ADMINISTRATIVE ABSTENTION

Louis J. Virelli III[*]

* Professor of Law, Stetson University College of Law. I am grateful to Mike Allen, Emily Hammond, and all of the participants in the 2014 Administrative Law Discussion Forum held at the University of Louisville Louis D. Brandeis School of Law for their helpful comments and suggestions on an earlier draft of this piece. I would also like to thank Melaina Tryon for her outstanding research assistance. Any errors are entirely my own. This research was generously supported by a grant from Stetson University College of Law.

ABSTRACT

Abstention—a federal court's decision to avoid interfering with an ongoing state proceeding—offers a snapshot into the foundations of our constitutional arrangement. In addition to notions of equity and comity, abstention conjures issues of federalism, the separation of powers, and democratic legitimacy. When abstention intersects with state administrative law, these issues take on new force and, in some instances, new meaning. Unlike state courts, administrative agencies occupy a tenuous position in a tripartite democracy and are tasked with making often difficult and controversial policy decisions. A federal court's decision to interfere with that policymaking process has consequences for state government far beyond the interruption of a purely judicial proceeding. Yet despite the different stakes raised by administrative abstention, the Supreme Court and the academic literature have largely overlooked the unique interplay between abstention and administrative law. This Article recasts administrative abstention as a distinct species of abstention and evaluates it in terms of the principles of democratic legitimacy and good government that provide the foundation for the administrative state. Only by thinking of abstention in distinctly administrative terms can we fashion a relationship between federal courts and state agencies that protects the legitimacy of state administrative governance while maintaining a robust forum for the vindication of federal rights.

I. INTRODUCTION

Federal court abstention—the decision of a federal court to refrain from deciding a case in favor of a parallel state proceeding—embodies the most enduring principles of American law and democracy. Federal courts and commentators have long justified abstention on federalism grounds, citing the importance of comity between federal and state courts to achieving the dynamic and divided government envisioned by the Constitution.[1] More skeptical observers have criticized abstention as inconsistent with the principle of separation of powers.[2] When federal courts forgo their

1. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 43–45 (1971); Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 349–50 (1951); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1052 (1994); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547–51 (1985) [hereinafter *Jurisdiction and Discretion*].

2. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (arguing that abstention is inconsistent with statutory mandate that federal courts exercise subject matter jurisdiction over certain cases); Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 BYU L. REV.

statutory authority to exercise jurisdiction for reasons of equity, Congress's power to control the jurisdiction of the federal courts gives way to the judicial branch's equitable calculation about which cases merit attention. The ultimate result is not only a complicated and often confounding doctrine, but also a unique lens into some of the most profound questions regarding our constitutional arrangement.

Despite the often close attention paid by courts and commentators to abstention's role in our constitutional system, an important aspect of the doctrine has been overlooked. In addition to providing useful insight into questions of federalism and the separation of powers, abstention has much to say about another foundational feature of modern American government—the legitimacy of the administrative state.

This Article offers the first comprehensive look at this under-appreciated dimension of abstention law by isolating the concept of "administrative abstention" and considering how it can be brought to bear to both clarify and promote administrative legitimacy.[3] It recasts administrative abstention as an independent—and distinct—species of abstention jurisprudence. It makes the normative case that state administrative legitimacy should be an animating feature of administrative abstention, and articulates how the doctrine should be developed to make that happen. Part II argues for treating administrative abstention as a separate subset of abstention law and lays out the current state of abstention in the administrative context, highlighting some of the shortcomings of current doctrine when applied to state administrative law. Part III makes the case for reimagining administrative abstention as a legitimizing force in state administrative government and articulates the animating principles behind such a movement. Part IV explains what reimagining administrative abstention in this way means for the federal courts, and Part V outlines the overarching benefits of a coherent approach to administrative abstention.

767, 803–07. *But see Jurisdiction and Discretion*, *supra* note 1, at 575 (making historical argument for why abstention is consistent with federal subject matter jurisdiction statutes).

3. I use the phrase "administrative abstention" to refer to all instances where a federal court is determining whether to interfere with an ongoing state administrative proceeding or state judicial review thereof. The phrase has previously been used as a synonym for *Burford* abstention, *see, e.g.*, Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1153–56 (1974) (quoting *Ala. Pub. Serv. Comm'n.*, 341 U.S. at 348) (distinguishing *Burford* abstention from other abstention doctrines on the basis that the state court proceeding at issue in *Burford* was "an integral part of the regulatory process"), but since *Burford* abstention is not limited to agency proceedings and other forms of abstention—especially *Younger* abstention—have also been applied in cases involving state agencies, the characterization of *Burford* abstention as "administrative" is sufficiently incomplete that I feel comfortable using the phrase in its more literal sense.

II. ABSTENTION AND ADMINISTRATIVE AGENCIES

Abstention has developed as an equitable doctrine aimed at protecting state sovereignty—particularly the sovereignty of state courts—from federal interference. It is most frequently justified as promoting the notion of comity, which the Supreme Court has described as a "respect for state functions," and which includes the belief that the nation as a whole will benefit if states "are left free to perform their separate functions in their separate ways."[4] Federal courts are expected to consider the cost to state sovereignty when deciding whether to render decisions that interfere with state court proceedings. Abstention's equitable nature raises several problems that have been the subject of voluminous scholarly inquiry.[5] One dimension of federal abstention doctrine has, however, received significantly less attention—how, if at all, should abstention doctrine be applied when the ongoing state proceeding at issue is administrative, rather than purely judicial? Despite the fact that many of the Supreme Court's most notable abstention decisions have in fact involved state agency proceedings,[6] the overwhelming focus of the abstention literature deals with questions about the interaction between state and federal courts.[7] While these questions are without doubt critical to the functioning of our federal system, they are, I contend, different from (or at least more limited

4. Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (quoting *Younger*, 401 U.S. at 44).

5. Scholars have dissected most aspects of abstention doctrine, including abstention's apparent inconsistency with constitutional and statutory mandates regarding the subject matter jurisdiction of federal courts, the normative aspects of when and how to defer to state judicial proceedings, and abstention's consequences for the prerogative of federal enforcement and protection of federal rights. *See, e.g.*, Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988); Field, *supra* note 3; Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 482–87 (1978); *Jurisdiction and Discretion*, *supra* note 1; Shreve, *supra* note 2; Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613 (1999); 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 (1993).

6. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *Younger*, 401 U.S. at 37; Burford v. Sun Oil Co., 319 U.S. 315 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

7. *See, e.g.*, Althouse, *supra* note 5; Robert Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27, 29 (1976); Randall P. Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974); Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003); Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986); Field, *supra* note 3; Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Rehnquist, *supra* note 1; Charles R. Wise & Robert K. Christensen, *Sorting Out Federal and State Judicial Roles in State Institutional Reform: Abstention's Potential Role*, 20 FORDHAM URB. L.J. 387 (2001).

than) the questions raised when we focus on federal threats to state administrative conduct. Moreover, the judicial response to what I assert are the unique features of administrative abstention has been a mosaic of doctrines that are not only incomplete, but that also appear to misunderstand both the distinct nature of, and the issues surrounding, the intersection of abstention and administrative law. This section will first make the case that administrative abstention should be recast as a related yet distinct branch of abstention law. It then identifies the gaps in current abstention doctrine's treatment of state administrative proceedings and relies on those gaps to formulate a set of unifying principles to guide the formation of a new, holistic view of administrative abstention.

A. The Case for Recharacterizing Administrative Abstention

There has been little discussion of administrative abstention as a stand-alone concept. *Burford* abstention—the doctrine that takes its name from the case that bore it—is often called "administrative abstention,"[8] but that label has since become a misnomer. Since its decision in *Burford*, the Court has developed several competing doctrines, such as *Younger* and *Colorado River* abstention, that also include state administrative proceedings.[9] This current array of doctrines lacks coherence, especially in terms of the treatment of state administrative action. The doctrines sometimes overlap and other times diverge from one another such that they fail to capture the full range of principles that bear upon administrative law and, in turn, administrative abstention.

There are several independent reasons why administrative abstention should be evaluated separately from more traditional judicial abstention. The first is that agencies occupy a different, and more tenuous, place than courts in our constitutional separation of powers regime. The separation of powers is endemic in American government. It is implicitly present in the division of responsibilities and checks and balances created by the U.S. Constitution[10] and is equally important to—and often explicitly required by[11]—every state constitution in the United States. Regardless of whether the separation of powers is understood as an exercise in isolating the three branches of government from one another or in facilitating the fair and

8. *See, e.g.*, Field, *supra* note 3, at 1154; Woolhandler & Collins, *supra* note 5, at 616.

9. *Colo. River*, 424 U.S. at 800; *Younger*, 401 U.S. at 37.

10. U.S. CONST. arts. I, II, III; Bowsher v. Synar, 478 U.S. 714, 721–22 (1986).

11. FLA. CONST. art. II, § 3; IND. CONST. art. III, § 1; MONT. CONST. art. III, § 1; N.J. CONST. art. III, § 1; OR. CONST. art. III, § 1.

balanced interaction among them,[12] the concept of assigning responsibility for specific governmental functions to specific institutions is critical to our constitutional democracy. Such is the environment in which administrative agencies find themselves. Agencies are generally not created by constitutional text,[13] so their authority to perform governing functions is necessarily derivative; it is most frequently the product of legislative delegation of some type of policymaking authority. What's more, agencies are regularly empowered to perform tasks that are otherwise assigned to the constitutional branches. They legislate through rulemaking, for example, and act like courts through adjudication. In sum, agencies generally exercise government power not explicitly assigned to them by the governing constitution, and in the process impinge on the prerogative of a constitutionally created branch of government to perform the same task. This can make agencies' very existence, let alone their claim to governmental authority, constitutionally tenuous.

Agencies' precarious positioning within the separation of powers raises persistent questions about the legitimacy of agency authority in a democratic government.[14] Administrative legitimacy is often justified through claims about agency expertise, accountability (including public participation), efficiency, and judicial review of agency decisions.[15] The

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12. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

13. Some state constitutions provide for the creation of certain agencies, *e.g.*, FLA. CONST. art. IV, § 11 (Department of Veterans Affairs), but most state agencies are created and controlled by statute. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999).

14. The term legitimacy does not necessarily lend itself to a single definition, but as David Arkush has explained:

> Observers have not always made clear what is meant by the term legitimacy, but the ordinary sense of the term often suffices, with its evocation of a set of characteristics related to public perceptions of legality, propriety, and efficacy. The principal reason for concern over the legitimacy of the administrative process is that it often involves the exercise of "substantial public power by unelected agency officials." The lack of public accountability, as well as agencies' poor fit within the constitutional scheme that separates legislative, executive, and judicial powers, means that agency decisions run a higher risk than other government actions of being viewed as unlawful, unsound, or undemocratic.

