State Policy in Federal Courts: Stabilizing the *Burford* Abstention Doctrine

Virginia Robinson†

*The federal abstention doctrines govern the narrow circumstances under which a district court can decline to hear a case even though it has proper jurisdiction. One of those doctrines—*Burford *abstention—has generated a morass of confusion over when it applies and what goals it is meant to achieve. To find a way out of the morass, this Comment looks at contemporaneous developments in doctrines of federal court review—and at the procedural history of* Burford *itself—to pinpoint the precise problem that* Burford *abstention was created to solve. It argues that the* Burford *Court was wary of federal courts exercising jurisdiction in cases like* Burford *where states had organized their systems of government in ways that did not neatly parallel the federal separation of powers. When state courts have been empowered to exercise complex administrative agency–style discretion, federal courts are not a comparable substitute. Judges in the federal system, who have life tenure, may not be able to adequately step into the policymaking shoes of state court judges, who are, for better or for worse, more democratically accountable.*

This Comment proposes a straightforward test—the "Judicial Discretion Test"—that courts can use to determine whether Burford *abstention is appropriate. The Test uses judicial discretion as a proxy for policymaking authority. Under the Judicial Discretion Test, if a state court judge hearing the case would have significantly more discretion under the state law at issue than a federal court judge would have when hearing a comparable case under federal law, the federal court should abstain in favor of state court. This Test is more administrable than the current framework under which courts perform ad hoc analyses, often cherry-picking particular facts from the original* Burford *case and looking at how closely those facts match the ones in the case at hand. As this Comment shows, it also better vindicates each of the concerns that motivated the original creation of the* Burford *abstention doctrine.*

† B.S. 2012, Auburn University; B.A. 2012, Auburn University; J.D. Candidate 2023, The University of Chicago Law School. I would like to thank Professor Bridget Fahey and the editors and staff of the *University of Chicago Law Review* for their thoughtful advice and insight.

INTRODUCTION

On September 13, 1948, the Southern Railway Company filed a petition with the Alabama Public Service Commission requesting permission to discontinue the operation of two passenger trains—Numbers Seven and Eight—that ran daily between Tuscumbia, Alabama, and Chattanooga, Tennessee.[1] The falling prices of automobiles and the construction of the federal interstate system had reduced ridership, and the railroad estimated that operating the two trains would cost the company $78,710.74 over the next year.[2] But the Alabama Public Service Commission found that there was a public necessity for the routes, denied the railroad's request, and threatened to assess a statutory penalty if

1 Ala. Pub. Serv. Comm'n v. S. Ry. Co. (*Alabama Public II*), 341 U.S. 341, 343 (1951).
2 Brief for Appellee at 2, *Alabama Public II*, 341 U.S. 341 (No. 395).

the company discontinued the trains.[3] In response, the Southern Railway Company filed a request for a permanent injunction in federal district court, invoking both federal question and diversity jurisdiction.[4] The district court, in reviewing the evidence de novo,[5] found that no public necessity existed and granted the injunction based on the railroad's showing of the heavy financial burden.[6] On direct appeal, however, the Supreme Court reversed. The Court held that the district court should have declined to hear the case even though it had proper jurisdiction because the railroad had failed to show that "the Alabama procedure for review of Commission orders [was] in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders."[7] This unusual requirement—that a prospective litigant in federal court make a showing of the inadequacy of state procedures before their claim will be heard in federal court—is part of the strange landscape of the *Burford* abstention doctrine.

The federal abstention doctrines govern the circumstances under which a federal district court can decline to hear a case over which it has jurisdiction. Generally, a federal district court is obligated to adjudicate any matter over which Congress has granted jurisdiction.[8] This requirement is grounded in the principle that "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."[9] However, the Supreme Court has articulated a set of "extraordinary and narrow exception[s] to the duty of a District Court to adjudicate a controversy properly before it."[10] These exceptions—the

---

3 *Id.* at 9–10.

4 S. Ry. Co. v. Ala. Pub. Serv. Comm'n (*Alabama Public I*), 91 F. Supp. 980, 982 (M.D. Ala. 1950), *rev'd*, 341 U.S. 341 (1951).

5 *Alabama Public II*, 341 U.S. at 347. Note that the district court was engaged in de novo review of the agency action and substituted *its own* judgement of what constituted a public necessity for the *state agency's* judgement. This Comment will argue that it was precisely that nondeferential standard of review that counselled for abstention.

6 *Alabama Public I*, 91 F. Supp. at 994–95.

7 *Alabama Public II*, 341 U.S. at 349.

8 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."); *see also* Chicot County v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.").

9 New Orleans Pub. Serv., Inc. v. Council of New Orleans (*NOPSI*), 491 U.S. 350, 359 (1989).

10 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

abstention doctrines—are named after the cases in which each was first laid out.[11] *Burford* abstention, first articulated in *Burford v. Sun Oil Co.*,[12] is one such exception. Roughly, it governs cases in federal court that involve complex questions of state policy.[13] Courts have invoked *Burford* abstention to deny litigants a federal forum in a wide variety of cases: a challenge to state eminent domain procedures,[14] petitions for corporate dissolution,[15] a request for the recission of a life-insurance policy,[16] and a constitutional challenge to a state workers' compensation law.[17]

---

[11] The four abstention doctrines are (1) *Pullman* abstention, which allows a federal court to stay a federal proceeding while state courts interpret state law if that interpretation could obviate the need for a ruling on federal constitutional grounds, R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941); (2) *Burford* abstention, the subject of this Comment, Burford v. Sun Oil Co., 319 U.S. 315, 332–34 (1943); (3) *Younger* abstention, which bars federal courts from hearing a civil rights tort claim when there is an ongoing state prosecution, Younger v. Harris, 401 U.S. 37, 41 (1971); and (4) *Colorado River* abstention, which allows federal courts to abstain in favor of a parallel state court proceeding, *Colo. River Water Conservation Dist.*, 424 U.S. at 817–19. There is a fifth case—*Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959)—which involved a doctrine sometimes called *Thibodaux* abstention. However, some (including possibly the Supreme Court) consider *Thibodaux* abstention a subset of *Burford* abstention (or maybe vice-versa). *See Colo. River Water Conservation Dist.*, 424 U.S. at 814. For completeness, *Thibodaux* abstention allows a federal court sitting in diversity to abstain in favor of the state court when the case involves matters of state law that are of great public importance to the state. *Thibodaux*, 360 U.S. at 28.

[12] 319 U.S. 315 (1943).

[13] The scholarship contains many definitions for *Burford* abstention. *See, e.g.*, Gordon G. Young, *Federal Court Abstention and State Administrative Law from* Burford *to* Ankenbrandt*: Fifty Years of Judicial Federalism Under* Burford v. Sun Oil Co. *and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 870 (1993) ("*Burford* abstention is normally viewed as appropriate in certain cases involving difficult questions of state law connected with state administrative processes."); Charles S. Treat, Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 971 (1979) ("The 'administrative abstention' doctrine [of *Burford* abstention] . . . allows federal courts to abstain from reviewing certain decisions of state administrative agencies or from otherwise assuming the functions of state courts in the development and implementation of a state's public policies."); Lewis Yelin, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1873 (1999) ("*Burford* abstention is implicated when the exercise of federal jurisdiction in the type of case before the court would disrupt state efforts to establish and develop a coherent regulatory policy concerning issues of primary interest to the state."). However, scholars and district courts disagree about both the purpose and the scope of the doctrine, and "[a] more precise definition remains elusive under the varying results and abstract verbal formulations found in cases addressing [its] meaning." Young, *supra*, at 870.

[14] *See, e.g.*, Rucci v. Cranberry Township, 130 F. App'x 572, 578 (3d Cir. 2005).

[15] *See, e.g.*, Friedman v. Revenue Mgmt. of N.Y., Inc., 38 F.3d 668, 671 (2d Cir. 1994); Caudill v. Eubanks Farms, Inc., 301 F.3d 658, 665 (6th Cir. 2002).

[16] *See, e.g.*, First Penn-Pac. Life Ins. Co. v. Evans, 304 F.3d 345, 346 (4th Cir. 2002).

[17] *See, e.g.*, Liberty Mut. Ins. Co. v. Hurlbut, 585 F.3d 639, 648 (2d Cir. 2009).

Unfortunately, in the seventy years since its creation, *Burford* abstention has generated a morass of confusion over when it applies and what goals it is meant to achieve. Scholars have called it "troublesome and enigmatic"[18] and have noted that there is "considerable confusion" in the lower courts over its application.[19] It is at the heart of two separate circuit splits, discussed in Part II, that have emerged as the lower courts have struggled to apply the doctrine. First, there is a split as to whether *Burford* abstention is appropriate in cases where the court must decide whether to dissolve a closely held corporation under state law.[20] Second, courts disagree over whether *Burford* abstention is appropriate in cases where the litigant is challenging a local land-use decision.[21] These disagreements arise because there is no clear test for lower courts to apply when deciding whether to abstain on *Burford* grounds. Instead, courts perform ad hoc analyses, often cherry-picking particular facts from the original *Burford* case and looking at how closely those facts match the ones in the case at hand. As discussed in Part II, different circuits envision *Burford* abstention as vindicating different concerns and rule accordingly.

The divergence among lower courts creates three problems for the system of federal jurisdiction. First, it leads to uncertainty for litigants. Second, it undercuts the congressional decision that litigants should be afforded a federal forum in cases where they meet either the federal question or the diversity jurisdiction requirements. Third, it creates areas where the boundaries between federal and state control over state policy are murky.

The uncertainty over *Burford* abstention also creates further uncertainty for state legislatures and weakens our system of federalism. States have no guidelines for when federal courts will or will not place their thumbs on the scales in situations where state

---

18 Young, *supra* note 13, at 863.

19 Treat, *supra* note 13, at 980.

20 *Compare, e.g.*, *Friedman*, 38 F.3d at 671 (holding *Burford* abstention appropriate for a corporate-dissolution claim), *and Caudill*, 301 F.3d at 665 (same), *with* Deal v. Tugalo Gas Co., 991 F.3d 1313, 1327 n.8 (11th Cir. 2021) (declining to extend *Burford* to state law judicial-dissolution claims).

