suits. Still, that task is beyond the scope of this or any traditional law review article. That kind of work would involve an attempt to determine: (1) what state government currently means and might optimally mean in our country and (2) the possibilities of disruption of such government by the exercise of federal jurisdiction.

I propose, instead, to criticize Burford in the federal question context, based on the implicitly predominant value underlying the jurisdictional grant. I leave a more foundational reassessment to Congress or some task force, whether legislative, executive, judicial, or academic. That value is the great importance of providing federal courts for plaintiffs who assert federal causes of action. Again, one might ask why not provide federal courts for litigants with federal rights defenses to state law claims, and I could not provide a good answer based on policy or logic. History has foreclosed the courts from such an approach. It was rejected no later than 1908 in the Mottley case, the same year that Ex parte Young and Prentis laid the foundation for federal injunctions against state officers who violated federal law. Mottley held that the presence of a federal defense was not sufficient to ground federal jurisdiction under the federal question statute.

It is worth noting, however, that in many federal rights cases, the distinction between federal claims and defenses has been circumvented, because many federal rights against states have been seen as

abstention, where the desire to avoid unnecessary constitutional law-making is the driving force. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941).

571. See BATOR ET AL., supra note 2, at 997-98.


575. See supra notes 138-44, 205, and accompanying text (paving the way for federal injunctions against state officers by harmonizing them with the requirements of the Eleventh Amendment and by permitting such suits without prior resort to state courts).

576. Mottley, 211 U.S. at 152 ("It is the settled interpretation of [28 U.S.C. § 1331, the federal question jurisdiction statute.] . . . that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").
providing both a sword and a shield. These provide both a defense to prosecution and a cause of action — a federal right to an injunction. To illustrate, the plaintiffs in Ex parte Young had a choice between asserting their federal rights as a defense to a state criminal prosecution or asserting them as a claim for relief in a preemptive federal injunctive action. They chose the second course.

This second, sword-like aspect of most federal rights to be free of specified sorts of state action indicates the importance attached to a federal forum. The full blown abstention doctrines came decades after Ex parte Young, most often in extremely apologetic opinions stressing both the generally unflagging responsibility of federal courts to hear cases within their statutory jurisdiction and the extremely limited nature of any exception to such obligation. Indeed the whole design of the system makes no sense if federal courts are not seen as having a strong presumptive obligation to hear plaintiffs who assert federal causes of action. What are federal courts there for if not for that?

Despite what the case law has to say on the importance of federal plaintiffs' access to federal court, I am not tempted to push arguments for Burford's illegitimacy too far. After all, the general rule of plaintiffs' access has been tempered by requirements of standing, ripeness, abstention, and other doctrines which often make it difficult for someone with a federal right, presumptively available in an injunctive action, actually to assert it. These seem to be fixed features of our current system. I am, however, not entirely comfortable

577. See Ex parte Young, 209 U.S. 123 (1908); Younger v. Harris, 401 U.S. 37 (1971). Both of these federal suits to enjoin state court proceedings, allegedly predicated on constitutional error, recognized federal question jurisdiction to settle affirmatively constitutional issues which otherwise would have arisen only as defenses in state criminal proceedings. In Young, the suit was allowed to proceed. 209 U.S. at 168. In Younger, there was no suggestion that the suit was not within the judicial power as defined in Article III of the Constitution or within the court's statutory federal question jurisdiction. The Court decided only that abstention prohibited the suit and that it was unnecessary to decide whether the Anti-Injunction Act was also a bar. Younger, 401 U.S. at 54. Its premise was that judicial federalism, not § 1331, required that such issues be raised only as defenses in state court. See id. at 52-54. Younger left open the possibility that, in particularly compelling circumstances, such suits would lie to terminate state criminal prosecutions. Id. at 54. For a view that Fourteenth Amendment rights, but not nearly all federal rights, found an implied injunctive cause of action as well as a defense to state proceedings, see Henry P. Monaghan, Federal Statutory Review Under Section 1983 and the APA, 91 COLUM. L. REV. 233, 238-41, 240 n.55 (1991).

578. This was the course forced upon the plaintiffs in Younger. 401 U.S. at 37.

579. Young, 209 U.S. at 131.

with *Burford*'s method of compromising the clear federal interest, implicit in the current system, with perceived contrary state interests. *Burford*, as currently practiced, seems inconsistent with the long prevailing thrust of the current pattern of federal rights jurisdiction that federal courts be open to plaintiffs with federal rights claims. While it is impossible to attach definitive weights to the state's interests protected by the various possible *Burford* doctrines, all but the implausible "local" matter interpretation seemed concerned not with symbolic noninterference as in *Younger*, but with the possible federal court distortion of state law and institutions.