David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2013) (footnotes omitted) (quoting Thomas O. Sargentich, *The Reform of the Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 393 (1984)).

15. *Id.* at 620 (arguing that democratic legitimacy "envisions a high degree of citizen participation in the administrative process, or at least strong democratic accountability for agency officials regarding whether they actively consider public views"); Jost Delbruck, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies*, 10 IND. J. GLOBAL LEGAL STUD. 29, 34 (2003) (listing "transparency and efficiency of government," "accountability," and "expertise" as legitimizing forces for public authority); Richard H. Fallon Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 942 (1988) ("Congress frequently provides for judicial review in part to secure an imprimatur of legitimacy for

details of how each of these concepts relates to administrative abstention is addressed below.[16] At this juncture, it suffices to point out that the existence of courts does not raise the same questions of legitimacy as that of administrative agencies. Federal and state courts are part of a constitutionally prescribed branch of government and are thus legitimized through their constitutional pedigree, which agencies generally lack. Because administrative abstention invokes federal interference with state agency activity, it implicates questions about the legitimacy of that activity that are lacking in judicial abstention and that merit separate consideration within abstention doctrine.

A second reason for treating administrative abstention differently is that courts and administrative agencies do not serve the same governmental role.[17] Courts—especially lower courts[18]—are engaged mostly in dispute resolution; adverse parties appear before courts seeking an answer to a question they cannot answer on their own.[19] In almost every case, a court is

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administrative action."); Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 MO. L. REV. 511, 515–18 (2013).

16. *See infra* Part III.B.

17. This point is meant to be largely descriptive, in the sense that it is not a claim that the relationship between abstention and administrative legitimacy turns on the institutional competency of agencies versus courts to, for instance, engage in policymaking. There is a robust literature on institutional competency, *see, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994), which this Article does not engage with directly. For current purposes, it is enough to note that state agencies are tasked with policymaking responsibilities that state courts are not, such that (regardless of whether they are the more competent institutional actor) state agencies have a different responsibility than courts within state government. This responsibility, coupled with agencies' different, and generally weaker, constitutional pedigree, raises legitimacy questions independent of concerns about institutional competence. One may take the position that competence is a prerequisite to legitimacy, but that claim is beyond the scope of this argument, which is focused more narrowly on how federal interference with ongoing state policymaking activities impacts the legitimacy of those activities. The fact that arguments about competence could also impact claims to legitimacy does not change the fact that there are discreet legitimacy issues raised by the mere fact of federal interference with state agency conduct.

18. Charles H. Koch, FCC v. WNCN Listeners Guild*: An Old-Fashioned Remedy For What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 989 (1999) ("The occasion of review of administrative action may not be used to inject the courts into general policymaking. In the administrative scheme, the agencies, not the reviewing courts, are the designated 'faithful agents' of the legislature."); *see* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 281 (1957) ("[T]he [Supreme] Court cannot act strictly as a legal institution. It must . . . choose among controversial alternatives of public policy . . . . It is in this sense that the Court is a national policy-maker . . . .").

19. This is of course a bit of an oversimplification. Although many courts have as their primary responsibility the deciding of cases, they may also occupy administrative roles such as setting rules and codes of conduct for the legal system in their jurisdiction. *See* 28 U.S.C. § 2071(a) (2012) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). In cases where courts have additional administrative duties beyond simply deciding cases, the distinction between administrative and judicial abstention takes on potentially greater importance, as it offers a framework for better understanding the principles at play and the whole range of consequences brought on by abstention when the state entity is engaging in administrative activities.

required to reach a conclusion about the dispute in question. A court presented with a justiciable case or controversy does not have the luxury of deciding that it would rather not pick a "winner" or otherwise offer a final resolution to the problem. The court is also, at least in theory, expected to play a non-normative role in the decision-making process.[20] Wherever possible, courts are expected to apply law to the facts of the case as objectively as possible, deferring to the normative judgments of the policymaking branches of government—the legislative and executive—for their determination of what legal rules are most effective and desirable.

Agencies, by contrast, are policymaking entities, even when they appear to be acting like courts. Although they often retain some quasi-judicial authority, agencies are expected to exercise far more independent judgment in their deliberations than courts.[21] Agencies have more control over which issues they address and are less bound by precedent in their decision making.[22] This difference is often codified. An agency's enabling act typically grants agency personnel a good deal of discretion, something courts are only expected to exercise when the controlling legal authority is either inapposite or too vague to dictate the outcome.[23] Agencies are also

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20. This is a potentially controversial statement when taken as a normative argument, or even a generalized description, about the nature of judging. I intend here only to highlight the *relative* difference between courts and agencies, in particular that the former's job description includes lass of a policy making role than the latter. As for the role of ideology in judging, in *The Behavior of Federal Judges*, Professors Epstein and Landes and Judge Posner concluded that "a substantial ideology effect" (measured in terms of conservatism and liberalism) appears in split decisions by the Supreme Court, but that ideology arises less frequently in federal appellate court decisions and very rarely in district court decisions. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 149, 168, 226 (2013). Instead, judges are "motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter . . . ." *Id.* at 5. In a criticism of *The Behavior of Federal Judges*, Professor Lawrence Solum argues that the book's "labor economics model," and alternative theories about ideological judging, fail to consider "the desire of many judges to 'get the law right.'" Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2489 (2014).

21. *See* Koch, *supra* note 18, at 989; John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653 (2001) (arguing that courts should be the "faithful agents" of the legislature, meaning they would remain faithful to the legislative allocation of decision-making authority to agencies).

22. Agencies' decision to adjudicate in the first instance may be a matter of discretion, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), whereas courts are generally required to rule on otherwise justiciable cases. Moreover, agencies frequently adopt legal positions different from those in previous adjudications. A prime example is the National Labor Relations Board (NLRB), which has a long history of favoring adjudication over rulemaking as its primary policymaking vehicle, and has adopted inconsistent interpretations of one of its controlling statutes from one adjudication to another. *See, e.g.*, Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 & n.3 (1947).

23. EPSTEIN, LANDES & POSNER, *supra* note 20, at 28 ("If the judge has to exercise discretion, implying that he cannot in all cases just mechanically apply rules to facts to yield a decision . . . then to decide a case he is bound sometimes to have to fall back on intuitions of policy . . . . He cannot just

designed to be more politically accountable than courts. This is important for the legitimacy concerns discussed above,[24] but also because the political nature of agency decision making distinguishes it enough from judicial activity to justify recharacterizing administrative abstention as a separate concept within the broader abstention landscape.

A third reason for thinking of administrative abstention as a separate concept is that agencies are procedurally very different from courts. These differences raise complex issues for administrative abstention that simply do not arise in the context of judicial abstention. Not only do agencies engage in purely executive and quasi-legislative activities, like investigations, prosecutions, and rulemaking, that are not part of the duties of courts,[25] but they also employ a range of adjudicative procedures that do not fit into the traditional judicial model of adversarial dispute resolution. Decisions to issue a license or pay benefits are not likely to be adversarial proceedings and often do not even involve two distinct parties. Policy decisions about how to allocate agency funds or whether to pursue particular projects can qualify as agency adjudications despite not resembling a traditional judicial proceeding.[26] Moreover, agencies have a choice about how to perform their statutorily assigned duties. Agencies are given near unfettered discretion to determine whether to use rulemaking or adjudication in pursuit of a policy objective.[27] This choice has significant consequences for a doctrine like abstention that (at least to date) depends on the type of agency activity at issue.[28] Judicial proceedings are far more

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throw up his hands and refuse to decide a case on the ground that the 'law' in some narrow sense yields no clue to how to decide.").

24. For a discussion of how accountability impacts administrative legitimacy and, in turn, administrative abstention, see *infra* Part III.B.2.

25. While courts are not rulemaking entities generally, the Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2012), gives federal courts the power to create rules of practice and procedure. The Judicial Conference of the United States is the primary policymaking body for the federal courts. United States Courts, *Governance & the Judicial Conference*, USCOURTS.GOV, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Mar. 2, 2016).

26. *See, e.g.*, *Overton Park*, 401 U.S. at 402 (treating a decision by the Secretary of Transportation to authorize the building of a new federal highway as an adjudication).

27. *See, e.g.*, Marion OB/GYN, Inc. v. State Med. Bd., 739 N.E.2d 15, 21 (Ohio Ct. App. 2000) ("The Ohio Supreme Court has followed *Chenery* in recognizing that administrative agencies must be permitted to announce and apply a new rule by adjudication.") (discussing SEC v. Chenery Corp., 332 U.S. 194 (1947)); Arthur Earl Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 BYU J. PUB. L. 161, 167 (1988) ("The typical state court opinion on this subject asserts that where an administrative agency is authorized to develop its law by rulemaking or by adjudication, the agency has broad discretion, in the absence of a specific statute to the contrary, to select which of these procedures it will employ to make law on a particular subject.").

28. *See infra* Part II.B (describing current abstention doctrine in the administrative context).

likely to trigger abstention than non-judicial proceedings,[29] and the fact that agencies have such wide discretion to choose between legislative and adjudicative policymaking approaches necessarily creates a potential weakness in administrative abstention—if agencies can alter the entire abstention calculus based on the procedural form they adopt, then the animating principles behind abstention cannot be effectively realized.

A similar problem arises around judicial review of agency decisions. Unlike trial courts, which are subject to de novo review by appellate courts, agencies are often afforded considerable discretion in their interpretation of certain statutes and other legal authorities.[30] How, then, are we to understand the application of an abstention doctrine designed to encourage federal court deference to procedurally similar state court proceedings to a system that entrusts so much discretion to a state agency and then requires its own courts to defer to that agency's determination of both facts and law? Should we treat the agency proceeding and the subsequent judicial review thereof as a singular state proceeding for abstention purposes? Should there be a difference in the eyes of a federal court entertaining a motion to abstain from interfering with a state agency proceeding as opposed to a state court's review of that proceeding? Some answers to these questions are proposed below.[31] For now it is important to recognize these pragmatic differences between administrative and purely judicial proceedings in order to appreciate how abstention doctrine should be applied to administrative agencies and if that application can be understood in the same way as a decision to abstain in favor of a proceeding in state court.

From a purely theoretical standpoint, there are several reasons why administrative abstention may merit different treatment. Questions of institutional legitimacy, the integrity of state policy making, and the procedural differences between administrative and judicial decision making offer several dimensions on which administrative abstention can be viewed as sufficiently distinct from judicial abstention to require separate treatment. This theoretical conclusion is bolstered by the current state of abstention doctrine dealing with state administrative proceedings. The gaps left by existing abstention law reveal a need for a more comprehensive view of administrative abstention so that the doctrine can adequately

29. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 371 (1989) (concluding that *Younger* abstention did not apply because "ratemaking is an essentially legislative act").