21 *Compare* MLC Auto., LLC v. Town of Southern Pines, 532 F.3d 269, 284 (4th Cir. 2008) (approving of *Burford* abstention when a ruling would impact the land-use policy of a town), *and* Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760, 764–65 (4th Cir. 1991) (invoking *Burford* abstention in a case that challenged local annexation orders), *with* Saginaw Hous. Comm'n v. Bannum, Inc., 576 F.3d 620, 628 (6th Cir. 2009) ("*Burford* abstention applies only to statewide policies[,] and [ ] the appropriate focus for *Burford* abstention is state policy, rather than local policy.").

courts have discretion to make state policy determinations. In contrast, a clear picture of when federal courts will defer to state courts would allow state legislatures to make separation of powers choices where, for example, state courts could participate in policy creation without fear that federal courts might toss their hats into the ring.[22]

To find a way out of the morass, this Comment starts out in Part I by looking at contemporaneous developments in doctrines of federal court review—and at the procedural history of *Burford* itself—to pinpoint the precise problem that *Burford* abstention was created to solve. The history shows that the *Burford* Court was wary of federal courts exercising jurisdiction in cases like *Burford* where states had organized their systems of government in ways that did not parallel the federal separation of powers.[23] For example, states can (and do) empower their courts to undertake discretionary policy decisions, placing state courts in the institutional place of federal administrative bodies.[24] *Erie Railroad Co. v. Tompkins*[25] instructed federal courts to apply state substantive law by making an "*Erie* guess" as to what a state court would do, but that created a problem: What happens when a state law case that requires the judge to make a discretionary state policy decision arrives in federal courts? When state courts employ complex administrative agency–style discretion, federal courts are not a comparable substitute. Contrary to *Erie*'s assumption, judges in the federal system, who have life tenure, may not be adequately able to step into the policymaking shoes of state court judges, who are, for better or for worse, more democratically accountable.[26] This Comment argues that *Burford* abstention was created to respond to precisely that problem and to ensure that federal judges do not act as state policymakers.[27]

In light of that history, in Part III this Comment proposes a straightforward test—the "Judicial Discretion Test"—that courts can use to determine whether *Burford* abstention is appropriate.

---

22 This is one of the original explanations that the Supreme Court gave for approving of abstention in *Burford*. *See* 319 U.S. at 329–31.

23 *See infra* Part I.B.

24 *See Burford*, 319 U.S. at 325–26.

25 304 U.S. 64 (1938).

26 Thirty-nine states use some form of election when choosing judges. In addition, judges are subject either to reappointment or to retention elections in all but three states. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://perma.cc/S6XF-TC5U.

27 *See infra* Part I.B.

In general, the Test presupposes that federal courts should abstain whenever state court judges are functioning as policymakers. To determine whether that's the case, the Test uses judicial discretion[28] as a proxy for policymaking authority.[29] When state courts have been given policy discretion in a particular case, federal courts should abstain under *Burford* in favor of state court review so that state policy decisions are made by state judges, rather than by federal judges. To figure out whether state courts are acting as policymakers, federal courts should take a close look at the amount of discretion that is vested in the state court under state law in a particular dispute. That discretion sometimes derives from statutes,[30] sometimes from common law,[31] and sometimes from a combination of the two.[32] If that discretion exceeds the amount of discretion that a federal court would be able to employ when judging a similar action under federal law, then the federal court should abstain under *Burford* in favor of the state forum.[33] Part IV demonstrates the Test by applying it to the two

---

[28] This Comment also proposes a preliminary account of judicial discretion, laying out two sources of discretion: direct statutory grants and nondeferential review of state agency action. *See infra* Part III.A.

[29] Usually, judicial decisions are constrained by the law and the facts. Judges might disagree about the law or the facts, but once a judge is clear about the law and the facts, the outcome is determined. However, in some state law contexts, the judge exercises discretion, *even once the law and the facts are settled*. Two different state court judges could come to opposite conclusions even if they agree on the relevant law and facts. This discretion is a type of policymaking authority. The state legislature has permitted the judges to inject considerations external to the law and the facts. That permission is a grant of policymaking authority: the judge receives the power to define facets of the law in a way similar to the way that Congress enables executive branch actors to flesh out federal statutes. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (holding that it was constitutional for Congress to delegate power to the Attorney General to fill out the details of how to apply the Sex Offender Registration and Notification Act's registration requirements to prior offenders).

[30] *See, e.g.*, N.Y. BUS. CORP. L. § 1104-a (listing factors that judges should take into account when determining whether to dissolve a corporation based on a suit by minority shareholders).

[31] *See, e.g.*, R.R. Comm'n v. Shell Oil Co., 161 S.W.2d 1022, 1030 (Tex. 1942) (ruling that the state district court should reach an independent judgment as to whether a permit was appropriate).

[32] *See, e.g.*, Gross v. Adcomm, Inc., No. 2009-CA-001734-MR, 2010 WL 4295697, at *3 (Ky. Ct. App. Oct. 29, 2010) (citing KY. REV. STAT. § 271B.14-300(2)(a)):

> Because KRS 271B.14–300 uses the word "may" instead of "shall," we read it to authorize, but not mandate, the dissolution of a corporation by the trial court. Thus, even if all of the requirements of KRS 271B.14–300(2)(a) [are] met in [a particular] case, the decision of whether to dissolve [a corporation is] within the discretion of the trial court.

[33] Of course, sometimes there is no agency. For example, in the corporate-dissolution split described below, there was no state agency charged with overseeing corporate

circuit splits discussed in Part II. Finally, Part V shows that this Test, in addition to being more administrable than the current regime, vindicates each of the goals that concerned the Supreme Court in *Burford*.

I. *BURFORD* IN CONTEXT: THE UNSETTLED ROLE OF FEDERAL COURTS IN THE 1940S

This Part advances a theory of the goals that *Burford* abstention was created to vindicate and demonstrates that current proposals for reform fail to account for those goals. Part I.A looks at mid–twentieth century shifts in (1) the framework that federal courts used to adjudicate claims brought under state law and (2) the way federal courts thought about their role in reviewing federal administrative decisions. These shifts, still nascent when *Burford* was working its way up to the Supreme Court, redefined the role of federal courts in relation to both federal agencies and state courts. *Burford* was actually heard twice in the Fifth Circuit, and those two Fifth Circuit cases, discussed in Part I.B.1, show how these shifts—in applying state law and in reviewing administrative actions—created uncertainty over the appropriate scope of federal court review of state administrative actions. In *Burford*, the Supreme Court confronted the intersection of these two new shifts: the federal courts' role in reviewing state agency actions governed by state substantive law. However, as discussed in Part I.B.2, the Court—rather than squarely confront that intersection and use it to clarify each doctrine—chose to emphasize the particular facts of the case, leaving the underlying rationale for abstention unstated. As discussed in Part I.C, lower courts and scholars have been struggling to apply the doctrine ever since.

A. The Shifting Nature of Federal Court Review in the 1930s and 1940s

The Court decided *Burford* at a time when background assumptions about the role of federal court review of agency actions and state court decisions were shifting dramatically.[34] In *Erie*, the

dissolutions. *See infra* Part II.A. However, federal courts can still look at the amount of discretion available to the courts under federal statutes to determine whether a federal court should abstain.

[34] For a more thorough discussion of the dramatic changes that were taking place in the lead-up to *Burford*, see Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 646–53 (1999).

Court upended an almost-century-long practice of using federal "general law" when adjudicating state law cases in the federal courts.[35] Instead, *Erie* instructed federal courts sitting in diversity to follow state substantive law, including common law as articulated by the state courts.[36] Federal procedure, however, still governed.[37]

In addition, the New Deal–era Court's retreat from the protections of "economic due process" established by *Lochner v. New York*[38] led to the "sidelining" of both "federal due process claims challenging the reasonableness of regulatory actions" and "non-federal diversity claims that could provide parallel remedies."[39] The Court's repudiation of *Lochner* thus created a vacuum. Previously, courts had assessed regulatory action according to federal due process claims under the doctrine of economic due process. With the avenue to a challenge under economic due process closed off, it wasn't clear how—or whether—courts should review agency actions. When *Burford* was decided in 1943, *Lochner* had already been dethroned, but the Administrative Procedure Act of 1946[40]—which governs not only agency processes but also court review of those processes—was still three years away. The role of federal courts in reviewing agency decisions, like their role in reviewing state law cases, was thrown into flux.

Those questions over federal court review of agency decisions become even more complicated when federal courts are asked to adjudicate cases about state agency decisions governed by state law. States have the freedom to organize their systems of government in ways that do not map clearly onto the strict separation of powers mandated in the federal system by the Constitution.[41] Some states have empowered their courts to behave in ways that

---

35 *Erie*, 304 U.S. at 74–75.

36 *Id.* at 79–80.

37 *See id.* at 92 (Reed, J., concurring in part).

38 198 U.S. 45 (1905).

39 Woolhandler & Collins, *supra* note 34, at 619.

40 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

41 *Cf.* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 980–82 (2019) (noting that, despite the federal constitutional prohibition on judicial crime creation, more than a dozen states give their judges the power to "convict for conduct that is not criminalized by statute," and that, in some cases, judges in those states have "use[d] their common law authority to convict for a crime that had never before been recognized in the jurisdiction").

federal courts cannot.[42] Moreover, states are not bound by the federal government's decisions about federal administrative law or by the constitutional separation of powers constraints that govern federal court review of federal administrative decisions. As governance became more complicated and states began to build their own administrative systems, state legislatures and state courts began to answer state administrative law questions, and they did not always answer those questions in the same way as the federal system.

Federal courts should recognize that states might not reach the same conclusions as the federal government about the proper allocation of decision-making authority across different branches of government. In some states, the relationship between a state court and a state administrative agency might not be reproducible in a federal court.[43] In others, state courts are given policy-making tasks that, in the federal system, would be undertaken by federal agencies.[44] As the *Burford* line of cases will show, the role of federal courts in these situations remains confusing today. This raises two questions: First, to what degree should federal courts respect the choices made by states about how state courts relate to state agencies? Second, what role should federal courts play in resolving disputes that implicate state policies? While these are distinct questions, most courts (and scholars) ask only the second. This Comment brings the first question into clearer focus and articulates an administrable way of determining when *Erie* fails for this category of cases.

B. *Burford* Was Created to Solve a Problem that Arose Under *Erie*

In *Burford*, the Sun Oil Company sought to enjoin an order by the Texas Railroad Commission that granted G.E. Burford the right to drill wells on his tract of land in the East Texas oil field.[45] Because oil moves across oil fields, it is possible for a well located

---

[42] *See, e.g.*, *Burford*, 319 U.S. at 325–26 (discussing the broad authority of the Travis County District Court to be a partner in creating a coherent system of regulation).