The cases which I have termed primary jurisdiction pattern cases, if they are properly seen as *Burford* variants at all, would most naturally adopt a *Pullman* approach. The only other *Burford* variant is a review pattern case, a case like *Burford* itself, in which a particular state court has exclusive power initially to review state administrative action under state law. Here the problems of return to a federal court and abstaining in favor of state judicial proceedings are difficult and the answers depend on a variety of possible perspectives.

Allowing return to the federal court for resolution of federal issues after the state litigation, spawned by *Burford* abstention, has run its course will not be universally popular; the similar practice under *Pullman* has been criticized as leading to unreasonable delay. There is, however, a strong case to be made for the *Pullman* approach if the concerns supporting *Burford* abstention are only that a specialized state court is part of the policy-making process.

I argued in the first portion of this Article that it was the hybrid nature of the trial court in *Burford* which resulted in the current approach. Viewing the state court as a state policy-making organ, the Court in *Burford* refused to threaten its potential contribution to state policy. But refusing to fully accept the implications of that view, the Court accepted the state's characterization of that body as

581. See supra notes 577-80 and accompanying text.
582. See supra note 382 and accompanying text.
583. See supra note 388 and accompanying text. Typically, but not always, in primary jurisdiction cases, an agency is consulted in order to enable a court to proceed with a case before it.
584. For a discussion of difficulties of delay under *Pullman* abstention and a discussion of judicial and scholarly criticism, see *Bator et al.*, supra note 2, 1363-64.
585. See supra notes 209-11, 219-24, and accompanying text.
a court for purposes of federal claim preclusion. 587

I believe that the Burford Court's approach was mistaken in this respect. If the reason for deferring under Burford is that the state policy-making process has not come to an end until one or more state courts have "reviewed" the agency's decision, then those courts are functioning as a higher level of the agency. The Supreme Court could force the states to choose whether a specialized state court should be treated as part of the agency or as a court. If the first treatment is chosen, no full res judicata effect would attach to the court's judgment although it might have a collateral estoppel effect as to facts found. If the state selects the second sort of treatment, there would be no need to resort to that body before filing in a federal district court. The Supreme Court could accomplish this by presuming that any state body officially called a court is a court and by requiring a state legislature to indicate otherwise. The price of so indicating would be that the body's judgments would not be accorded full res judicata effect. 588 Michigan v. Long, 589 in an analogous context, indicates the Court's power to adopt this approach. 590

Certainly there will be delay occasioned by allowing federal review after specialized state courts have decided. But in an important sense, the plaintiff's federal claim is not ripe until those state courts have spoken. 591 If, at this point, a substantial federal claim still exists, do not the federal courts exist largely for the purpose of vindicating such claims? The Court's handling of res judicata in connection with Pullman abstention makes it clear that the federal statute dealing with claim preclusion is not an absolute barrier. 592

From a traditional perspective, it is precisely because an original Burford-style federal claim is in some sense not ripe until one or more state courts have contributed to the administrative process that Burford makes a stronger claim than Pullman for suspending the rules of res judicata and allowing return to federal court after

587. Id. at 328.
588. See supra part III.C.2.a.
590. In Long, the Court made clear its power to create presumptions concerning the meaning of state decisions in order to determine its own appellate jurisdiction. Id. at 1042 n.8.
591. In effect, the specialized state court proceeding constitutes one more administrative remedy which must be exhausted before a federal court can proceed.
592. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 n.12 (1964) (noting that the Court is "confident that state courts, sharing the abstention doctrine's purpose of 'furthering the harmonious relation between state and federal authority,' will respect a litigant's reservation of his federal claims for decision by the federal courts") (citation omitted)).
The reason for this is that, after Pullman abstention, a case must often be litigated through several levels of the state judiciary before return to the federal court is possible. If Burford abstention is based solely on the need for input from an expert state court, a federal suit could be pursued once that court has reached its decision. There is no need to pursue the case any further through the state courts.

If Burford is seen as grounded on premises going beyond the need for expert state court review, the problem of a return to federal court may be more difficult. In Section VI, I described a possible alternative, but still reasonably mainstream, foundation for Burford abstention. On this view, the problem is not that some state court is an extension of the agency. It is, rather, that review of agency action, even in conventional state courts, poses issues which cannot comfortably be accommodated under Erie-Meredith. The notion is that it is impossible for a federal court acceptably to anticipate and apply state law and practice dealing with the scope of review of agency action.