30. At the federal level, this brand of judicial deference to agency statutory interpretation is referred to as *Chevron* deference, after the Supreme Court case that articulated the principle. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

31. *See infra* Part IV.B.

address the entire range of principles and challenges implicated by federal review of state agency action.

B. Synthesizing Current Administrative Abstention Doctrine

Perhaps because administrative abstention has never been articulated as a robust, stand-alone doctrine, attempts to organize and make sense of how current abstention doctrine applies in the administrative context are lacking. On their face, all four manifestations of abstention doctrine—commonly known as *Pullman*, *Burford*, *Younger*, and *Colorado River* abstention after the cases that gave rise to them—reach state administrative action. In fact, two of these four cases directly involve a federal court's decision to abstain in favor of a state agency decision.[32] One of those that did not directly involve state agency action, *Younger v. Harris*,[33] is the foundation for perhaps the Supreme Court's most explicit treatment of state administrative action, and the fourth has been described as "considerably more limited" than other abstention doctrines.[34] In short, the interaction of state administrative action and federal court abstention is not limited to a single abstention doctrine. That is not to say, however, that each abstention doctrine treats state agency action in the same way, or that the presence of a state administrative proceeding is of equal moment across the full spectrum of modern abstention law.

Two prominent abstention doctrines, *Pullman* and *Colorado River*, are largely agnostic about the relevant state proceeding and thus offer little insight regarding administrative abstention. In *Railroad Commission v. Pullman Co.*,[35] the Supreme Court suggested that a federal court should abstain where staying the federal action would allow a state agency to moot a federal constitutional question by first resolving an issue of state law.[36] Despite *Pullman* itself requiring abstention in favor of a state administrative proceeding, the *Pullman* doctrine does not raise any issues unique to administrative abstention. First, it only involves staying a federal suit until the answer to a question of state law can be obtained from the appropriate state source. Since agencies will rarely, if ever, be the final

32. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Burford v. Sun Oil Co., 319 U.S. 315 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

33. 401 U.S. 37 (1971).

34. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986); Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

35. 312 U.S. 496 (1941).

36. *See id.* at 498 ("Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law.").

word on a matter of state law, it is more likely that *Pullman* abstention would apply to state court review of an agency decision, rather than to a state administrative proceeding itself. Moreover, even if a state agency were the appropriate source of the state law ruling at issue, the fact that the district court is merely staying its consideration of the federal constitutional issue until the relevant state issue is resolved makes any differences between that agency and a state court irrelevant to the federal court's abstention decision.

As with *Pullman*, the abstention doctrine inspired by the Court's decision in *Colorado River Water Conservation District v. United States*[37] was developed in deference to preexisting state law. The case involved a dispute over water rights for which Colorado had specifically developed its own state-wide system of adjudication. In the absence of any grounds for abstention under then-existing doctrine, *Colorado River* involved the dismissal of a federal court suit for reasons of "wise judicial administration."[38] Some of the factors supporting abstention in *Colorado River* included the desire to avoid piecemeal litigation and the presence of "comprehensive state systems for adjudication" of the relevant issues.[39] *Colorado River* abstention was meant to be a very narrow, limited means of discouraging concurrent federal and state proceedings. In fact, the Court described the circumstances in which abstention should adhere under *Colorado River* as "considerably more limited than the circumstances appropriate for abstention" under any of its other doctrines.[40] So while both *Pullman* and *Colorado River* abstention could theoretically be brought to bear in an administrative abstention case, they are not at the heart of administrative abstention law. That distinction is reserved for the two remaining abstention doctrines: *Burford* and *Younger* abstention.

1. Burford *Abstention and State Administrative Proceedings*

Burford abstention is sometimes called administrative abstention, even though it is not exclusive to state agencies.[41] It is named after the Supreme Court's decision in *Burford v. Sun Oil Co.*,[42] in which a Texas state

37. 424 U.S. 800.

38. *Id.* at 818.

39. *Id.* at 819.

40. *Id.* at 818. Later cases addressing *Colorado River* abstention confirmed its limited scope, suggesting that it is at best a last resort in abstention cases, let alone in administrative abstention cases. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983) (concluding that contract dispute in state court did not raise exceptional circumstances necessary to justify abstention under *Colorado River*).

41. *See supra* note 3 (explaining why the phrase is used more broadly in this Article).

42. 319 U.S. 315 (1943).

commission's decision to permit the drilling of an oil well was challenged in federal court on due process grounds.[43] The Supreme Court held that the federal district court should have dismissed the due process claim due to the unsettled nature of the state law questions at issue, the importance of oil and gas exploration to Texas, and the availability of a complex scheme for resolving the relevant questions at the state level.[44] The Court has since explained that there is no "formulaic test" for determining when *Burford* abstention is appropriate.[45] A common thread has nevertheless emerged in the *Burford* line of cases that offers some insight into its animating principles and, in turn, into the broader concept of administrative abstention.

Like its companion abstention doctrines, *Burford* abstention is premised on federalism and comity concerns.[46] More specifically, the Supreme Court's *Burford* jurisprudence reflects sensitivity by federal courts to the value of states retaining control over their substantive policy decisions. The Court has indicated that federal courts should inquire into whether the state proceedings involve "unsettled issues of state law pertaining to subjects of 'substantial' importance to state or local government."[47] Writing for the majority in *Burford*, Justice Black explained that federal courts sitting in equity retain discretion to abstain from interfering in state proceedings in deference to the "'rightful independence of state governments in carrying out their domestic policy.'"[48] Noting that the abstention question in *Burford* "clearly involve[d] basic problems of Texas policy," Justice Black went on to state that "'[f]ew public interests have a higher claim upon the discretion of a

43. *Id.* at 317.

44. *Id*. at 332–34.

45. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 727–28 (1996).

46. *Burford*, 319 U.S. at 332–33.

47. ALLEN, FINCH, AND ROBERTS, FEDERAL COURTS: CONTEXT, CASES, AND PROBLEMS 690 (2009). *See also Burford*, 319 U.S. at 318 ("The order under consideration [in *Burford*] is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'"). As part of its determination that a policy question was important or complex enough to merit abstention, the *Burford* Court relied, at least in part, on the fact that Texas had designed a specialized state court review process for orders of the Texas Railroad Commission, which the Court described as "permit[ting] the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field." *Id*. at 327. At first glance, the Court's interest in the adjudicative system created by the state indicates that the Court may be seeking to protect a wider range of state activities from federal interference than simply the substantive policy outcome. For present purposes, however, it is sufficient to note that the Court's analysis in *Burford* is targeted at the ability of the state to exercise dominion over its own policy outcomes, whether by creating additional procedural safeguards or merely by remaining exempt from federal review altogether. *See infra* Part IV.A (arguing that the concept of state interest in administrative abstention should include the state's interest in the integrity of its agencies' policymaking functions).

48. 319 U.S. at 318 (quoting Pennsylvania v. Williams, 294 U.S. 176, 185 (1935)).

federal chancellor than the avoidance of needless friction with state policies.'"[49]

This focus on preventing federal interference with state policy decisions that are complex, local, and internally significant to the state persists throughout *Burford*'s progeny. In its first application of *Burford*, the Court held that the district court should have abstained from interfering in a decision of the Alabama Public Service Commission requiring the Southern Railway to continue operating two intrastate rail lines.[50] The Court noted that the proposed discontinuation of the train lines was an "essentially local problem" for which a specific state court review process had been established.[51] It explained its desire to avoid "'needless friction with state policies'" and pledged "'scrupulous regard for the rightful independence of state governments,'"[52] ultimately holding that abstention was appropriate to allow the state sufficient latitude to reach its own conclusions regarding an issue that state and local officials were far more familiar with—the state's own transportation needs.[53]

A few years later the Court took up two related cases in which it addressed abstention in the context of state eminent domain proceedings: *County of Allegheny v. Frank Mashuda Co.*[54] and *Louisiana Power & Light Co. v. City of Thibodeaux*.[55] Although the Court reached opposite conclusions in the two cases, its rationale was consistent with regard to its application of *Burford*.[56] It held that *Burford* abstention was appropriate in *City of Thibodeaux* because the case involved an unsettled question of state law—"the meaning of a disputed state statute."[57] By contrast, in *County of Allegheny*, the Court concluded that abstention was not appropriate because

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49. *Id.* at 332 (quoting R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941)).

50. Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 350 (1951).

51. *Id.* at 347.

52. *Id.* at 350, 349 (quoting *R.R. Comm'n*, 312 U.S. at 500; Matthews v. Rodgers, 284 U.S. 521, 525 (1935)).

53. *See id*. at 349.

54. Cty. of Allegheny v. Mashuda, 360 U.S. 185 (1959).

55. La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

56. *County of Allegheny* and *Thibodaux* were at least facially distinguishable from previous applications of the *Burford* doctrine because the federal court actions in those cases were based on diversity of citizenship jurisdiction, rather than the existence of a federal question. Although potentially important to other features of the analysis, the basis for jurisdiction did not affect the feature of those cases that is most important here, namely the impact of a federal court's decision to abstain on an issue of state policy.

57. *City of Thibodaux*, 360 U.S. at 29. The *City of Thibodaux* Court also paid close attention to the fact that the decision to abstain resulted only in a stay, rather than an outright dismissal, of the federal court proceedings. *Id.* at 28. The fact that the district court did not wholly surrender jurisdiction over the matter made the equitable question of whether to abstain easier in the eyes of the Court. It did not, however, appear to have any bearing on the underlying purpose of abstaining, to protect the state's authority as a sovereign policymaker from federal interference.

the "only question for decision [was] the purely factual question whether the County expropriated the respondents' land for private rather than for public use," not the resolution of a complex or unsettled legal issue.[58] In both instances, the Court's decision can be seen as focused on the nature of the policy question in the administrative proceeding and the degree to which a federal court exercising jurisdiction will interfere with that state's resolution of the policy question. Where an unsettled issue is under consideration at the state level and federal court involvement could alter or otherwise threaten the quality of that outcome, the Court has been more likely to uphold decisions to abstain under *Burford*.

This trend continued in one of the Court's more recent cases invoking *Burford* abstention. In *New Orleans Public Service, Inc. (NOPSI) v. Council of New Orleans*,[59] the Supreme Court addressed abstention questions under both *Burford* and *Younger* in connection with a federal court case seeking to enjoin a state ratemaking proceeding.[60] It held that *Burford* abstention was not appropriate because the state court proceeding did not involve "'difficult questions of state law,'" and because the federal court proceeding would not "'be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"[61] Once again, with regard to *Burford* abstention, the Court focused on the nature of the policy decision by looking at its complexity and relevance to the community, and on the quality of the state's substantive policy by asking whether federal interference could harm the policy's uniformity and cohesiveness within the state.