[43] *See infra* Part I.B.

[44] *Compare* N.Y. BUS. CORP. L. § 1104-a (giving New York judges the authority to determine whether to dissolve New York corporations), *with* 12 C.F.R. § 747.402 (2021) (giving the National Credit Union Administration Board the authority to determine whether to liquidate (or revoke the charter of) a federal credit union).

[45] *Burford*, 319 U.S. at 316–17.

on one plot to drain oil from other plots of land.[46] Texas law at the time stated that "the holder of an oil lease [owned] the oil in place beneath the surface" of his land.[47] To prevent waste and to balance different landowners' property interests, the Texas legislature had given the Commission "broad discretion" to regulate drilling.[48] The legislature had also concentrated jurisdiction to review the Commission's decisions in the Travis County District Court.[49] However, Sun Oil brought the case in federal court, invoking both diversity jurisdiction and federal question jurisdiction, on the theory that the Commission had denied Sun Oil due process of law by granting the permit.[50]

The Supreme Court's opinion in *Burford* is relatively brief and confined to a discussion of the facts. To get a clearer picture of the underlying situation that led the Court to take the unusual step of creating an abstention doctrine, Part I.B.1 starts with a brief discussion of the two Fifth Circuit cases and the Texas Supreme Court case that laid the groundwork for the issue as it came to the Court in *Burford*. A discussion of the materials that the Court would have had in front of them can help isolate the root of the Court's reticence to allow the exercise of federal jurisdiction: the intersection of administrative law and the *Erie* doctrine.[51] Part I.B.2 then lays out the factors highlighted in the *Burford* opinion and shows how they support the theory that *Burford* was meant to vindicate unusual state choices about the allocation of policymaking authority.

---

[46] *Id.* at 319; *see also* THERE WILL BE BLOOD (Paramount Vantage 2007) ("I drink your milkshake! I drink it up!").

[47] R.R. Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 579, *modified*, 311 U.S. 614 (1940).

[48] *Burford*, 319 U.S. at 320.

[49] *Id.* at 326.

[50] *Id.* at 317. In particular, Sun Oil argued that "the Commission ha[d], in effect, disregarded and violated its own rules and regulations in issuing the permit" and that the permit therefore constituted "[a] taking . . . in violation of Texas laws and constitution, and the Fourteenth Amendment to the Federal Constitution." Sun Oil Co. v. Burford (*Sun Oil I*), 124 F.2d 467, 468 (5th Cir. 1941), *judgment vacated on reh'g*, 130 F.2d 10 (5th Cir. 1942), *rev'd*, 319 U.S. 315 (1943).

[51] As far as I can tell, this is the first time that the case's background in the lower courts has been discussed in the scholarship. Of course, only the Supreme Court's holding constitutes binding precedent. However, a clear picture of the record can help us understand why the Court felt the need to carve out a new area for abstention, even though the power to abstain generally rests on rocky constitutional ground. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (characterizing the Court's abstention doctrines as "judicial usurpation of legislative authority, in violation of the principle of separation of powers").

1. *Burford* in the Fifth Circuit and standards of review.

The Fifth Circuit, in its first of two opinions—*Sun Oil v. Burford*[52] (*Sun Oil I*)—agreed with the district court that Sun Oil's state law claims should be dismissed and pursued in state court.[53] It held that "if [the federal court found] no violation of the Due Process Clause under the Federal Constitution, then [it] should not attempt to decide the reasonableness of the action of the Railroad Commission [under state law]."[54] And the post–Lochner era federal due process analysis was a low bar: a federal court asked only whether the Commission had made an informed decision; it no longer looked at the substance of the decision.[55] That meant that the Fifth Circuit was reviewing Commission actions under a very deferential standard.

The court justified that deference by pointing out that it was ill-equipped to assess whether the Commission's decision was reasonable, noting that:

> [A] body like the Commission with the assistance of its experts, the use of public hearings at which members of the industry could appear and be heard with suggestions for better regulations, was more qualified to work out [a system for equitably controlling the production of gas and oil] than a court of justice.[56]

The court then affirmed the district court's dismissal of the state law claims.[57]

In dismissing those claims, the court extended an earlier Supreme Court decision that had advocated for dismissal in a similar circumstance. In *Railroad Commission v. Rowan & Nichols Oil Co.*,[58] also decided in the aftermath of *Erie*, the Supreme Court had similarly declined to rule on the state law issues in a case where the respondent had challenged a decision of the Railroad Commission of Texas. At that time (and at the time of *Sun Oil I*), there was an open question as to the standard of review applicable to litigants challenging Commission

---

52 124 F.2d 467 (5th Cir. 1941), *judgment vacated on reh'g*, 130 F.2d 10 (5th Cir. 1942), *rev'd*, 319 U.S. 315 (1943).

53 *See id.* at 468, 470.

54 *Sun Oil I*, 124 F.2d at 469.

55 *See supra* Part I.A.

56 *Id.*

57 *See Sun Oil I*, 124 F.2d at 468, 470.

58 310 U.S. 573 (1940).

decisions in Texas courts[59] because the Texas Supreme Court had not yet ruled on whether courts should be reviewing Commission orders under "reasonable basis" review—a relatively deferential standard—or if courts should apply their own independent judgments on whether the Commission had made the right call.[60] The Supreme Court counselled that, under the circumstances, a federal court should not weigh in on state law claims that were only in federal court because they were pendant on federal claims. The *Sun Oil I* Court, in dismissing the case, extended the Supreme Court's decision in *Rowan & Nichols* to apply to the state law claims of litigants invoking diversity jurisdiction as well.[61]

The very next year, however, the Supreme Court of Texas clarified the standard of review. It ruled that state courts should make independent judgments as to the reasonableness of challenged Railroad Commission actions.[62] This set up a problem. Under *Erie*, district courts sitting in diversity must attempt to mimic as closely as possible the substantive legal analysis that a state court would employ. In this case, though, that would require the federal district court to make a determination about Texas local policy—namely, whether Burford should be permitted to drill the extra wells. Unlike a federal due process analysis, in which the federal court would look only at whether the Commission had made an informed decision, the court would be asked to redo the Railroad Commission's analysis from scratch—effectively substituting its judgment for that of the Commission.

Because of this change in the legal landscape, the Fifth Circuit granted a rehearing in *Sun Oil Co. v. Burford*[63] (*Sun Oil II*). On rehearing, the Fifth Circuit remanded the case, asking the district court to independently evaluate whether the permit should have been granted in accordance with the now-clear

---

59 *Rowan & Nichols*, 310 U.S. at 583–84.

60 *See Sun Oil Co. v. Burford* (*Sun Oil II*), 130 F.2d 10, 13–14 (5th Cir. 1942), *rev'd*, 319 U.S. 315 (1943).

61 *Sun Oil I*, 124 F.2d at 468–69.

62 R.R. Comm'n v. Shell Oil Co., 161 S.W.2d 1022, 1030 (Tex. 1942):

> In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same.

See also Sun Oil II, 130 F.2d at 13 ("[T]he Supreme Court of Texas held that the courts of that state might exercise an independent judgment upon the validity of oil-proration orders of the Railroad Commission of Texas.").

63 130 F.2d 10 (5th Cir. 1942), *rev'd*, 319 U.S. 315 (1943).

standard of review.[64] This time, Burford appealed to the Supreme Court, arguing that *Sun Oil I*, which had affirmed the district court's dismissal of the case in favor of the state forum, should not have been overturned.[65]

2. The Supreme Court's concerns about exercising jurisdiction in *Burford*.

The Supreme Court agreed with Burford (and *Sun Oil I*) and held that the district court had correctly abstained because "a sound respect for the independence of state action require[d] the federal equity court to stay its hand."[66] The Court's opinion, however, did not provide a formula to determine why abstention was appropriate, and lower courts were left to derive their own formulae from the facts of the original case.[67] Because the original invocation of *Burford* abstention emphasized the factual record, rather than a stated rule of law, it is worthwhile to dive into the case's facts.[68]

In its opinion, the Supreme Court emphasized several factual findings that led it to conclude that the district court had properly abstained from exercising jurisdiction. Its focus on different aspects of the factual record reveals that it was motivated not by a single concern, but by a variety of considerations originating from the request that a federal court weigh in on state administrative actions.

First, the Court was concerned with the state's ability to administer its laws without the interference of federal courts. This was not a hypothetical concern: In previous cases where federal courts had weighed in on state questions, the state legislature had been forced to amend its statutes to correct for federal court mistakes.[69] The Court mentioned that "[s]pecial sessions of the [state] legislature ha[d] been occupied with consideration of

---

64 *See id.* at 17–18.

65 Brief for Petitioner at 11, *Burford*, 319 U.S. 315. (No. 495).

66 *Burford*, 319 U.S. at 334.

67 *See* Young, *supra* note 13, at 877–78.

68 Professor Gordon Young identifies nine distinct factors mentioned by the *Burford* court. *Id.* at 877–78. In contrast, I've selected four factors that other courts have seized upon. Young also noted that "[t]he opinion did not indicate which of the bewilderingly large number of possible combinations of these factors would be sufficient to warrant abstention." *Id.* at 878. In isolating the factors that are emphasized in modern opinions, I hope to illuminate the different underlying goals that motivate the choice of particular factors.

69 *Burford*, 319 U.S. at 328.

federal court decisions."[70] By poking their noses into the administration of state policies, the federal courts had created extra work for the state, which had been trying to create a coherent policy regime. Those facts, taken together, show that part of the *Burford* Court's reticence to allow the federal courts to exercise jurisdiction was based on concerns about federalism.

Second, the Court did not want the federal courts to be engaged in policymaking. The case in *Burford* "so clearly involve[d] basic problems of Texas policy that equitable discretion should be exercised."[71] The *Burford* Court emphasized that the Texas courts had "fully as much power as the Commission to determine particular cases" and that those courts were able to hear cases de novo.[72] Further, Texas courts could "formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them."[73] Those powers look like the internal-review processes that agencies use when reviewing their own adjudications and not like the usual tasks that are undertaken by federal courts. Despite the Court's admonishment that "no useful purpose [would] be served by attempting to label the court's position as legislative or judicial,"[74] the Court seemed to be nervous about federal courts engaging in agency-like policymaking.