Such a view moves Burford beyond its original province but not into very strange territory. It does, however, require federal court abstention until all state appeals are at an end. As a result, its costs are identical to those of Pullman abstention.

Finally, there is the third, more radical, perspective, which I propose above. On this view, some issues resolved in state courts, with no agency involvement at all, implicate sensitive state policy-making indistinguishable from that made in agencies. Extending Burford to such unclear and sensitive issues would narrow the general requirement of Erie-Meredith that federal courts interpret state nonadministrative law no matter how sensitive and unclear. In so doing, it would expand Burford or Thibodaux abstention to a new set of cases.

I believe that the price of this extension of Burford should be adjustment of the rules of res judicata, as under Pullman abstention, but with a recognition that the cost is high in terms of delay. It

593. But see id. (allowing for the relaxation of traditional rules of res judicata only where the federal courts have abstained on Pullman grounds).
594. See supra part VI.B.2.
is only where an issue of state law is so sensitive and unclear as to justify the delay that such extended Burford or Thibodaux abstention should be allowed. While I believe that these cases may be relatively rare, federal law needs such a category. Indeed, Thibodaux and Colorado River seem to have recognized as much. The apparent suggestion in New Orleans to the contrary is unfortunate. An Erie-Meredith doctrine without exceptions seems unjustifiable. It is improbable that absolutely all state law can be developed and applied acceptably well by federal courts. I hope that this is the meaning of the Court's cryptic statements in Ankenbrandt.

B. Diversity Cases

The presence of a federal question has been seen as strongly but not conclusively counseling against Burford abstention. Such judicial restraint generally has been seen as least problematic in diversity cases. In sections other than those immediately above, I have neglected diversity cases only somewhat. The discussion of Burford's origins, current ambiguity, and preemption by other doctrines applies to diversity cases as well.

However, Burford seems paradoxical in a pure diversity case. On the one hand, the federal interest seems less; on the other, the jurisdictional grant carries precisely the message that there are reasons for getting involved in local disputes whenever parties are technically diverse even though the issues concern state law.

I favor allowing Burford's expansion to nonadministrative cases

596. See supra parts IV.B, VI.
597. See supra notes 15-16 for a discussion of Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (suggesting that Burford abstention may be warranted in some cases involving no state agencies).
598. See supra notes 247-49 and accompanying text.
599. See, e.g., Smith v. Metropolitan Property & Liab. Ins. Co., 629 F.2d 757, 760-61 (2d Cir. 1980) (finding that abstention was justified in a diversity action where there was considerable uncertainty in the state law as to the validity of an insurance clause and there was a strong state interest in the doctrinal integrity of the regulatory scheme); Urbano v. Board of Managers of N.J. State Prison, 415 F.2d 247, 253-58 (3d Cir. 1969) (finding abstention justified in a "non-routine" diversity action that involved "serious issues" of state public trust law); City of Monroe v. United Gas Corp., 253 F.2d 377, 380-81 (5th Cir. 1958) (dismissing the suit on Burford abstention grounds after concluding that there was no federal question presented).
600. See Burford, 319 U.S. at 344-45 (Frankfurter, J., dissenting) ("There may be excellent reasons why Congress should abolish diversity jurisdiction. But, . . . it is not a defensible ground for having this Court by indirection abrogate diversity jurisdiction when, as a matter of fact, Congress has persistently refused to restrict such jurisdiction . . . .").
601. See id.
as formulated above but, of course, without the possibility of return to federal court for redetermination of state law issues. This is admittedly a partial abolition of diversity by the Courts, but one which operates when the federal court finds an unacceptably high possibility that some unclear issue of state law of vital importance to the states may be decided mistakenly. In this context, too, the involvement of state administrative action should matter less than the fact that a federal district court finds itself unacceptably unsure as to how a state organ, agency, or court will develop important state policy.

**CONCLUSION**

The *Burford* doctrine has been a mysterious form of abstention, never carefully justified by a commentator or a judicial opinion. The Supreme Court formulations of *Burford* have been abstract, leading to a variety of views concerning its requirements among the federal circuits. The Supreme Court's formulaic gyrations from *Colorado River* to *New Orleans* to *Ankenbrandt* have been unsettling. The Court should attempt to answer the following questions at the next appropriate opportunity:

1. Regardless of whether it is called *Burford* or *Thibodaux* abstention, is there a general abstention doctrine, applicable beyond cases involving state administrative agencies, which requires or permits federal courts to defer to state judicial proceedings for the determination of unsettled and sensitive issues of state law and policy?

2. If so, does the Court intend at least some special treatment for cases involving state administrative agencies? If so, why, and under what circumstances?