The Court's most recent interaction with *Burford*, *Quackenbush v. Allstate Insurance Co.*,[62] ultimately turned on the type of abstention-related relief available in damages actions.[63] More important for present purposes, however, is the Court's expression in *Quackenbush* of the principles animating the *Burford* doctrine. In an action by the California insurance commissioner to recover reinsurance proceeds, the Court reiterated its statement from *NOPSI* that the critical inquiries under *Burford* are whether the state policy issue is sufficiently complex to merit abstention and

58. *Cty. of Allegheny*, 360 U.S. at 189.

59. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989).

60. A discussion of the *NOPSI* Court's *Younger* analysis, which included a critical consideration of the legislative features of rate making, can be found *infra* at Part II.B.2.

61. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

62. Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

63. *Id.* at 721. The Court held that dismissal or remand of a case on abstention grounds was inappropriate in a common law action for damages, as opposed to a claim for equitable relief. *Id.* The Court did, however, leave open the possibility that a stay of the federal action could be acceptable in damages actions if it met the other criteria supporting abstention. *Id.*

whether federal involvement will threaten the uniformity and cohesion of that policy.[64] This continued focus on preserving the integrity of state policy decisions represents the driving principle behind the *Burford* doctrine. In conjunction with the motivating features of the Court's *Younger* jurisprudence, it provides a useful jumping-off point for thinking about the normative goals, and the potential for a more holistic theory, of administrative abstention.

2. Younger *Abstention and State Administrative Proceedings*

In *Younger v. Harris*,[65] the Court invoked the concept of "Our Federalism" to hold that a federal court should abstain on equitable grounds from interfering with ongoing state criminal proceedings.[66] Since its decision in *Younger*, the Court has expanded on its initial purpose of protecting state criminal proceedings from federal injunctions to include other, related areas such as civil enforcement proceedings and orders "uniquely in furtherance of state courts' ability to perform their judicial functions."[67] Within the Court's ongoing application of *Younger* is a subset of cases dealing specifically with state administrative proceedings. As with *Burford* abstention, the *Younger* cases operate within limits that are critical to understanding both the current structure of administrative abstention law and the benefits of rethinking administrative abstention as a separate coherent doctrine.

The Court's first explicit foray into applying *Younger* to administrative proceedings took place in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*.[68] *Middlesex* involved a federal court challenge to the constitutionality of an ongoing attorney disciplinary proceeding. The Supreme Court upheld the district court's dismissal of the federal challenge on *Younger* abstention grounds, relying as it did in *Burford* on "notion[s] of 'comity,'" which it defined as "'a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'"[69] The *Middlesex* Court then turned its attention to the specific question of abstention in favor of state administrative proceedings. It articulated three factors to consider in

64. *Id.* at 726–27.

65. 401 U.S. 37 (1971).

66. *Id.* at 44, 53.

67. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 368 (1989) (citing Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 13 (1987); Juidice v. Vail, 430 U.S. 327, 336 n.12 (1977)).

68. Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

69. *Id.* at 431 (quoting *Younger*, 401 U.S. at 44).

gauging whether the state administrative proceeding merited *Younger* abstention: whether the administrative proceeding is "'judicial in nature,'" whether it implicates "important state interests," and whether it offers the federal plaintiff "an adequate opportunity to present the federal challenge."[70]

The Court appeared to treat the first two factors separately. It first adopted a permissive definition of an "ongoing state judicial proceeding," relying (rather cursorily) on the state of New Jersey's representation that its civil attorney disciplinary proceedings were "'judicial in nature'" because they were "'initiated by filing a complaint . . . [that] is in effect a filing with the [state] Supreme Court.'"[71] It then went on to discuss, as a separate ground for abstention, the importance of the state's substantive interest in "maintaining and assuring the professional conduct of the attorneys it licenses."[72]

While the Court's factors were cleanly compartmentalized, its explanation of them was less so. The Court stated that *Younger* applies to "noncriminal judicial proceedings," but focused most heavily on the state interest prong.[73] It offered three circumstances in which a state's interest may be deemed important enough to merit abstention. Although the second and third circumstances involved substantive policy concerns,[74] the first sought to protect "noncriminal proceedings [that] bear a close relationship to proceedings criminal in nature."[75] By considering the criminal nature of the state proceeding as part of the state interest prong, the Court signaled a

70. *Id.* at 433–34, 437 (quoting Toft v. Ketchum, 113 A.2d 671, 674 (N.J. 1955)). The "adequate state forum" factor is an important part of abstention law generally and thus is relevant to all manner of abstention inquiries. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); *Younger*, 401 U.S. at 40; Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941). Without in any way denigrating its significance, this Article will focus on the first two *Middlesex* factors, as they are more narrowly tailored to administrative abstention in particular and thus are more revealing to our investigation into a unified theory of administrative abstention. The proposed default rule for administrative abstention includes an important caveat to ensure that abstention does not occur when there is no adequate state forum for resolving federal claims. *See infra* Part IV.A.

71. *Middlesex*, 457 U.S. at 432–34 (quoting *Toft*, 113 A.2d at 674).

72. *Id.* at 434. It then applied the third factor—whether the state courts offer an adequate forum for consideration of the federal plaintiff's claims. *Id.* at 437. Although this factor remains an important part of both *Burford* and *Younger* abstention in the administrative context, it is not a focus of this part of this Article because the presence of an adequate state forum is a virtual constant in abstention law; even under the new characterization of administrative abstention offered here, an adequate state forum is still considered a necessary prerequisite to any federal court decision to abstain.

73. *Id.* at 432.

74. The second and third examples cited by the Court were "[p]roceedings necessary for the vindication of important state policies" and "[proceedings necessary] for the functioning of the state judicial system." *Id.*

75. *Id.*

willingness to conflate the first two factors of its test, thereby potentially granting additional weight to the nature of the underlying state proceeding.

Four years after *Middlesex*, the Court again took up the question of *Younger* and state administrative proceedings in *Ohio Civil Rights Commission v. Dayton Christian Schools*.[76] In *Dayton Christian*, a private school sought a federal injunction of an ongoing state administrative proceeding involving a teacher's allegations of unlawful sex discrimination by her employer. The Ohio Civil Rights Commission, the state agency responsible for adjudicating the teacher's discrimination claims, moved to dismiss the federal court action under *Younger*.[77] The *Dayton Christian* Court read the important state interest factor broadly. Faced with the question of whether a state agency should be permitted to complete its investigation into sex discrimination in the face of a concurrent First Amendment challenge in federal court, the Court ordered abstention based on the state's broad and important interest in "the elimination of prohibited sex discrimination."[78] While this state interest was perhaps no broader than the proffered state interest in *Middlesex* of promoting professional conduct among attorneys,[79] at a minimum it confirmed that the state interest factor under *Younger* seeks to protect substantive state policy goals, rather than simply a category of proceedings, from federal interference. Read on its face, this position creates an even wider basis for abstention than *Burford*'s protection of complex state regulatory schemes.

Dayton Christian adopted an arguably narrower position than *Middlesex*, however, with regard to the judicial nature of the state proceeding. The *Dayton Christian* Court concluded that the commission proceeding at issue was judicial in nature, and therefore eligible for *Younger* abstention, but offered virtually no analysis in support of that conclusion.[80] It did, however, offer a glimpse into its broader thinking about what makes an administrative proceeding "judicial." In distinguishing *Dayton Christian* from an earlier decision by the Court holding that federal plaintiffs need not exhaust administrative remedies

76. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

77. *See id*. at 624–25.

78. *Id*. at 628.

79. *Middlesex*, 457 U.S. at 434.

80. The only indication in the *Dayton Christian* Court's opinion that it believed the Ohio Civil Rights Commission proceeding to be judicial in nature for *Younger* purposes was its discussion in a footnote that "[o]f course, if state law expressly indicates that the administrative proceedings are not even 'judicial in nature,' abstention may not be appropriate." 477 U.S. at 627 n.2. Since the Court did not then go on to determine that the Commission's proceedings were ineligible for abstention, one can reasonably infer that the Court did not think that Ohio state law expressly indicated that the Commission's proceedings were not "judicial in nature." *Id*.

under 42 U.S.C. § 1983 (2012),[81] the Court described the Ohio Civil Rights Commission proceeding as "coercive rather than remedial."[82] A coercive proceeding is ostensibly a better candidate for abstention because it is more akin to the types of civil enforcement and criminal judicial proceedings already approved for *Younger* abstention by the Court in other contexts.[83] A remedial action, by contrast, more closely approximates a civil suit.[84] Unlike in *Middlesex*, the Court in *Dayton Christian* did not expressly incorporate the nature of the state proceeding into its state interest analysis. It did, however, narrow the range of proceedings that qualify as sufficiently judicial—i.e., those analogous to criminal proceedings—under *Younger*.

The Court's first two forays into applying *Younger* abstention to state administrative proceedings left a slightly muddled, but still multi-dimensional, approach. After *Dayton Christian*, it appeared as if the Court favored a narrower view of the types of state proceedings that were sufficiently judicial in nature to trigger abstention,[85] yet remained receptive to a broad (and maybe even an expanded) category of state interests that merit abstention. This trend continued in *NOPSI*, a case that also involved *Burford* abstention.[86] In *NOPSI*, the Court dealt with the same issues it faced in *Middlesex* and *Dayton Christian*, but in the opposite order. NOPSI, a private utility company, sought a federal court injunction of a local ratemaking proceeding on the grounds that the city council's denial of a rate increase was preempted by federal law.[87] The city council asked the federal court to abstain from issuing an injunction under *Burford* and *Younger*.[88] Starting with the question of the state's interest in its proceeding,[89] the Court rejected NOPSI's argument that a state could not have a viable interest in the case because it was an alleged violation of

81. Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982).

82. *Dayton Christian*, 477 U.S. at 628 n.2.

83. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 594 (1975) (applying *Younger* to civil enforcement proceedings); Younger v. Harris, 401 U.S. 37, 40–41 (1971) (requiring abstention in favor of a state criminal trial).

84. The Court also cited the fact that the Commission's proceeding "began before any substantial advancement in the federal action took place, and involve[d] an important state interest" in defense of its decision to apply abstention principles where exhaustion was not required. *Dayton Christian*, 477 U.S. at 627 n.2. While these other factors reinforce the factors that the Court deems relevant in determining whether *Younger* abstention should attach, they do not offer the same additional insight into the Court's analysis as the characterization of the proceeding as coercive.