Third, the Court was worried that the federal district court was a poor substitute for the Travis County court in Texas. *Burford* involved a challenge to the Commission's ability to make exceptions to its minimum spacing guidelines.[75] "[S]ince each exception may provoke a conflict among the interested parties, the volume of litigation arising from the administration of the rule is considerable."[76] The Court was thinking about the state's ability to administer its laws consistently, given the volume of litigation. The Court went on to explain that "[c]oncentration of judicial supervision of Railroad Commission orders permits the state courts . . . to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field."[77] That specialized knowledge is integral to the coherence of the regulatory regime. The Court's focus on administrability and

---

70 *Id.* at 329.
71 *Id.* at 332.
72 *Id.* at 326.
73 *Id.*
74 *Burford*, 319 U.S. at 325 (citations omitted).
75 *Id.* at 321–22.
76 *Id.* at 324.
77 *Id.* at 327.

specialization shows that it was also concerned with comparative institutional competence.

Finally, the Court was concerned with Texas's ability to structure its government in order to allocate policymaking authority as it saw fit. The Court spent multiple pages discussing how the Texas legislature had provided for the administration of these oil wells. Not only had the Texas legislature delegated "broad discretion" to the Commission to administer the law,[78] but it had also made "the Texas courts [ ] working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry."[79] In the federal system, courts are not "working partners" with agencies. The courts do not work together with agencies to create coherent regulatory regimes. Rather, the federal courts assess whether an agency action was in accordance with the agency's enabling statute, or whether there was sufficient evidence in the record to support an agency's determinations. But the states are free to arrange their governments however they see fit; they are not required to conform to the federal separation of powers. This Comment will argue that this concern, the concern that states should have freedom to allocate policymaking in their courts, was precisely what motivated the creation of the *Burford* abstention doctrine.

This Comment refers to the first three concerns as the "three justifications," and separates out the fourth as the central problem that *Burford* was meant to address. Each of these four concerns—federal forbearance from interfering in state matters, federal avoidance of cases that require explicit policymaking, the vindication of institutional competence, and a state's ability to architect its own separation of powers—must be addressed by any test that is faithful to *Burford*'s original purpose.

C. The Flaws in *Burford* Have Been Exacerbated Over Time

The *Burford* Court failed to identify any necessary or sufficient conditions for *Burford* abstention, and courts and scholars have struggled to determine the doctrine's contours ever since. This Section discusses those struggles, starting with the Supreme Court's guidance in later cases. The Court has upheld a district court's decision to abstain in only one other case, decided within

---

78 *Id.* at 320 (quoting VERNON'S TEX. STAT. Art. 6008, §§ 1, 22).

79 *Burford*, 319 U.S. at 326.

a decade of *Burford* itself.[80] However, the Court has heard several cases where it determined that abstention under *Burford* was inappropriate, most recently in 1996.[81] While the Court has not expressly cast doubt on the validity of *Burford*, it has suggested new formulations of *Burford*'s application in each subsequent case.[82] The next two sections discuss, respectively, the instability of the doctrine at the Supreme Court and the divisions between the lower courts over the purpose of the doctrine. The third Section demonstrates that the current scholarly proposals for reform do not fully wrestle with *Burford* in all its glory.

1. The Court's subsequent cases have muddied the doctrine.

Since *Burford*, the Court has attempted to set forth more precise boundaries. Different opinions have articulated different conditions under which it is appropriate to abstain. Lower courts looking to those opinions for guidance will find conflicting instructions. Perhaps abstention is appropriate only "when the exercise by the federal court of jurisdiction would disrupt a state administrative process."[83] Or maybe a lower court should also consider abstaining when a case "involves a specialized aspect of a complicated system of local law outside the normal competence of a federal court."[84] The clearest formulation is found in *New Orleans Public Service, Inc. v. Council of New Orleans*[85] (*NOPSI*):

> 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

---

80 *See, e.g.*, Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 343–44, 351 (1951).

81 *See, e.g.*, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 33 (1959) (Brennan, J., dissenting); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 815 (1976); New Orleans Pub. Serv., Inc. v. Council of New Orleans (*NOPSI*), 491 U.S. 350, 362 (1989); Ankenbrandt v. Richards, 504 U.S. 689, 706 (1992); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996).

82 *See infra* Part I.C.1.

83 *Thibodaux*, 360 U.S. at 33 (Brennan, J., dissenting).

84 *Alabama Public*, 341 U.S. at 360; *see also id.* (Frankfurter, J., concurring) ("In [*Burford*], the majority found that the technicalities of oil regulation and the importance of competent, uniform review made it proper for the District Court to decline to exercise its equity jurisdiction.").

85 491 U.S. 350 (1989).

(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."[86]

However, even these ostensibly clear criteria have been criticized as "unintelligibly abstract without the illustration provided by actual case decisions and opinions."[87] In addition, subsequent cases have further muddled the *NOPSI* criteria.[88] For example, in *Quackenbush v. Allstate Insurance Co.*,[89] the Court emphasized that there is no "formulaic test for determining when dismissal under *Burford* is appropriate."[90] Justices have also disagreed about the appropriateness of *Burford* abstention in nonequity cases[91] and have suggested that *Burford* abstention could operate as a stay, so that the procedural consequences would be more similar to those under other abstention doctrines.[92] These conflicting instructions and offhand propositions about possible expansions or contractions of the doctrine have—predictably—led to instability in the lower courts' application of *Burford* abstention.[93]

2. Lower courts are divided over *Burford*'s justifications.

As disagreements between courts of appeals proliferate, circuits have gravitated toward different theories of abstention.[94] Those theories can be seen by looking at the courts' reasoning and decision patterns. This Section discusses the three justifying theories that animate those circuit court analyses: federalism,

---

86 *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814).

87 Young, *supra* note 13, at 864.

88 *See, e.g.*, *Ankenbrandt*, 504 U.S. at 705–06; *Quackenbush*, 517 U.S. at 727–28.

89 517 U.S. 706 (1996).

90 *Id.* at 727.

91 *Compare id.* at 733 (Kennedy, J., concurring) (stating that the court "ought not rule out [ ] the possibility that a federal court might dismiss a suit for damages in a case where a serious affront to the interests of federalism could be averted in no other way"), *with id.* at 731–32 (Scalia, J., concurring) (stating that he would not have joined the opinion had he thought it left open the possibility of invoking *Burford* in a suit for damages). Note that the Court itself stated that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or *otherwise discretionary*." *Id.* at 731 (majority opinion) (emphasis added). It is not clear to me what constitutes discretionary relief and whether damages could count.

92 *Ankenbrandt*, 504 U.S. at 706 n.8 ("[S]hould *Burford* abstention be relevant in other circumstances, it may be appropriate for the court to retain jurisdiction.").

93 *See infra* Part II (discussing two current circuit splits).

94 For example, Kade Olsen identifies two theories of abstention that operate in the circuit courts: a federalism theory and a separation of powers theory. Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 774–78 (2013).

separation of powers, and institutional competence. The two circuit splits discussed in Part III further demonstrate that judicial focus on one theory at the expense of the others leads to inconsistent application of the abstention doctrine across circuits.

a) Federalism justifications. Sometimes courts invoke *Burford* abstention to protect state interests from federal meddling. This approach is rooted in the *Burford* Court's instruction that "a sound respect for the independence of state action" justifies abstention.[95] Lower courts that engage in balancing tests between state and federal interests when determining whether to abstain under *Burford* exemplify this approach. For example, the Fourth Circuit abstains whenever a "State's interests are paramount and [ ] a dispute would best be adjudicated in a state forum."[96] That language is taken directly from the Supreme Court's instruction in *Quackenbush*, which, compared to other Supreme Court cases on the issue, placed particular emphasis on the federalism justification to the exclusion of other usually referenced purposes.[97] The Sixth Circuit employs a similar balancing test.[98] The Second Circuit goes even further: rather than balance federal interests against state interests, it abstains from exercising federal jurisdiction whenever there is a strong state interest, regardless of the strength of the federal interests.[99]

b) Separation of powers justifications. At other times, courts invoke *Burford* abstention to prevent federal courts from taking on functions that look too much like executive or legislative powers. The Court in *Burford* noted that "the Texas courts [were] working partners with the Railroad Commission in the business of creating a regulatory system" and that "[t]he court [had] fully as much power as the Commission to determine

---

95 *Burford*, 319 U.S. at 334.

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

97 *See Quackenbush*, 517 U.S. at 728.

98 *See, e.g.*, Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co., 621 F.3d 554, 562–68 (6th Cir. 2010) (weighing the relative federal and state interests); *see also* Ada–Cascade Watch Co., Inc. v. Cascade Res. Recovery, Inc., 720 F.2d 897, 903 (6th Cir. 1983) ("The key question is whether an erroneous federal court decision could impair the state's effort to implement its policy.").

99 *See* Liberty Mut. Ins. Co. v. Hurlbut, 585 F.3d 639, 650 (2d Cir. 2009) (describing the relevant factors when considering whether to invoke *Burford* abstention as: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern" (quoting Hachamovitch v. DeBuno, 159 F.3d 687, 697 (2d Cir. 1998))).

particular cases."[100] Based on that recognition, later courts have focused on the unusual policymaking role that the Texas state court was playing. The First Circuit often emphasizes this aspect of *Burford* and supports abstention only in "'unusual circumstances,' when federal review risks having the district court become the 'regulatory decision-making center.'"[101] Similarly, the Ninth Circuit requires, among other factors,[102] both that there is a state agency involved and that suits challenging that agency's actions are concentrated in a particular state court.[103]

Scholars sometimes attribute this justification to a court's fears that it may be overstepping its Article III powers by exercising power that is not sufficiently "judicial."[104] However, in the original *Burford* case, the Court explicitly declined to "label the [state] court's position as legislative."[105] Professor Gordon Young argued that the Supreme Court was nervous about labeling activities "legislative" or "judicial" because that distinction had caused trouble in prior cases about claim preclusion.[106]

c) Institutional competence justifications.[107] Finally, scholars occasionally hint at institutional specialization as a third

---

[100] *Burford*, 319 U.S. at 326.

[101] Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20, 30 (1st Cir. 2011) (quoting Vaquería Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 473 (1st Cir. 2009)).

[102] The Ninth Circuit has developed a three-factor test for determining when to abstain under *Burford*:

> (1) [T]he state must have chosen to concentrate suits challenging the actions of the agency involved in a particular court; (2) the federal issues cannot be easily separated from complex state law issues with respect to which state courts might have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy.