3. If the answer to question one is yes, are there to be further guidelines as to what state law questions are sufficiently sensitive and unclear to warrant abstention under the first category of the *Burford* doctrine as described in *New Orleans*? Or is the doctrine a greatly discretionary and amorphous exception to the *Erie-Meredith* principle?

4. How does the second category of *Burford* abstention, recognized in *New Orleans*, differ from the first? Does it apply, as I argue above, only to cases in which the federal court confronts what I

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602. For a general discussion of the utility of diversity jurisdiction, proposals to abolish it, and attacks on such proposals, see BATOR ET AL., *supra* note 2, at 1695-1700.
have termed "developmental" state regulatory schemes?

5. To what extent is the flat dismissal, typical of most Burford cases, still appropriate under the Burford or Thibodaux doctrines? To what extent is a Pullman-style approach now recommended or required?

Some issues have been clarified by recent cases, however. Until the New Orleans opinion, Burford abstention was much more widely available, because a remote connection between a case and a state policy-making process often sufficed under the law of a particular circuit. New Orleans now requires a close connection in order to justify Burford abstention. In particular, it requires some real possibility that the exercise of federal jurisdiction will interfere with state policy-making.

I believe that many lawyers, including Supreme Court Justices, will be surprised at how limited Burford's practical scope is after New Orleans and in light of other doctrines of federal judicial restraint. The form of federal proceeding in which state administrative policy is most likely to be warped is one in which state administrative action is attacked in federal court. After Pennhurst, most such attacks based on state law invalidity are precluded by the Eleventh Amendment. Other doctrines including ripeness, claim and issue preclusion, Rooker-Feldman, Younger abstention, and Pullman abstention will often provide clearer grounds for abstaining in a case in which analysis under Burford would otherwise be necessary.

For the set of cases in which Burford retains practical significance, often suits against local government, the doctrine has been changed by New Orleans in other ways. Burford, and possibly Pullman abstention as well, may be limited to its original province of suits of an equitable nature. There were suggestions in a 1976 Supreme Court opinion that Burford may apply beyond cases involving administrative law to cases involving regular state statutory and case law of an unclear and particularly sensitive nature. If New Orleans has limited Burford to cases involving administrative agencies, it is regrettable in light of changes in our view of the judicial process since Erie and Meredith forbade abstention in nonadministrative cases simply to avoid difficult questions of state law. Today it is clear that judges often make sensitive state policy in ways significantly similar to administrative agencies. If the recent Ankenbrandt case broadens federal abstention to cover some cases involving sensitive and unclear issues to be resolved by state courts alone, that is
laudable.

While I reject it, unique treatment for cases coming from state agencies is not indefensible. Even if judges are not seen as making policy in any strong sense, state scope of review law may be an exception to the assumption that state law is communicable to federal judges. The federal experience, both before and after *Chevron*, suggests that scope of review law is not ordinary law. There is every reason to believe that the cognate state scope of review law is equally ineffable.

I am troubled by procedural differences between the *Burford* and *Pullman* varieties of abstention. *Pullman* allows a return to federal court for litigation of federal issues after abstention; *Burford* generally does not. This seems inconsistent with the strong values underlying the statutory grant of federal question jurisdiction and insensitive to the predominant nature of *Burford* abstention as a somewhat disguised and highly specialized administrative exhaustion doctrine. Once again, if the hazy *Ankenbrandt* case signals the beginning of such an approach, that is laudable.

Finally, whether or not *Burford* is confined to administrative cases, the current formula for *Burford* abstention seems to require very difficult judgments about the importance of certain processes of state policy formation and the likelihood that a federal suit will disrupt them. At least the latter is difficult for federal appellate courts to review on a case-by-case basis.

As a result, the Supreme Court should monitor *Burford* abstention in the lower federal courts over a number of years. Perhaps several Supreme Court law clerks should be given the task of starting and continuing a multi-year longitudinal study for the Justices. Its focus should be the performance of the lower federal courts under all major forms of abstention possessing a large discretionary component, particularly *Burford* abstention. This would permit each Justice, whatever his or her personal criteria of doctrinal success, a broader feel as to whether such criteria are being met. Possession of such information seems vital to determining whether any such form of abstention should be abandoned or whether the formula defining it should restricted, expanded, or further elaborated. With the near total demise of its mandatory jurisdiction, the Court’s primary role as a policy-maker has become impossible for anyone to deny. Even this fractious Court should, more often than I believe it does, at-
tempt to think collectively through the whole bodies of doctrines which in the past it has carelessly created one case at a time.