85. *See id.*

86. For a discussion of the *Burford* issues in *NOPSI*, see discussion *supra* notes 51–53 and accompanying text.

87. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 355 (1989).

88. *Id.* The *NOPSI* Court's *Burford* analysis is discussed *supra* at Part II.B.1.

89. Despite the fact that the administrative entity involved in the case was the New Orleans City Council, the Court continued to refer to the relevant government interest as the state's, or Louisiana's, interest. *Id.* at 365.

federal law. It explained that the relevant state interest inquiry under *Younger* is "the importance of the generic proceedings to the State," rather than "its interest in the *outcome* of the particular case."[90] The Court concluded that the state had "a substantial, legitimate interest" in ratemaking proceedings generally, independent of the agency's specific policy decisions regarding whether and how to establish certain rates for certain parties.[91]

Once it established that the state interest was sufficient to merit abstention, the Court moved on to considering whether the ratemaking proceeding may be treated as judicial for *Younger* purposes. The city council argued that the proceeding was judicial based on the "unified nature" of administrative adjudication.[92] Under this "unitary theory," an administrative action and state judicial review thereof are treated as a singular event—much like a state trial and the subsequent appeal[93]—and thus the administrative proceeding is rendered judicial by virtue of the state courts' review of the agency's conduct.[94] The Court in *NOPSI* did not squarely address the unitary theory approach because state court review of the city council's ratemaking proceeding had not yet occurred.[95] It relied instead on the fact that because "ratemaking is an essentially legislative act . . . the Council's proceedings here were plainly legislative."[96] As a result, *NOPSI* held that *Younger* abstention was not warranted because the agency conduct at issue was not sufficiently judicial in nature.[97]

The Court's decision in *NOPSI* highlights several points about the animating principles of *Younger* abstention for state administrative

90. *Id.*

91. *Id.*

92. *Id*. at 361.

93. *Id*. at 368–69 ("When, in a proceeding to which *Younger* applies, a state trial court has entered judgment, the losing party cannot, of course, pursue equitable remedies in federal district court while concurrently challenging the trial court's judgment on appeal."). The term "unitary theory" is adapted from the language of an amicus brief filed by Professors Erwin Chemerinsky, Kermit Roosevelt, Paul Salamanca, and Christina Whitman in the most recent administrative abstention case before the Supreme Court. *See* Brief of Law Professors as Amici Curiae in Support of Petitioner at 21, Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584 (2013) (No. 12-815).

94. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368–69.

95. The Court did address the related question of ripeness, concluding that because judicial review of the ratemaking proceeding would be a judicial act, it would not constitute a continuation of the legislative process, and therefore the ratemaking proceeding was ripe for review because the legislative process challenge was complete. *Id.* at 370–72.

96. *Id.* at 371 (citation omitted).

97. *Id*. at 373. That is not to say, however, that had a federal court sought to enjoin a state court's review of the agency ratemaking proceeding, abstention would not be proper. State court review of administrative action is far more likely to qualify as judicial activity under *Younger*. Calls for abstention in favor of judicial review of administrative action will thus be far better received than motions to abstain from interfering with agency conduct that is legislative or executive in nature. This distinction between agency activity and state court review is discussed in greater detail *infra* at Part V.C.2.

proceedings. First, the *NOPSI* court treated the state interest prong as substantive; whether, as in *Middlesex*, the proceeding was criminal in nature was not dispositive of the state interest inquiry in *NOPSI*. Second, in terms of the *NOPSI* Court's analysis of the nature of the administrative proceeding, two additional principles emerge. One is that the nature of the proceeding remains, as it was in *Middlesex* and *Dayton Christian*, an important issue under *Younger*. The second is that the fact of judicial review does not necessarily alter the nature of the administrative action.

The current state of *Younger* abstention was articulated in the Court's most recent abstention decision—*Sprint Communications, Inc. v. Jacobs*.[98] *Sprint* involved a decision by the Iowa Utilities Board (IUB) that non-Sprint telecommunications providers were entitled to collect access charges for certain VoIP calls from Sprint customers. Sprint challenged the IUB ruling in federal court, claiming that federal law precluded the IUB from rendering its decision in favor of the non-Sprint providers.[99] The lower court decision and the oral argument before the Court effectively ignored the first *Middlesex* factor, focusing instead on two very different approaches to the state interest factor. The lower court and IUB argued that abstention was appropriate because "Iowa has an important state interest in regulating and enforcing its intrastate utility rates,"[100] and the nature of the proceeding—whether the state administrative proceeding was coercive or remedial—is not "outcome determinative" with regard to abstention.[101] Sprint maintained that the relevant state interest under *Younger* lies in

98. 134 S. Ct. 584 (2013).

99. *See* Sprint Commc'ns Co. v. Jacobs, 690 F.3d 864 (8th Cir. 2012), *rev'd*, 134 S. Ct. 584 (2013). There are some procedural features of the case that do not directly affect the present analysis, yet are worth mentioning in the interest of completeness. First, there is some dispute in the case whether Sprint relied on federal law as a substantive defense to the access charge question, as the IUB contends, or as a jurisdictional bar to the IUB adjudication, as Sprint claims. *Id*. at 866. This goes primarily to the adequate state forum prong of the *Middlesex* test, rather than the state interest prong, and as such is not directly relevant to the instant discussion. Second, Sprint challenged the IUB decision in both state and federal court. According to Sprint, its state court action was done solely to preserve state court remedies in the event its federal court action was dismissed. Brief of Appellant Sprint Commc'ns Co. at 13, Sprint Commc'ns, Co. v. Jacobs, 690 F.3d 864 (2012) (No. 11-2984). This has ramifications for the adequate state-forum prong, which again is not directly relevant to the present discussion, and, albeit also indirectly, to the state interest prong. There was some discussion at oral argument about the applicable state interest due to the fact that the state interest in the original agency adjudication was arguably different from the state's interest on appeal to its courts. Transcript of Oral Argument at 12–13, Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584 (2013) (No. 12-815). Regardless of whether this contention is true, and despite the fact that it would be relevant to an abstention analysis, it does not go to the question at hand, namely whether the current standards (or lack thereof) governing determination of the relevant state interest at the agency stage are sufficiently helpful. This unified proceeding concept is relevant, however, to fashioning a limiting principle to the policymaking interest analysis. *See infra* Part V.C.2.

100. *See Sprint Commc'ns*, 690 F.3d at 868; Transcript of Oral Argument at 21, Sprint Commc'ns, Inc v. Jacobs, 134 S. Ct. 584 (2013) (No. 12-815).

101. *Sprint Commc'ns*, 690 F.3d at 868.

protecting certain proceedings from federal interference. It argued that the state's interest in this case was inadequate to justify abstention because it was "not . . . at that same level of importance as a State criminal court"[102] and was not the type of "civil enforcement" proceeding that merited abstention in *Middlesex* and *Dayton Christian*.[103]

The *Sprint* Court was thus encouraged to choose between two very different courses of action—having abstention turn on the substantive importance of the state policy question at issue or on the similarities between the state administrative proceeding and a criminal or quasi-criminal enforcement proceeding. Rather than focus on the three *Middlesex* factors, the *Sprint* Court accepted the invitation to have its decision turn on the state interest factor, holding that *Younger* abstention is only available in either criminal or "quasi-criminal" civil proceedings.[104] It explicitly rejected the broad state interest inquiry employed in its own precedents and in the lower court in *Sprint*. It found that without limiting the abstention inquiry to at least quasi-criminal proceedings, the state interest factor "would extend *Younger* to virtually all parallel state and federal proceedings."[105]

This brief account of the Court's *Burford* and *Younger* jurisprudence is not meant to be either exhaustive or critical. Its value instead lies in its characterization of the two primary sources of administrative abstention law. As we seek to take a holistic approach to administrative abstention, we must first locate the existing boundaries. Both *Burford* and *Younger* abstention incorporate a perspective and a corresponding set of principles regarding when and how federal courts should become involved in state

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102. Transcript of Oral Argument at 19, Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584 (2013) (No. 12-815).

103. *Id.* at 14–15, 19.

104. The Court outlined the three types of proceedings that qualify for *Younger* abstention as follows:

> More recently, in *NOPSI* the Court had occasion to review and restate our *Younger* jurisprudence. *NOPSI* addressed and rejected an argument that a federal court should refuse to exercise jurisdiction to review a state council's ratemaking decision. "[O]nly exceptional circumstances," we reaffirmed, "justify a federal court's refusal to decide a case in deference to the States." Those "exceptional circumstances" exist, the Court determined after surveying prior decisions, in three types of proceedings. First, *Younger* precluded federal intrusion into ongoing state criminal prosecutions. Second, certain "civil enforcement proceedings" warranted abstention. Finally, federal courts refrained from interfering with pending "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." We have not applied *Younger* outside these three "exceptional" categories, and today hold, in accord with *NOPSI*, that they define *Younger*'s scope.

Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013) (citations omitted) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 368 (1989)).

105. *Id.* at 593.

administrative proceedings that is highly relevant to the questions of federalism and comity these abstention doctrines purport to address. *Burford* balances the federal courts' role in vindicating federal rights against the importance of protecting state policy decisions from federal intervention by limiting its application to areas of state law that are highly complex, of substantive import to the state, or both.[106] It seeks to protect the uniformity and cohesion of those policies so as not to inadvertently subject state policy decisions to death by a thousand federal cuts. *Younger* abstention began as a wide-ranging view of the state interests in an administrative proceeding,[107] but over time was narrowed to focus primarily on the nature of that proceeding. Whereas the Court's early treatment of *Younger* deferred to state law characterizations of administrative proceedings as judicial and entertained seemingly broad claims of state interest in approving abstention,[108] the Court's recent decision in *Sprint* made clear that only a select sample of agency conduct qualifies for *Younger* abstention. It held that only administrative proceedings that are quasi-criminal or that promote the proper functioning of the state judicial system are sufficiently "judicial in nature" and important to the state to encapsulate the comity and federalism concerns that *Younger* sought to address.[109]

3. Commonalities and Conceptual Gaps in Existing Abstention Doctrine

The Court's *Burford* and *Younger* jurisprudence reveal some common perspectives on administrative abstention. First, and most importantly for the present discussion, both doctrines treat abstention as a discreet inquiry, dependent on the qualities of the specific administrative proceeding at issue. Neither doctrine approaches administrative abstention from an institutional perspective, and thus both fail to recognize the full range of issues—including administrative legitimacy, federalism, and separation of powers—that attach whenever courts seek to intervene in the activities of a policymaking institution.[110]

In addition to focusing on individual proceedings, *Burford* and *Younger* abstention are further limited to only a certain subset of agency activity.