Wynnyk v. Jackson County, 99 F. App'x 134, 135 (9th Cir. 2004) (citing United States v. Morros, 268 F.3d 695, 705 (9th Cir. 2001)). These three factors correspond nicely to the three justifications identified in this Section: separation of powers, institutional competency, and federalism.

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

[104] *See generally* Olsen, *supra* note 94, at 789–92. The *Thibodaux* Court also expressed this concern, justifying abstention based on the "regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." 360 U.S. at 29.

[105] *Burford*, 319 U.S. at 325 ("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.").

[106] *See* Young, *supra* note 13, at 894–98.

[107] Institutional competence justifications often overlap with separation of powers concerns. That is because one justification for separation of powers is that different branches develop different institutional competencies. *Cf.* Louis J. Virelli III, *Administrative Abstention*, 67 ALA. L. REV. 1019, 1044–45 (2016) ("Unlike the relationship

justification that courts have cited for abstaining under *Burford*.[108] This justification is often traced back to the court's observation in *Burford* that "[c]oncentration of judicial supervision . . . permits the state courts . . . to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field."[109] Sometimes courts—including the First, Seventh, and Ninth Circuits—have explicitly refused to abstain whenever the potential state court had no special competence or expertise in the litigated matter.[110]

3. Existing proposals for reform fail to vindicate states' choices about their governance structures.

The Judicial Discretion Test proposed in Part III recognizes that *Burford* abstention is difficult precisely because it sits at the intersection of administrative law and the application of *Erie*. Any proposal that is faithful to the original spirit of *Burford* must not only vindicate all three of the goals discussed in the prior Section but must also be responsive to the problems that *Burford* abstention was created to solve. Current scholarly proposals for reform fall into two categories: those that argue for abstention reform generally and those that argue for *Burford* abstention reform specifically. However, none of the current proposals adequately grapples with the central problem of *Burford*: What happens when states allocate policymaking authority to their courts?

Some existing scholarship advocates for abstention reform generally. For example, James Bedell has argued that all forms of abstention should be codified in federal law to promote clarity

between trial and appellate courts, where the division of expertise lies along the fault line between issues of law and fact, administrative agencies are expert across a third—policymaking—dimension that is generally considered outside the realm of judicial competence."). To avoid duplication, in this Section, I try to focus on the special subject-matter competence of the state court, rather than general institutional-competence concerns about rulemaking or policymaking writ large.

108 *See* Young, *supra* note 13, at 878 n.117. *But see* Virelli, *supra* note 107, at 1042 n.111 ("The attention paid in *Burford* to specialized court review is thus best understood as evidence of the complexity and significance of the policy question to the state (hence the state's going to the trouble of designing a specialized review procedure).").

109 *Burford*, 319 U.S. at 327.

110 *See, e.g.*, Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 842 (9th Cir. 1979); Wynn v. Carey, 582 F.2d 1375, 1383 (7th Cir. 1978); Penagaricano v. Allen Corp., 267 F.2d 550, 557 (1st Cir. 1959); Romero v. Weakley, 226 F.2d 399, 402 (9th Cir. 1955); Clutchette v. Procunier, 328 F. Supp. 767, 772 (N.D. Cal. 1971).

and create a more efficient judicial system.[111] The question of whether the abstention doctrines should be codified is outside the scope of this Comment.[112] However, codification of the *NOPSI* rule, as proposed by Bedell, cannot possibly solve the current confusion: a test that requires abstention only when "[t]he state's interest in deciding the issue in its own judicial system is strong" does not provide more predictability than the current regime.[113] An unadministrable rule will create circuit splits,[114] whether Congress or the Court hands it down.

Other scholars argue that all abstention doctrines should be replaced by a "first-filed" rule that could guard against duplicative litigation while maintaining forum neutrality.[115] These scholars sometimes argue that developments in the law, such as res judicata principles, have made *Burford* abstention unnecessary.[116] But forum neutrality is not the goal of *Burford*. Unlike the abstention doctrine recognized in *Colorado River Water Conservation District v. United States*,[117] *Burford*'s goal is not simply to avoid wasteful, duplicative litigation. Rather, it is meant to keep *state* policy in *state* courts. A forum-neutral doctrine could not possibly take its place. Unlike these general reform proposals, the Judicial Discretion Test proposed in this Comment is responsive to *Burford*'s goals and would create predictability and transparency in the application of *Burford* abstention.

In addition to the general abstention-reform proposals, two recent publications have discussed *Burford* abstention specifically. However, neither provides a solution that is responsive to all three justifications—federalism, separation of powers, and institutional competence—or to the problems that appear when states allocate policymaking authority to their judiciaries. The first proposal is from a student note by Kade Olsen, who argued

---

111 James Bedell, *Clearing the Judicial Fog: Codifying Abstention*, 68 CASE W. RSRV. L. REV. 943, 966–72 (2018).

112 The question of whether abstention ought to be codified implicates concerns about judicial usurpation of Congress's power to regulate the jurisdiction of the federal courts. This Comment is not concerned with which branch creates the rules for abstention. Instead, it is concerned with the *content* of those rules: How should courts determine when abstention is appropriate?

113 Bedell, *supra* note 111, at 972.

114 *See infra* Part II.

115 James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1066–69 (1994).

116 *Id.*

117 424 U.S. 800, 813, 817–19 (1976).

that *Burford* abstention should be justified by drawing a distinction between legislative and judicial power, rather than by invoking equitable discretion.[118] That proposal elevates separation of powers concerns at the expense of federalism principles. It also fails to recognize that the Court is wary of drawing a thick line between "legislative" and "judicial" action.[119]

The second proposal—by Professor Louis Virelli III—discusses *Burford* abstention as a type of "administrative abstention" and advocates focusing on promoting state administrative independence.[120] Virelli correctly identified that "[*Burford*] seeks to protect the uniformity and cohesion of [state] policies so as not to inadvertently subject state policy decisions to death by a thousand federal cuts."[121] However, his article completely elides the role of state courts in the process. It suggests that federal courts abstain in favor of the determinations made by state *administrative agencies*. Somehow, Virelli has left state *courts* entirely out of the picture. His proposal looks less like abstention and more like an extreme form of deference: when litigants ask federal courts to question state agency decisions, federal courts should always defer to those state agencies.[122] In reality, though, the level of deference that courts afford to state agency decisions is determined by state law, and *Erie* demands that federal courts adhere to that precise level of deference. *Burford* abstention is not about when we should trust state agencies; it is about whether we trust federal courts to wield the power afforded to state courts in shaping state and local policy.

II. *BURFORD* TODAY: CONFUSION HAS LED TO CIRCUIT SPLITS

Various circuit splits have emerged as the lower courts have struggled to apply the doctrine. One such split concerns whether *Burford* abstention is appropriate in suits seeking dissolution of a closely held corporation under state law.[123] A second split, which

---

[118] Olsen, *supra* note 94, at 784–85.

[119] *See Burford*, 319 U.S. at 325 ("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.").

[120] *See generally* Virelli, *supra* note 107.

[121] *Id.* at 1041.

[122] *See id.*

[123] *Compare* Friedman v. Revenue Mgmt. of N.Y., Inc., 38 F.3d 668, 671 (2d Cir. 1994) (holding *Burford* abstention appropriate in a corporate-dissolution claim), *and* Caudill v. Eubanks Farms, Inc., 301 F.3d 658, 665 (6th Cir. 2002) (same), *with* Deal v. Tugalo Gas Co., 991 F.3d 1313, 1327 n.8 (11th Cir. 2021) (declining to extend *Burford* to state law

generally arises in cases about land-use restrictions, turns on the appropriate geographical scope for policies that merit abstention.[124] The following two sections discuss each split in turn.

A. The Corporate-Dissolution Split

This split concerns cases where a shareholder comes to federal court seeking dissolution under state law of a closely held corporation—a corporation "whose stock is not freely traded and is held by only a few shareholders."[125] The boundaries of a court's authority to dissolve such a corporation are generally described in the state's corporate governance statutes.[126] Usually, the complainant requests that the court dissolve the corporation alleging either (1) internal dissension that "has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs"[127] or (2) misbehavior—fraud, corporate waste, or illegal activity—by the other shareholders.[128] The Second[129] and Sixth[130] Circuits both approve of *Burford* abstention when federal judges are asked to determine whether to dissolve a state law corporation. In contrast, the Eleventh Circuit has forbidden its district courts from abstaining because the cases did not involve state administrative proceedings.[131]

At least two circuits have ruled that *Burford* abstention applies in corporate-dissolution cases. In *Friedman v. Revenue Management of New York, Inc.*,[132] the Second Circuit affirmed the

judicial-dissolution claims). *See also generally* Peter Mahler, *U.S. Circuit Courts Split on Abstention Doctrine in Dissolution Cases*, JD SUPRA (Mar. 29, 2021), https://perma.cc/3ZK9-676X.

124 *Compare* MLC Auto., LLC v. Town of S. Pines, 532 F.3d 269, 284 (4th Cir. 2008) (approving of *Burford* abstention when a ruling would impact the land-use policy of a town), *and* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760, 764–65 (4th Cir. 1991) (invoking *Burford* abstention in a case that challenged local annexation orders), *with* Saginaw Hous. Comm'n v. Bannum, Inc., 576 F.3d 620, 628 (6th Cir. 2009) ("*Burford* abstention applies only to statewide policies[,] and [ ] the appropriate focus for *Burford* abstention is state policy, rather than local policy.").

125 *Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

126 *See, e.g.*, N.Y. BUS. CORP. L. §§ 1104, 1104-a (describing the criteria for judges to consider when faced with judicial-dissolution claims by stakeholders representing half of voting shares and groups of minority stakeholders, respectively).

127 *In re* T.J. Ronan Paint Corp., 469 N.Y.S.2d 931, 937 (App. Div. 1984).

128 *See, e.g.*, GA. CODE ANN. § 14-2-1430(2)(D) (2010) ("The [ ] court may dissolve a corporation . . . [i]n a proceeding by a shareholder if it is established that . . . [t]he corporate assets are being misapplied or wasted.").

129 *Friedman*, 38 F.3d at 671.

130 *Caudill*, 301 F.3d at 665.

131 *Deal*, 991 F.3d at 1326–27.