106. *Supra* notes 42–49 and accompanying text.

107. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627–28 (1986); Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433–34 (1982).

108. *See Dayton Christian*, 477 U.S. at 628; *Middlesex*, 457 U.S. at 433–34.

109. *See Sprint*, 134 S. Ct. at 592.

110. This institutional perspective is the primary focus of this Article and will be discussed further *infra* Part III.

For *Burford*, it is instances where the state policy at issue is substantively important enough to be protected from federal courts.[111] For *Younger*, it is a pre-identified *class* of proceedings—quasi-criminal proceedings or those that further the functioning of the state judicial system[112]—that are worth insulating from federal involvement. In both cases, the abstention decision is focused on preventing federal courts from intervening in a substantively defined set of the state's policy choices. No protection is provided for relatively straightforward or mundane policy decisions, in the case of *Burford*, or agency adjudications that address potentially important, yet purely civil or remedial, policy questions under *Younger*. This exclusion of certain agency proceedings has institutional as well as political and legal consequences that modern abstention doctrine is simply unable to address and has thus far overlooked.

Nor do possible points of overlap in the two doctrines solve the problem of exclusion. Imagine a pending state agency adjudication regarding whether to use state land to build a bridge across the only stretch of river in the state. Local residents are very excited about the project because it will bring needed jobs and revenue to their corner of the state, and taxpayers from other areas are opposed due to the cost and relatively low number of people who will use the bridge. The question is not considered unduly complex as policy matters go; it is just a matter of whether the bridge is worth the money. There are no significant economic, health, environmental, or other complicating factors associated with the decision. There is no specialized state tribunal for resolving disputes like this, and because it is not a common issue in the state, there is no threat to the uniformity of a larger state policy due to outside interference with the proceeding. This proceeding does not trigger abstention under the Court's existing jurisprudence. It does not appear to be sufficiently important to the state to merit abstention under *Burford*, and *Younger* does not apply because it does not involve either a coercive proceeding or one that is critical to the functioning of the state judicial system. Maybe, then, the answer is simply that abstention should not apply because federal courts have a duty to exercise jurisdiction and to enforce federal rights.

The problem with this answer, and the thesis of this Article, is that a decision not to abstain based solely on the parameters listed in the hypo is

111. Although *Burford* and its progeny did rely on the existence of specialized judicial procedures as evidence in support of abstention, the Court's focus in those instances was on the *existence* of such a system, not its procedural details. 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), rather than an abiding interest in protecting certain state procedural mechanisms from federal interference.

112. *See supra* note 104 and accompanying text.

profoundly incomplete. Beyond the aforementioned failure of modern abstention doctrine to see the institutional implications of administrative abstention,[113] it likewise fails to address the institutional issues implicated in individual cases, such as the costs to the state of federal interference with its policy-making process, both in terms of commandeering state sovereignty over policy decisions and threatening the legitimacy of the state's administrative institutions in general. That is not to say that the hypothetical decision to build a bridge necessarily demands abstention—that question will be taken up later in the Article.[114] It does, however, highlight how existing abstention law fails to see some of the broader issues associated with federal judicial involvement in state administrative processes, and suggests the need to properly address this failure by offering a more holistic, comprehensive characterization of administrative abstention.

Burford and *Younger* also collectively fail to consider the procedural realities of administrative—as opposed to purely judicial—procedure. In most instances, administrative agencies have wide latitude to determine whether to engage their policymaking responsibilities through administrative rulemaking or adjudication.[115] This decision by an agency comes with a plethora of legal, political, and administrative consequences, but often does not inhibit the agency's ability to reach a given policy conclusion or affect a specific outcome. Under current abstention doctrine, however, federal courts are only required to consider the consequences of their decisions on adjudicative proceedings in state agencies. This judicial-judicial symmetry between the state and federal systems has some intuitive appeal in terms of deciding when federal courts should exercise their authority to intervene in state matters, but it does not answer the question of why federal courts are required to consider the animating principles of abstention before intruding on a state adjudication but are not permitted to abstain when a rulemaking proceeding is at issue. The question becomes even more pressing when we consider the fact that state agencies have broad authority to choose their policymaking mechanisms.[116] The result is a potentially arbitrary set of abstention cases, where the outcome is heavily influenced by a factor that has little relevance to the comity and federalism

113. *See* discussion *supra* note 110 and accompanying text.

114. *See infra* Part IV (outlining a new approach to administrative abstention).

115. *But see* FLA. STAT. § 120.54(1)(a) (2015) ("Rulemaking is not a matter of agency discretion."); *id.* § 120.54(1)(a)(2)(b) (permitting adjudication only when "[t]he particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances"); OHIO REV. CODE § 119.06 (2014) ("No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order.").

116. *See supra* note 27 and accompanying text.

concerns that drive abstention. Even worse, abstention's failure to consider an agency's procedural flexibility could create incentives for state agencies that unnecessarily complicate an already delicate political choice about whether rulemaking or adjudication is best suited to a policy problem within the agency's jurisdiction.[117] Rather than being faced only with concerns about political expediency, administrative efficiency, and the practical and social consequences of a decision to regulate via rule or order, the state also faces pressure, created by federal abstention doctrine, to protect itself from federal interference. The very creation of this pressure can be seen as a violation of the comity and federalism concerns that abstention is designed to protect.[118] While that does not mean that abstention must occur in every instance where state interests are jeopardized, the fact that a foundational feature of administrative law is entirely absent from the abstention calculus at minimum suggests that administrative abstention in its current state is conceptually deficient.

Another procedural aspect of administrative law that is not adequately captured by existing abstention jurisprudence is judicial review of agency action. Courts have made clear that an appeal of a lower court ruling is considered a unified proceeding for abstention purposes; whether a federal court may interfere in a state judicial proceeding is not in any way affected by the fact that the state court proceeding is appealable to a higher court.[119] Judicial review of agency action, however, is often notably different than a traditional judicial appeal. The most obvious difference lies in the range of deference granted by reviewing courts to agency decisions, including legal interpretations.[120] Unlike the relationship between trial and appellate courts, where the division of expertise lies along the fault line between issues of

117. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 921 (1965) ("The ability to choose among several methods of policy formulation carries with it the responsibility for choosing wisely, and critics may be quick not only to take exception to the course adopted in particular instances but also to suggest basic statutory changes in administrative procedure.").

118. One response at this juncture may be to remind the reader that when federal rights are at stake—as is the case in most if not all abstention cases—the burdens on the state in terms of the difficulty in deciding how to exercise its administrative authority or reach a particular policy goal not only can but should be given less weight in favor of protecting those rights. This is a powerful retort and one that is not lost in the instant analysis. Rethinking administrative abstention by orienting it in the broader universe of administrative law does not necessarily require abstention to occur less frequently or to limit the ultimate jurisdiction or power of the federal courts, including the lower federal courts. Rather, it simply draws into abstention's orbit a broader range of concerns that I contend are already there and simply overlooked, thereby resulting in a more thorough and legitimate abstention doctrine in administrative cases.

119. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 368–69 (1989); Huffman v. Pursue, Ltd., 420 U.S. 592, 607–08 (1975).

120. *See, e.g.*, 5 U.S.C. § 706(2) (2012) (provision of the APA outlining the various standards of judicial review for agency decisions of fact, policy, and law).

law and fact, administrative agencies are expert across a third—policymaking—dimension that is generally considered outside the realm of judicial competence.[121] For that reason, judicial review of agency action is less like the mere continuation of an adjudicative proceeding and is more closely analogous to a court exercising original jurisdiction over the conduct of another branch of government. This is more consistent with the categorization of agency action as occurring within the executive branch, and is more descriptively accurate. The policy judgment inherent in many agency adjudications places the reviewing court in a far more delicate position vis-à-vis an agency than a lower court. The fact that an agency adjudication may eventually end up in a state court does not make the agency adjudication process indistinguishable from judicial review of that process for abstention purposes.[122]

Finally, both *Burford* and *Younger* abstention allow *federal judges* to decide when an issue is of sufficient import to a state to protect it from federal interference. This is not only a further limit on abstention's reach, but also represents the existing doctrine's failure to recognize the gravity of federal judicial interference with a state policymaking institution. The result is a gap in the Court's abstention doctrine that calls for consideration of broader issues, such as the unique role of administrative agencies in state government or the relationship between the policymaking responsibilities of state agencies and the purely judicial role of the federal courts.

III. REIMAGINING ADMINISTRATIVE ABSTENTION

A. Abstention and Administrative Legitimacy

Given the doctrinal and conceptual shortcomings of existing abstention doctrine, the remaining question is what to do about it. How, if at all, can we recast administrative abstention such that it fulfills its promise as an inclusive, coherent approach to federal court involvement in state administrative proceedings? The first step is to meet the challenge of inclusiveness. As discussed in the previous section, administrative abstention in its current form amounts to a limited, case-by-case consideration of the federalism consequences attaching to federal court

121. *See* Koch, *supra* note 18; Manning, *supra* note 21.

122. *See* Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 592 (2014) ("We will assume without deciding, as the Court did in *NOPSI*, that an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes. The question remains, however, whether the initial IUB proceeding is of the 'sort . . . entitled to *Younger* treatment.'" (citation omitted) (quoting *New Orleans Pub. Serv., Inc.*, 491 at 369)). The so-called unitary theory of judicial review is discussed in greater detail *infra* at Part V.C.2.

interference with a state agency adjudication. While these federalism consequences are of course critical to any abstention calculus, and may work well in the context of federal courts' interaction with their state counterparts, they do not tell enough of the story in the administrative context. Administrative institutions—at the state and federal level—are policymaking entities that serve a critical function within a sovereign regime. Not only do they make important policy judgments associated with the entire range of the state's police power, they do so while occupying a tenuous place in the structure of government. In our traditional, tripartite governmental structure,[123] agencies are not only unaccounted for by the constitutional text, they are also controversial due to their often broad power and relative insulation from direct democratic control.[124] As a result, the legitimacy of agency action is a vital and fragile feature of any successful administrative state. Whereas courts are often explicitly provided for in state constitutions and other government charters, agencies are frequently created statutorily by the legislative branch to achieve specific policy missions.[125] The ability of those agencies to achieve their legislatively prescribed goals depends, in large part, on the legal and democratic legitimacy of their conduct, a legitimacy that is potentially threatened every time a federal court interrupts or undermines the functioning of a state administrative entity. Any comprehensive attempt to understand the inter-governmental dynamics at work in administrative abstention must therefore consider the potentially delegitimizing effects of federal court involvement in state administrative proceedings. An inclusive approach to administrative abstention must take seriously the legitimacy of state administrative institutions and proceedings, not just to protect state policy prerogatives, but to protect the very integrity of state government from undue federal interference.

B. Abstention and the Legitimizing Principles of Administrative Law

In addition to concerns about inclusiveness, we must address issues of coherence. What does it mean to protect institutional legitimacy, and how

123. As with the federal Constitution, "[s]eparation of powers is a bedrock principle to the constitutions of each of the fifty states." Rossi, *supra* note 13, at 1190.

124. Two common critiques of administrative government are (1) that it is undemocratic because it operates at least one step removed from popular accountability due to the fact that administrators are not elected officials, Thomas O. Sargenitch, *The Reform of the American Administrative Process*: *The Contemporary Debate*, 1984 WIS. L. REV. 385, 428–29 (1984), and (2) that agencies often exercise powers consistent with all three of our purportedly separate branches of government—the legislative, executive, and judicial branches. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994).

125. Lawson, *supra* note 124, at 1233.

can the success of such protections be measured? One way is to measure an administrative abstention regime against the foundational principles of a legitimate administrative state. Presumably, an approach to administrative abstention that supports the legitimizing principles of administrative government likewise supports the integrity and sovereignty of that government. There are several core principles of administrative government that, taken together, paint a coherent picture of legitimacy: expertise, accountability, and efficiency.[126] A form of administrative abstention that pays due respect to the legitimacy of state agencies must at least consider the effect of an abstention decision on these aspects of agency conduct.

1. Expertise

Agency expertise is a foundational principle of administrative law.[127] It reflects the often highly specific and technical mission of administrative agencies and the corresponding need for government officials with compartmentalized knowledge and experience in their delegated policymaking arena.[128] It is in contrast to the generalized knowledge and experience of legislators, thus explaining why legislatures so often delegate policymaking responsibility over complex and specialized policy issues to expert agencies.

But how does a federal court's decision whether to abstain from interfering with a state administrative proceeding impact agency expertise? To fully answer this question, it is useful to think of agencies' expertise in at least two dimensions. The first can be thought of as *ex ante* expertise—

126. *See supra* note 15 and accompanying text.

127. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 99–100 (1994) ("To be sure, many insist on technocratic rationality—on the importance of expertise in helping people to make informed judgments about the relations between means and ends. This is an enduring theme in administrative law . . . . [T]he absence of expertise, or the distortion of expert judgment through anecdote and interest-group power, is an important obstacle to a well-functioning system of regulatory law." (footnotes omitted)). In fact, agency expertise was a primary justification for the explosion of the administrative state in the United States during the New Deal. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938) ("With the rise of regulation, the need for expertness became dominant . . . ."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1252 (1986) ("As in its initial phase, the New Deal continued its propensity to address particularized areas of unrest through regulation by experts . . . ."); *id.* at 1266 ("With the final legitimation of the New Deal came the acceptance of a central precept of public administration: faith in the ability of experts to develop effective solutions . . . .").

128. *See* Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (noting "cases of great technological complexity" in administrative law); Lars Noah, *Scientific Republicanism: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1043 n.37 (2000) (referring to the "questions of ever-increasing scientific complexity" faced by administrative agencies) (quoting Thomas S. Burack, Note, *Of Reliable Science: Scientific Peer Review, Federal Regulatory Agencies, and the Courts*, 7 VA. J. NAT. RESOURCES L. 27, 96 (1987)).

the specialization in education and training that administrators and agency employees bring to their offices. Think of the FDA hiring credentialed scientists, or the Treasury being staffed with accomplished economists. Abstention has little if any effect on this aspect of agency expertise, as the decision whether or not to interfere with an administrative proceeding will neither enhance nor diminish the knowledge base that administrators bring to the job. This is an important observation, as the skill and talent of the individuals assembled in an agency may at first blush seem to be the most important source of its expertise, suggesting that administrative abstention may not have a significant impact on at least that legitimizing principle of administrative law.

Not all agency expertise can be described as *ex ante*, however. In fact, much of what an agency learns about its field and the policymaking process is *ex post*; it is related not just to the substantive knowledge that its employees brought to their positions, but to the knowledge and experience gained through the process of performing its administrative functions.[129] Imagine a decision by the EPA regarding where to set permissible levels of an air pollutant. There is no question that the agency's expertise will include its understanding of the relevant science and how certain pollutant concentrations will affect public health and welfare, much of which may be the product of its staff's *ex ante* expertise. Much of the decision may also depend, however, on information and skills developed from the agency's own practices, such as an understanding of the long-term social or economic effects of its decision or the difficulties associated with implementation or enforcement. It may be that eliminating pollutants like methane from the air has a clear enough effect on respiratory health that the decision seems relatively obvious to a scientist tasked with protecting people from harmful air pollutants, but that experienced administrators would also understand the potentially devastating effects on the beef industry and, in turn, on the nation's dietary needs from such a prohibition. The ability to understand the entire scope of a complex regulatory issue is thus an important feature of what we expect from our public administrators, and this understanding is enhanced through the *ex post* expertise that comes from administrative practice.

Unlike *ex ante* expertise, *ex post* expertise could be greatly affected by abstention. A federal court that interferes with an ongoing agency proceeding may also be short-circuiting both the agency's opportunity to bring its *ex post* expertise to bear on a problem and its ability to further

129. *See* Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007) (discussing the significance of, and the impact of regulatory costs on, agency expertise acquired through the process of regulation "endogenous expertise").

develop that expertise through additional experience. The ability to make a sound policy judgment depends not only on having been there before (something that abstention may also interfere with), but also on maneuvering through the policymaking process, including interaction with interest groups and other governmental entities. The more frequently agency proceedings are interrupted by federal courts, the more difficult it is for agencies to develop and rely on their *ex post* expertise, and the more likely that their legitimacy will be threatened.

2. Accountability

Accountability, which includes transparency and public participation,[130] is also important to administrative legitimacy.[131] Accountability refers to the public's ability to retain control over its government—even its administrative institutions—by judging its representatives on their performance in office.[132] In order for the public to make that judgment in the administrative context, it must be privy to an agency's explanations for its exercise of authority. Rather than simply accepting the proffered reasons for government action at face value and evaluating whether those reasons support the agency's position,

130. Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387, 428 (2003) (describing transparency as a "precondition" to accountability and explaining that "[t]ransparency and access to information facilitate accountability because citizens need information to know when to hold which leaders accountable for what decisions").

131. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 187 (1990) ("The principle of political accountability has an unmistakable foundation in Article I of the Constitution, and it is an overriding structural commitment of the document. The principle has foundations as well in assessments of institutional performance. At the same time, it operates to counteract characteristic failures in the regulatory process."); Lessig & Sunstein, *supra* note 127, at 94 ("Accountability and avoidance of factionalism, then, are two central values of the framers' original executive."); *id.* at 119 (arguing that a unitary executive "fits well with important political and constitutional values, including the interests in political accountability"). *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42–47 (1995) (noting the constitutional importance of accountability).

132. Professor Bressman describes the principle of accountability as follows:

> Perhaps the best understanding of accountability is not that it requires elected officials to make policy decisions simply because they are responsive to the people. Rather, it requires elected officials to make policy decisions because they are subject to the check of the people if they do not discharge their duties in a sufficiently public-regarding and otherwise rational, predictable, and fair manner. Thus, accountability can be understood to enable voters not only to consider whether elected officials have maximized popular preferences in making or executing the law, but also, and equally importantly, whether those officials have inappropriately favored narrow interests in doing so.

Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499 (2003) (footnotes omitted) (citing Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565–71 (1998)). In administrative law, this typically involves voters expressing their dissatisfaction with elected officials who appointed or otherwise supported particular administrators or agencies.

transparency and participation enable members of the voting public to access and contribute to information considered by the agency and to make a more informed judgment regarding the agency's reasoning.[133] Transparency and participation are thus preconditions to accountability in that it is necessary for the public to have an understanding of the information upon which administrators base their judgments in order to monitor the conduct and competency of those judgments.[134]

Abstention impacts accountability because it threatens to interrupt the administrative process before an agency is able to develop and/or share the evidence and rationale for its decision with the public. Imagine a licensing proceeding that is challenged in federal court before the agency has an opportunity to collect all of the relevant information regarding the social, environmental, or economic impacts of its decision. If the federal court does not abstain from hearing the challenge, the agency's work and policy position on the matter may never be made public and thus the agency will never be held accountable for its approach. While this may not appear problematic in the case at hand, as a decision by the federal court against the agency may prevent the proceeding from going forward, the longer-term effect of shielding an agency's practices from public view could be quite damaging to agency accountability and, in turn, legitimacy. Assume that in the above licensing example, the requesting party was a political supporter of the administration, such that absent federal court involvement in the proceeding it was likely to receive favorable treatment in the licensing process. Now also assume that the next candidate for the same license is a political opponent of the administration, and despite presenting a similar set of qualifications as the first candidate, was denied the license. Due to the federal court's abstention decision in the first licensing case, the agency's willingness to treat the two parties differently—regardless of whether such different treatment was permissible as a matter of law—is lost on the scrutinizing public, which is unable to hold the agency accountable for its willingness to consider political affiliation. Under this view, accountability is a cumulative phenomenon, where the ability of the

133. *See* Mark Fenster, *The Opacity Of Transparency*, 91 IOWA L. REV. 885, 899 (2006) ("The most significant consequences [of government transparency] flow from the public's increased ability to monitor government activity and hold officials . . . accountable for their actions." (footnote omitted)); *see also* Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 928 (D.C. Cir. 1982) (describing Congress's purpose in enacting the Sunshine Act as to "enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people." (footnote omitted)).

134. *Common Cause*, 674 F.2d at 928; Beutz, *supra* note 130, at 428; Fenster, *supra* note 133, at 899.

public to see and understand what its administrative representatives are doing is not purely iterative, but instead stretches across the entire arc of the agency's governance, such that even agency activities that do not survive legal challenge are relevant to the public's understanding of how that agency functions on its behalf.