132 38 F.3d 668 (2d Cir. 1994).

district court's decision to abstain from a case seeking dissolution of a closely held corporation under New York law.[133] In doing so, the court noted that "New York has a strong interest in the creation and dissolution of its corporations and in the uniform development and interpretation of the statutory scheme regarding its corporations" and that "abstention would avoid needless interference with New York's regulatory scheme governing its corporations"[134] The court was also concerned that exercising jurisdiction "would allow 'the possibility of federal dissolution actions, based on [state statutes], being commenced in a number of different districts in which a particular . . . corporation was subject to service, thereby placing an onerous burden on the corporation.'"[135]

Similarly, in *Caudill v. Eubanks Farms, Inc.*,[136] the Sixth Circuit held that the district court was right to abstain from hearing a case seeking dissolution under Kentucky law.[137] The appellate court agreed that "the Kentucky Legislature ha[d] enacted a comprehensive legislative scheme to govern businesses which elect to incorporate in the state" and found "no reason to disturb important state interests in this case."[138] The *Friedman* and *Caudill* courts both noted that "every federal court that ha[d] addressed the issue of dissolving state corporations ha[d] either abstained or noted that abstention would be appropriate."[139]

In March 2021, however, the Eleventh Circuit split from this approach in *Deal v. Tugalo Gas Co.*[140] It held that abstention in corporate-dissolution cases was inappropriate because there are "no ongoing state administrative proceeding[s]" or "preexisting action[s] by a [ ] state court or executive official."[141] The court admonished other circuits for expanding *Burford* abstention past its appropriate reach, noting that "[a]ll we have is a potentially thorny legal question—namely, whether a federal court has the authority to dissolve a state-chartered corporation. Standing alone, that's no basis for refusing to decide a properly filed

---

133 *Id.* at 671.

134 *Id.*

135 *Id.* (quoting Alkire v. Interstate Theatres Corp., 379 F. Supp. 1210, 1215 (D. Mass. 1974)).

136 301 F.3d 658 (6th Cir. 2002).

137 *Id.* at 665.

138 *Id.*

139 *Friedman*, 38 F.3d at 671 (collecting cases); *Caudill*, 301 F.3d at 665 (quoting *Friedman*, 38 F.3d at 671).

140 991 F.3d 1313 (11th Cir. 2021).

141 *Id.* at 1326.

case."[142] In a footnote, the court made the circuit split explicit by writing that "[t]o the extent that other courts have extended *Burford* to state-law judicial-dissolution claims, we disagree," and citing the *Friedman* and *Caudill* decisions.[143]

The courts that approved of *Burford* abstention in corporate-dissolution cases did so based on two justifications: federalism and institutional competence. The Second Circuit primarily invoked a federalism justification and was mostly concerned with protecting New York's interests in the development of its doctrine applying statutory corporate law.[144] The *Caudill* court agreed with the Second Circuit's federalism approach. However, it also relied on an institutional-competence justification, citing Professor Lewis Yelin's assertion that "[t]hrough the repeated adjudication of actions to dissolve close corporations, the state courts acquire a depth of knowledge about the complex factual circumstances surrounding dysfunctional corporations that allows them to develop an understanding of when dissolution is required and when other remedies are more appropriate."[145]

In contrast, the Eleventh Circuit emphasized the separation of powers justification for *Burford* by focusing on the lack of an administrative proceeding.[146] The theory goes like this: if there is no administrative proceeding, then there is no blurring of the boundary of the role of state courts and therefore no need for a federal court to worry about venturing too far into policymaking territory. The varying rationales employed by the circuit courts in adjudicating the application of *Burford* to corporate-dissolution cases show the lack of consensus on the underlying purpose of the doctrine. The Eleventh Circuit, in emphasizing the separation of powers justification, ignored the federalism aspect of the case: states should be in charge of their own policy determinations regarding corporate law.

B. The Local Land-Use Ordinance Split

This split concerns cases where one party challenges a determination by a municipal zoning board. Usually, the complainant requests an injunction based on the theory that the zoning board

---

142 *Id.* at 1326–27.

143 *Id.* at 1327 n.8.

144 *See Friedman*, 38 F.3d at 671.

145 *Caudill*, 301 F.3d at 665 (quoting Yelin, *supra* note 13, at 1881 n.53).

146 *Deal*, 991 F.3d at 1326.

has violated its own ordinances or otherwise acted unlawfully.[147] The split is rooted in a disagreement about the appropriate geographical scope for policies that merit abstention.[148] The Third and Sixth Circuits have both held that *Burford* abstention is inappropriate in local land-use ordinance cases because the exercise of jurisdiction by a federal court would not upset a statewide policy.[149] In contrast, the Fourth Circuit often invokes *Burford* abstention in cases that arise from local zoning or land-use laws[150] unless the case implicates federal preemption or the First Amendment.[151] Although many cases implicate local-land use policy, for ease of comparison this Section focuses on two cases in which landowners requested injunctions in response to their towns' alleged violations of the towns' own zoning ordinances.

In *Saginaw Housing Commission v. Bannum, Inc.*,[152] the Sixth Circuit held categorically that a federal court should not abstain "from a decision involving the interpretation of a local land use ordinance."[153] In order to determine whether *Burford* abstention was proper, the court found "it appropriate to focus on the state rather than the local policy."[154] It held that only a "coherent state policy" can merit *Burford*'s protection[155] because municipalities, unlike states, "are not themselves sovereign" and "do not receive all the federal deference of the States that create

---

147 *See, e.g.*, *Saginaw*, 576 F.3d at 623; Meredith v. Talbot County, 828 F.2d 228, 231 (4th Cir. 1987); Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 745 (3d Cir. 1982).

148 *Compare MLC Auto.*, 532 F.3d at 284, *and Front Royal*, 945 F.2d at 764–65, *with Saginaw*, 576 F.3d at 628.

149 *See Saginaw*, 576 F.3d at 628 (holding "that the zoning dispute in this case does not implicate the kind of coherent state policy that would warrant *Burford* abstention"); *Heritage Farms*, 671 F.2d at 747 (deciding that *Burford* abstention was improper because there was "no uniform state policy for land use and development—policies necessarily differ from municipality to municipality").

150 *See Meredith*, 828 F.2d at 230–31; *see also MLC Auto.*, 532 F.3d at 284 (approving of *Burford* abstention when a ruling would impact the land-use policy of a town); Pomponio v. Fauquier Cnty. Bd. of Supervisors, 21 F.3d 1319, 1327 (4th Cir.1994) (en banc), *abrogated on other grounds by Quackenbush*, 517 U.S. (1996) ("[A]bsent unusual circumstances, a district court should abstain under the *Burford* doctrine from exercising its jurisdiction in cases arising solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims."); *Front Royal*, 945 F.2d at 764–65 (invoking *Burford* abstention in a case that challenged local annexation orders).

151 *See Pomponio*, 21 F.3d at 1328.

152 576 F.3d 620 (6th Cir. 2009).

153 *Id.* at 626.

154 *Id.*

155 *Id.*

them."[156] The court looked at Michigan's Township Zoning Act[157] to determine that there was no such coherent state policy, citing (1) the lack of substantive guidance to townships, (2) the lack of a centralized state agency, and (3) the lack of special rules for state circuit courts on appeal.[158] The Sixth Circuit also explicitly stated that it did not agree with the Fourth Circuit's expansive approach to *Burford* abstention because "*Burford* abstention applies only to statewide policies[,] and [ ] the appropriate focus for *Burford* abstention is state policy, rather than local policy."[159]

In *Meredith v. Talbot County*,[160] the Fourth Circuit abstained from a case in which "the claims asserted . . . raise[d] questions that implicate[d] the policies of Talbot County concerning the use of local land."[161] In doing so, it also looked for a "complex state regulatory scheme."[162] However, unlike the Sixth Circuit, the Fourth considered a complex local regulatory system sufficient, stating that "[t]he procedures, programs, statutes, regulations, planning boards, and officials involved in the subdivision approval process qualify zoning in Talbot County, Maryland, as being governed by a complex state regulatory scheme."[163] In fact, in a later case the Fourth Circuit went so far as to state that:

> "[Q]uestions of state and local land use and zoning law are a classic example of situations" where *Burford* should apply, and that "federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases and . . . sitting as a zoning board of appeals."[164]

The Fourth Circuit looks primarily at the complexity of the regulatory regime at issue (and its local salience), rather than at whether federal-court involvement might impinge on state sovereignty.

These disagreements among the circuits reflect underlying confusion about the goals and parameters of the *Burford* abstention doctrine. First, courts are confused about the goals of *Burford*

---

156 *Id.* (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985); City of Lafayette, v. La. Power & Light Co., 435 U.S. 389, 412 (1978) (plurality opinion)).

157 MICH. COMP. LAWS §§ 125.271–125.310.

158 *Saginaw*, 576 F.3d at 627–28.

159 *Id.* at 628.

160 828 F.2d 228 (4th Cir. 1987).

161 *Id.* at 231.

162 *Id.* at 232 (quoting Browning-Ferris, Inc. v. Baltimore County, 774 F.2d 77, 79 (4th Cir. 1985)).

163 *Id.*

164 *MLC Auto.*, 532 F.3d at 282 (quoting *Pomponio*, 21 F.3d at 1327).

abstention. Is it meant to prevent federal courts from taking on legislative functions? Or is it meant to protect local policies from federal meddling? Perhaps it is meant to keep specialized cases in specialized courts, where judges have developed subject-matter expertise. More importantly: How do we weigh the relative merits of those goals against the assumption that federal courts are well equipped to mimic state court reasoning under *Erie*?

Second, the unpredictable application of *Burford* abstention creates incentives for litigants to engage in forum shopping, straining the dockets of the federal courts.[165] This Comment proposes a solution: federal courts should abstain under *Burford* whenever an *Erie* guess would require that a federal judge make a state policy decision.

III. FIXING *BURFORD*: A NEW JUDICIAL DISCRETION TEST

This Part proposes a test that lower courts can use to determine whether *Burford* abstention is appropriate in a particular case. The Judicial Discretion Test turns on the level of judicial discretion that a state court is permitted to exercise under state law, using judicial discretion as a proxy for policymaking authority to determine when a federal court should abstain in favor of the state court. The sections below (1) provide a preliminary framework that courts can employ to determine what level of discretion is being afforded and (2) lay out the Judicial Discretion Test. Part IV then applies the Judicial Discretion Test to the two circuit splits discussed in Part II. Finally, Part V shows that this test vindicates each of the three goals of *Burford* abstention.

A. A Quick and Dirty Theory of Judicial Discretion

Judicial discretion arises in two situations. First, judicial discretion is sometimes authorized directly by statute or common law. A clear statutory example is in criminal sentencing for federal crimes.[166] Even once fact finding is complete, a federal judge can exercise discretion when determining the length of a sentence. But most other statutes mandate a particular result once the factual determinations are settled. For example, the federal

---

[165] If there is a predictable category of cases that fall under *Burford* abstention, litigants will be more likely to bring those cases in state court in the first instance, lessening the overall caseload.

[166] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the federal sentencing guidelines were advisory, rather than mandatory).

bankruptcy code's good-faith requirement for a bankruptcy filing *requires* a judge to reject a plan on a finding of bad faith by its proponent.[167] In contrast, under Kentucky corporate law, even after a judge has found that the statutory factors required for corporate dissolution are present, she can choose whether to dissolve a corporation.[168] That judge exercises discretion beyond her role as a fact finder: she makes a decision about state corporate policy.

Second, when a court reviews a decision made by a prior decision maker, it can be vested with varying amounts of authority to substitute its judgement for that of the earlier actor. That authority is the "level of discretion." The level of discretion bears an inverse relationship to the amount of deference that the judge grants to the prior decision maker. For example, appellate courts reviewing determinations of fact by courts or agencies below typically must be highly deferential: this translates to very little discretion on their part to make a *different* finding of fact. Similarly, low discretion corresponds to high deference. There are three basic levels of discretion afforded to judges when reviewing the decision of some other body, whether it be a lower court, a corporation, or an agency. From least to most discretionary, the levels of discretion are (1) abuse of discretion,[169] (2) clearly erroneous,[170]

---

[167] 11 U.S.C. § 1129(a)(3) ("The court shall confirm a plan *only if* . . . [t]he plan has been proposed in good faith." (emphasis added)).

[168] *See infra* Part IV.A.

[169] This is an extremely deferential standard of review—a reviewing court will set aside an action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In appellate review, this happens most often in situations where a higher court reviews decisions by a lower court made in the context of a trial: for example, a ruling on a motion to compel discovery or on the choice of jury instructions. In corporate law, business decisions made by directors of a corporation are reviewed under a similar standard, so long as the directors don't have any conflicts of interest. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). Likewise, judges have very little discretion when reviewing *policy* decisions made by an agency—these decisions are set aside only if they are arbitrary and capricious. 5 U.S.C. § 706(2)(A). A judge looks only at whether there was a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1968)). Generally, this level of review arises when there are no disagreements as to either the facts on the ground or as to the legal authority of the decision maker.

[170] Judges often apply slightly more deference when reviewing questions of fact, whether the fact finder is a lower court or an agency. A trial court's findings of fact may not be set aside unless "clearly erroneous." FED. R. CIV. P. 52(a)(6). A reviewing court can set agency determinations aside only when a factual finding is "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E), a standard that is somewhere between the clearly erroneous standard applied to facts found by a trial judge and the "no reasonable jury" standard that applies to facts found by a jury. *Cf.* Universal Camera Corp. v. NLRB, 340

and (3) de novo review.[171] The names of the levels of discretion derive from the standards of review in the federal appellate courts.[172] However, these standards map relatively well onto judicial review of both administrative and corporate actions. For example, the three levels align with the standards of review under the Administrative Procedure Act[173] for questions of policy, fact, and law, respectively.

There are fine-grained distinctions drawn within some of these larger buckets, but here I am just constructing a general framework. Because I am using this framework to determine whether the discretion vested by the state in its courts significantly outpaces that which the federal courts are usually comfortable with, those particularities are largely irrelevant. (The framework does not turn on, for example, the slight difference in fact-finding deference offered to a jury rather than a judge, or on the different standards in administrative law that apply to formal versus informal adjudication.) In addition, I refrain from limiting this framework to review of administrative agency decisions. Instead, I see *Burford* abstention as a way for states to vest policy control of state regulatory regimes in state courts—whether those regulatory regimes involve an agency or not. For example, state corporate law is a state regulatory regime that usually declines to vest power in a particular state agency.

B. The Judicial Discretion Test

Federal district courts should abstain whenever state law vests a higher level of judicial discretion in a state court than federal courts typically enjoy in similar situations. First, a court evaluating whether *Burford* abstention is appropriate should look at the amount of discretion vested in the state court under state

---

U.S. 474, 477 (1951) (holding that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (quoting Consol. Edison Co. v. Lab. Bd., 305 U.S. 197, 229 (1938))).

171 Judges are sometimes permitted to substitute their own judgment for that of the original decision maker. The clearest example is when a higher court is reviewing a lower court's conclusions of law. Those conclusions are reviewed de novo. *See, e.g.*, Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014). For example, in *Burford*, the state courts were tasked with reviewing decisions of the Railroad Commission de novo, substituting the court's own judgment for that of the commission. *Burford*, 319 U.S. at 326.

172 *See, e.g.*, FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous.").

173 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

law.[174] That discretion sometimes derives from statutes,[175] sometimes from common law,[176] and sometimes from a combination of both.[177] Then, a court should examine the discretion exercised by federal courts in similar disputes brought under federal law. If the discretion vested in the state court exceeds the amount of discretion that a federal court would employ when judging a similar action by a federal agency (or under federal statutory law), then the federal court should abstain under *Burford*. For example, in the original *Burford* case, the state court was tasked with reviewing Railroad Commission decisions de novo.[178] In contrast, federal courts generally review agency determinations under either a "substantial evidence" standard or for abuse of discretion—both of which are highly deferential to the initial decision. Under the Judicial Discretion Test, the federal court in *Burford* was right to abstain in favor of a state court proceeding because the state law at issue allowed more judicial discretion.

IV. APPLYING THE JUDICIAL DISCRETION TEST

This Part looks at the two splits discussed in Part II and applies the Judicial Discretion Test from Part III to the cases involved in those splits. Conveniently, the two splits correspond to the two sources of judicial discretion discussed in Part III.A. In corporate-dissolution cases, judicial discretion is authorized directly by a combination of statute and common law. In local land-use cases, judicial discretion comes from the common law

---

[174] It seems possible that there might be more than one level of discretion implicated in a particular case. I don't have a comprehensive theory about what a judge should do in that situation, if it were to arise. However, at first glance, it seems like it would be appropriate to abstain if the application of any level of discretion would give the judge state-policymaking authority.

[175] *See, e.g.*, N.Y. BUS. CORP. L. § 1104-a (listing factors that judges should take into account when determining whether to dissolve a corporation in response to a suit by minority shareholders).

[176] *See, e.g.*, R.R. Comm'n v. Shell Oil Co., 161 S.W.2d 1022, 1030 (Tex. 1942) (ruling that the state district court should reach an independent judgment as to whether a permit was appropriate).

[177] *See, e.g.*, Gross v. Adcomm, Inc., No. 2009-CA-001734-MR, 2010 WL 4295697, at *3 (Ky. Ct. App. Oct. 29, 2010) (citing KY. REV. STAT. § 271B.14-300(a)(2)):

> Because KRS 271B.14–300 uses the word "may" instead of "shall," we read it to authorize, but not mandate, the dissolution of a corporation by the trial court. Thus, even if all of the requirements of KRS 271B.14–300(2)(a) [are] met in [a particular] case, the decision of whether to dissolve [a corporation is] within the discretion of the trial court.

[178] *Burford*, 319 U.S. at 326.

standard of review that the state uses when reviewing zoning board determinations.

A. To the Corporate-Dissolution Split

This Section applies the Judicial Discretion Test to the three main cases in the corporate dissolution split. Each of the cases concerns a matter of state policy: courts have recognized that states have an interest "in the creation and dissolution of its corporations and in the uniform development and interpretation of the statutory scheme regarding its corporations."[179] Therefore, courts should first look at the level of judicial discretion afforded under state law to determine whether it provides a state judge significantly more policymaking power than a federal judge enjoys in the closest analogous situation.

The district courts should have abstained under the Judicial Discretion Test's model of *Burford* in all three cases. In each of the three cases, litigants requested corporate dissolution of a closely held corporation. Because each state governs corporate dissolution under its own statutes, courts should analyze each of those statutes sui generis. The first step of the Judicial Discretion Test is to determine the amount of discretion vested in state court judges under state law. All three statutes leave state court judges with discretion even after the relevant facts have been established, often using discretionary language such as "may" or "can."[180] The Judicial Discretion Test then looks at an analogous federal situation. Here, because the discretion is statutory, the proper comparison will be with a federal statute that governs a similar situation. In contrast to the state corporate statutes at issue, federal statutes that govern the disposition of a corporation, such as the bankruptcy code, mandate particular courses of judicial action upon the findings of particular facts. For example, the good-faith requirement for a bankruptcy filing *requires* a judge to reject a plan on a finding of bad faith by its proponent.[181]

---

[179] *Friedman*, 38 F.3d at 671.

[180] *See* N.Y. BUS. CORP. L. § 1104-a(b) (affording New York judges independent authority to "determin[e] whether to proceed with involuntary dissolution" so long as they consider specific factors); KY. REV. STAT. § 271B.14-300 ("The [ ] Court *may* dissolve a corporation . . . . (emphasis added)); GA. CODE. ANN. § 14-2-1430 (2010) ("The superior court *may* dissolve a corporation . . . ." (emphasis added)).

[181] 11 U.S.C. § 1129(a)(3) ("The court shall confirm a plan *only if* . . . [t]he plan has been proposed in good faith." (emphasis added)). I use the bankruptcy code here because there is no federal corporate law, and, as such, there is no corporate-dissolution action. The closest analogue is found in 12 C.F.R. § 747.402, which gives the National Credit

As the *Caudill* court noted, "the state courts acquire a depth of knowledge about the complex factual circumstances surrounding dysfunctional corporations that allows them to develop an understanding of when dissolution is required and when other remedies are more appropriate."[182] The state courts have space to develop a coherent policy as to when it is appropriate to judicially dissolve corporations incorporated under the laws of that particular state. Thus, under the Judicial Discretion Test, federal courts should abstain to avoid interfering in those policy judgments.

B. To the Land-Use Regulation Split

Saginaw presents a straightforward application of how the Judicial Discretion Test works when the court is asked to review the actions of a state agency. Step one is to determine the amount of discretion afforded to judges in state courts. In Michigan, state courts review the decisions of zoning boards for abuse of discretion, meaning Michigan judges have little discretion when reviewing the decisions of zoning boards.[183] Step two requires determining whether that standard offers a federal judge more discretion than she would enjoy in a similar situation under federal law. Because this is a case where the judge is reviewing the actions of a decision maker—here, the agency—the appropriate analogue is the federal standard for reviewing federal agency decisions. In cases where court review is available, an abuse of discretion standard is the least discretionary: it severely constricts a judge's ability to substitute her opinion for that of the prior decision maker. Because the state court retains the minimal level of discretion, it is inappropriate to abstain under *Burford*. Put differently: when a federal court reviews a decision made by a federal agency, the most deferential standard of review—in cases where a federal court is reviewing a question of policy—is abuse of discretion. So, if state law dictates that a court is reviewing under an abuse of discretion standard, the federal court defers to the state agency *at least* to the extent that it would defer in a

Union Administration Board the authority to determine whether to liquidate or revoke the charter of a federal credit union. However, in that case, it is an administrative agency that is making the decision. As an aside, the fact that, in the federal government, this role is being filled by an administrative agency gives me *more* confidence that the Judicial Discretion Test is getting it right. The state courts are stepping into an agency-like, policymaking role.

[182] *Caudill*, 301 F.3d at 665 (quoting Yelin, *supra* note 13, at 1881 n.53).

[183] *See* Sinelli v. Birmingham Bd. of Zoning Appeals, 408 N.W.2d 412, 415 (Mich. App. 1987).

federal case—no matter the underlying dispute. Here, the federal court is not acting as an arbiter of state policy and thus need not abstain.

Applying the Test to *Meredith* is more complicated because state courts review zoning board decisions under a substantial evidence standard in Maryland.[184] To determine whether a federal judge would be vested with less deference (here, abuse of discretion) in a federal case, a federal court would need to look at the issue at hand to decide whether the court was reviewing a question of fact, law, or policy. In *Meredith*, the lower court reviewed a question of fact: Was the defendant's land in fact "inhabited by two rare and endangered species, the American bald eagle and the Delmarva fox squirrel"?[185] If so, the county planning officer was statutorily authorized to deny the land use permit under Maryland's Natural Resource Code.[186] Under federal administrative law, a question of fact from a formal adjudication is reviewed under a substantial evidence standard.[187] Therefore, in the immediate case, the federal court is being vested with the same amount of discretion to review the state agency's determination as it would be to review a federal agency's determination. Accordingly, under the Judicial Discretion Test, the Fourth Circuit should have ruled that the district court retained jurisdiction because it was not required to make a policy judgment. Rather, it was engaged in a deferential confirmation of agency fact finding.

In summary, the corporate-dissolution cases each warranted abstention under *Burford* because the relevant state statutes vested the state courts with substantial discretion to craft a coherent state policy with respect to corporate-dissolution claims. In contrast, abstention was not appropriate in the two land-use cases. In both land-use cases the role of state courts in assessing state agency action closely mirrored the role that federal courts played in analogous situations. The federal courts were not exercising a level of policy control that is foreign to the federal judiciary, and the courts should have felt confident to assess these cases according to the relevant state laws.

---

184 Mombee TLC, Inc. v. Mayor of Baltimore, 884 A.2d 748, 755 (Md. App. 2005).

185 *Meredith*, 828 F.2d at 230.

186 MD. NAT. RES. CODE ANN. § 8-1813(a)(2) (1983).

187 5 U.S.C. § 706(2)(E).

V. THE MERITS OF THE JUDICIAL DISCRETION TEST

The Judicial Discretion Test improves on the current *Burford* abstention regime in two ways. First, it provides clearer guidance to litigants and courts. Second, it is responsive to each of the three goals of *Burford* discussed in Part II—a state's ability to construct its own separation of powers structure, a state's interest in the administrability of its laws, and the vindication of institutional competence. It also directly addresses the situation that *Burford* was created to solve: it provides lower federal courts with guidance as to how to avoid deciding state policy questions. The following sections discuss both the benefits of the Judicial Discretion Test and a potential downside.

A. The Test Provides Clearer Guidance to Litigants and Courts

The Supreme Court's formulations of *Burford* abstention have resulted in inconsistent application of the doctrine across the lower courts.[188] The biggest upside of the Judicial Discretion Test is that it presents a predictable framework for applying *Burford* abstention. The current regime asks courts to determine whether a state law question is "difficult," whether policy problems are of "substantial public import," or whether federal review would disrupt "state efforts to establish coherent policy."[189] However, a review of lower-court *Burford* decisions demonstrates that these vague standards are difficult to apply consistently.[190] The Judicial Discretion Test, in contrast, provides a clear path for determining when *Burford* abstention is necessary to protect state policy independence. Lower courts will be able to apply the doctrine consistently across cases, and litigants will be able to predict whether their cases are candidates for abstention and choose a venue accordingly. The applications in Part IV demonstrated the simplicity of the Test.

B. The Test Helps Courts Achieve Each of the Three Goals of *Burford*

Courts have different ideas about the goals of abstention.[191] However, "[n]o matter what goals one thinks abstention should achieve, the lower courts' ability to fulfill those objectives can

---

188 *See supra* Part II; *see also supra* Part I.C.2.

189 *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814).

190 *See supra* Part II.

191 *See supra* Part I.C.2.

work only as long as they understand when to abstain and when not to abstain from hearing a case."[192] This Section shows that the Judicial Discretion Test vindicates each of the three goals of *Burford* abstention: federalism, separation of powers, and institutional competence.

1. Federalism concerns.

The Judicial Discretion Test mandates that federal courts respect state decisions to locate policymaking power in different branches than those the federal system has chosen. It therefore preserves a state's power to construct a system that empowers state courts to make policy decisions, even though the federal system does not allow its courts to do so. If federal courts abstain under *Burford* when state courts are given policy discretion, the states are able to locate that policymaking authority in their courts without worrying that it opens the door to federal courts making those policy decisions instead.

This benefit of the Judicial Discretion Test is especially salient given the different methods used by states in selecting judges. State judges are often elected. Whatever the downsides of electing state judges, it does make them more democratically accountable. If states vest those democratically accountable state judges with policymaking discretion, it makes sense to keep that state policy discretion out of the hands of federal judges, who are more insulated from public opinion. Moreover, the Judicial Discretion Test helps preserve the states' role as laboratories of democracy: as states choose different boundary lines between their three branches, benefits and consequences of those choices can become apparent. That can provide the federal government with insight into how it might tweak its own boundary lines to better align with democratic goals.

2. Separation of powers concerns.

The Judicial Discretion Test insulates federal courts from accusations of inappropriately taking on a policymaking role. If federal courts exercise only a standard of review not exceeding the amount allocated to them under Article III—as determined by the Supreme Court in cases where federal courts assess federal agency determinations—or are operating according to federal

---

[192] Bedell, *supra* note 111, at 959.

statutes, then there is no need to worry about these courts stepping outside of their constitutionally assigned role. Furthermore, the Test avoids the messy question of what constitutes a legislative or judicial function, which is a distinction that the Court has been reticent to make.[193]

3. Institutional competence concerns.

The Judicial Discretion Test ensures that federal courts are engaging in matters within their sphere of expertise. Federal courts are experienced in certain types of tasks. For example, they are sophisticated at interpreting statutes. They are also well-versed in the application of law to facts and in assessing agency decisions under the standards of review prescribed by the Administrative Procedure Act. However, federal courts are not well equipped for other tasks, like weighing state policy considerations. By abstaining from statutory causes of action that ask judges to weigh policy considerations and leave courts with latitude even after the facts have been determined, federal courts avoid being tasked with policymaking power outside of their wheelhouse. The Judicial Discretion Test provides guidance that can help lower federal courts identify the state policy cases that are best left to the state courts. Likewise, by ensuring that federal courts do not adjudicate cases that require weighing policy matters in a way that is not permitted in federal agency-review cases, the Judicial Discretion Test helps to ensure that federal courts do not step outside their zone of competence into unfamiliar terrain.

C. State Strategies to Elide Federal Oversight Present a Danger

The Judicial Discretion Test does have a possible downside. One of the upsides of the Test—the increased predictability that comes with a more rule-like formula—could provide states with a roadmap to evade federal jurisdiction over their policies, even if those policies give rise to claims under the Federal Constitution.[194] Recently, states have demonstrated a new willingness to intentionally design statutes to prevent federal courts

---

[193] *See Burford*, 319 U.S. at 325 ("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.").

[194] For example, in *Meredith*, the plaintiff alleged a taking under the Fifth Amendment. 828 F.2d at 231.

from exercising jurisdiction.[195] This is a live issue, but the Supreme Court has indicated that there are paths by which these creative laws can be challenged in federal court.[196] That shows that when states act opportunistically, the Court is willing to respond. In addition, *Burford* is an equitable doctrine that gives courts leeway to look beyond the particular situation and react to opportunistic behavior. In the interim, though, the Judicial Discretion Test can create a more predictable regime despite the possibility that states might coopt the doctrine strategically to avoid federal meddling in their affairs.

CONCLUSION

Burford abstention can be used to alleviate difficulties that come from having two systems of courts that are vested with different powers and are governed under different constitutions but that sometimes substitute for one another. However, the courts can use *Burford* to do so only if "they understand when to abstain and when not to abstain from hearing a case."[197] The Judicial Discretion Test is an administrable rule that will allow federal district courts to decide whether to abstain in a systematic way, while substantiating the goals that *Burford* abstention was created to achieve.

Burford is interesting precisely because it implicates multiple constitutional principles. First, it flies in the face of the notion that federal court jurisdiction, when proper, is mandatory. It also combines two notoriously thorny areas of law: federal courts and administrative law. There is a robust doctrine that governs what happens when federal courts are judging federal agency actions under federal law. There is also a robust doctrine for how federal courts should make *Erie* guesses in order to properly apply state law. However, there is a gap in the current doctrine: What should a federal court do when asked to review state agency action under state law? The Judicial Discretion Test fills that gap by providing a framework for when federal courts should abstain in favor of a state forum.

---

[195] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530–31 (2021) (discussing the Texas Heartbeat Act, 87th Leg., Reg. Sess., also known as S.B. 8, which creates a statutory civil cause of action against physicians who perform abortions so that any preenforcement challengers would lack standing).

[196] *Id.* at 537 ("[M]any paths exist to vindicate the supremacy of federal law in this area.").

[197] Bedell, *supra* note 111, at 959.