There is at least one other response to this argument about abstention's effect on accountability that is worth addressing here. That response, which is not exclusive to the principle of accountability, is that it is more important to have a federal court protect against potential violations of federal rights than to protect agency activity, especially when that activity runs afoul of federal law.[135] This claim is true, but incomplete. As mentioned above and discussed in greater detail below, one underappreciated difficulty with existing administrative abstention doctrine is the unified theory of judicial review, where agency activity and judicial review thereof are treated as synonymous for abstention purposes.[136] The above licensing example involved an abstention decision during the agency proceeding itself, thereby creating a tension between accountability and the critical factor of protecting federal rights. The same tension is not present, however, in an abstention decision made while the licensing issue is on review in the state courts. At that juncture, the principle of accountability has been fulfilled, as the agency's practices and rationale are available for public consumption. This information is important to that agency's legitimacy in the long run, as it contributes to its overall transparency. By contrast, the protection of federal rights may be attained just as easily and effectively by federal involvement at the judicial review stage than during the administrative proceeding.[137] Where this is true, the fact that accountability suffers under one scenario—federal interference with a proceeding still in the agency—and not the other is grounds for taking accountability seriously even under the most stringent rights-protecting regime. Put another way, it is at least worth asking whether abstention at the agency stage of the proceedings is doing cumulative harm to agency accountability because it is possible that the countervailing cost to federal

135. This position is often manifest in the debate over the relative competence of state versus federal tribunals in protecting federal rights, what has come to be known as the parity debate. For a summary of that debate, see Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 609–14 (1991).

136. *See infra* Part V.C.2 (discussing the unitary theory of judicial review).

137. To the extent this triggers questions about the ripeness of federal interference with state agency proceedings, it is important to remember that federal abstention cases often do not involve review of agency activity itself, but rather address other federal questions surrounding that activity, such as constitutional objections, that do not necessarily depend—as judicial review typically would—on the outcome of the agency proceeding.

rights will be negligible due to the availability of federal intervention at the judicial review stage.

3. Efficiency

The principle of efficiency is part of the broader but related principle of "good administration,"[138] as it acknowledges the importance of responsive, timely government. As Professor Glen Robinson explained, "The goal of efficiency needs no explanation or defense. If it cannot be considered an ultimate concern of administrative law that tasks be accomplished with the minimum expenditure of time and resources, it is nevertheless a matter of large importance."[139] This includes the efficiency and efficacy of both agency procedures in achieving their goals, and in the administrative burdens and tradeoffs associated with specific policy decisions.

Abstention has a direct impact on agency efficiency because it threatens to interrupt and potentially suspend agency procedures midstream. This is by definition inefficient in cases where federal involvement does not result in the suspension or cancellation of agency conduct. Even in cases where federal courts do find violations of federal rights that merit cancellation of an agency proceeding, avoidable and potentially damaging inefficiencies still exist. For example, in cases like *Burford* where the objection to agency conduct is procedural, interrupting the agency in the middle of its policymaking process just to later order it to resume those same activities using different procedures could be quite inefficient, especially if there was a significant time lapse between the initial agency proceeding and the federal court's order.[140] As discussed

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138. The principle of good administration, at least in a comparative context, includes ideas of efficiency, flexibility, consistency, proportionality, and other qualities of responsive, timely, effective government. *Principles of Good Administration*, PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN (Feb. 10, 2009), http://www.ombudsman.org.uk/__data/assets/pdf_file/0013/1039/0188-Principles-of-Good-Administration-bookletweb.pdf. For present purposes, efficiency is a sufficient proxy for the broader concept of good administration, both because it is affected in precisely the same way by abstention as the other features of good administration, and because it is the principle most often cited in American administrative law literature to represent this concept. *See* Delbruck, *supra* note 15; Virelli, *supra* note 15.

139. Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 516 (1970).

140. It is again important to note that this argument does not presuppose that protecting agency efficiency is of greater importance than protecting the constitutional rights of parties to that proceeding. The goal here is simply to draw attention to a heretofore underappreciated consequence of federal court involvement in state agency proceedings so as to permit a more informed and thorough analysis of when abstention is appropriate in such proceedings. In the case of *Burford*, for example, federal courts that felt compelled to intervene in the due process claim in that case could have done so in lieu of state court review proceedings, thereby reaching the same result in terms of protecting federal rights without bringing agency policymaking to an abrupt and potentially premature halt. This is especially true given that not all federal claims succeed in the federal courts, adding the risk that a well-meaning decision by

earlier, federal rights will not be affected when federal courts wait to intervene until the agency decision is on review in the state courts. But agency legitimacy, including expertise, accountability, and efficiency, will. Even for agency conduct that is ultimately cancelled by federal courts, there is greater efficiency in the agency's completion of its own procedures due to the long-term benefits of gathering information and developing rationales for its policy positions. If this efficiency benefit can be obtained without significant damage to federal protections, it should be relevant to a court's abstention calculus.

In sum, the unique status and functionality of administrative law implicates a broader set of issues in the abstention context than have been recognized in traditional abstention decisions that focus only on competing judicial systems. In order to meet abstention's abiding goal of finding an equitable balance between vindicating federal rights and respecting state autonomy, administrative abstention cases should consider the consequences to the legitimacy of the state administrative system.

IV. A NEW APPROACH TO ADMINISTRATIVE ABSTENTION

It is helpful to identify the gaps in existing abstention doctrine and to develop a new normative foundation for administrative abstention, but all of this discussion raises the larger question of what a new approach to administrative abstention should look like. Any attempt at devising a blanket rule will invariably run into the time-honored problem in administrative law of seemingly endless variability among agencies. This section thus proposes a default rule that creates a new framework for administrative abstention without unduly diminishing or discounting the federal courts' discretion on a case-by-case basis.

A. The Default Rule

Any default rule must take into account the goal of formulating a single, cohesive view of administrative abstention that seeks to protect the legitimacy of state administrative government without compromising the federal judiciary's ability to vindicate federal rights. Given these prerequisites, the answer is relatively straightforward. Federal courts should abstain from interfering in any ongoing policymaking activity by state agencies. This default rule applies regardless of whether the agency chooses to proceed by rulemaking or adjudication, but does not apply to

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a federal court to intervene in a state administrative proceeding will create inefficiencies that are costly in material and political terms to the state without resulting in the advancement of any federal interests.

state court review of agency action.[141] It enables federal courts to fully protect the integrity and legitimacy of state administrative institutions, which are the foundation of the very state sovereignty that abstention was created to protect, without expanding administrative abstention doctrine into areas of state practice (like judicial review) that do not directly impact legitimacy.

As with many default rules, however, some caveats are necessary. First, administrative abstention in any form can only apply where there is an adequate state forum for resolving disputes about federal rights. As the Supreme Court explained in *Dayton Christian*, state court review of agency proceedings is considered a sufficient forum,[142] but to the extent no adequate state forum exists to address claims that a federal right has been violated, abstention need not apply. Second, administrative proceedings that closely mirror civil trials may not implicate the same legitimacy concerns as other proceedings.[143] Picture an adversarial agency adjudication between two private parties for compensation under a state regulatory scheme in which the outcome will be determined solely based on the evidence developed by those parties.[144] This largely remedial proceeding is far less likely to implicate the principles of agency expertise and accountability that are fundamental to administrative legitimacy; when an agency acts exactly like a civil court, basing its decisions on a record built solely by the parties to the dispute, agency expertise and accountability are no more relevant to the proceeding's legitimacy than they would be in state court.[145] An attempt by a federal court to interfere in that proceeding may be governed by existing abstention doctrines,[146] but

141. This amounts to a rejection of the unitary theory of judicial review of agency activity, which was discussed by the Court in *NOPSI*, *see supra* notes 93–98 and accompanying text, and is taken up in greater detail in *infra* Part V.C.2.

142. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 629 (1986) ("[I]t is sufficient under *Middlesex* that constitutional claims may be raised in state-court judicial review of the . . . administrative proceeding." (internal citation omitted)).

143. Using the federal model as an example, this would include both formal adjudication *and formal rulemaking* proceedings as described in the Administrative Procedure Act, 5 U.S.C. §§ 554, 556–57 (2012). Because formal adjudication is used far more frequently than formal rulemaking, the following examples will focus on administrative adjudication. It is worth noting, however, that the analysis would be identical—at least in all relevant respects—were formal rulemaking substituted for formal adjudication.

144. An example of such a proceeding could be the proceeding before the CFTC in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

145. Agency expertise in a given field does not of course disappear in the face of an adversarial proceeding, but as an agency adjudication moves closer to a purely remedial exercise between two private parties, the agency has less opportunity to employ its substantive expertise in the adjudicative process.

146. If it is an enforcement proceeding, for example, then *Younger* abstention would likely apply. *See* Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013).

would not merit abstention based on the broader institutional notion of administrative abstention advocated here.

Now envision a different brand of agency adjudication, in which an expert state agency invited wide public participation in detailed proceedings to determine the appropriate location for a new waste management facility and published a thorough explanation of its findings and conclusions. Assume that a disgruntled party then brought a due process challenge to the proceedings in federal court. Under existing abstention doctrine, the federal court would be forced to decide whether the nature of the proceeding was sufficiently coercive or enforcement-based to justify an analogy to the state criminal proceeding in *Younger*, or whether the particular determination at issue was critical enough to state policy under *Burford*. It does not appear from this limited hypothetical that the determination was made for civil or administrative enforcement purposes, so *Younger* abstention would likely not apply.[147] It is also unclear whether the decision would be important enough to the state to justify *Burford* abstention.[148] It is a difficult analysis and could go one of two ways. It could cause courts to fear the creation of a slippery slope whereby every agency action that affects state residents (i.e., virtually all of them) would merit abstention. A court's willingness to go down this potentially slippery slope could end with a *Burford* doctrine broad enough to protect administrative legitimacy, but seems both unlikely given recent abstention precedent and difficult to justify as long as the qualifier of an important state interest remains in the standard.[149] A more likely result is that courts will resist the slippery slope problem and will limit abstention to only the "extraordinary circumstances" referred to in *Burford* and its progeny.[150]

The presence of a detailed regulatory scheme could also trigger *Burford* abstention, but for the wrong reasons. If the complex scheme consisted of a series of trial-like hearings before the agency, then the proceeding becomes essentially indistinguishable from a state court proceeding, and administrative abstention gives way to traditional questions of abstention in state judicial proceedings. If the complex scheme involves expert investigation and fact-finding and invites broad public participation, then it may merit abstention beyond what the Court has traditionally granted under *Burford*. In that case, looking at the state's interest in protecting the legitimacy of its administrative regime casts the abstention question in a potentially more useful light. It demonstrates that

147. *See supra* note 104 and accompanying text.

148. *See supra* notes 47–49 and accompanying text.

149. The *Burford* doctrine has been considerably narrowed, and the Court has hardly dealt with it in any substance since deciding *Burford* itself. *See* Young, *supra* note 5, at 906–13.

150. *Id.* at 900.

the loss to the state is not just the work of determining where to put a waste treatment plant, but also of the accountability and expertise of its governing agency. A federal injunction would interrupt the state adjudication without giving the agency the opportunity to respond to the concerns of its constituents. Much like Justice O'Connor warned about a threat to democratic accountability in *New York v. United States*,[151] this could damage agency accountability by causing public confusion as to which entity—state or federal—is responsible for the program.[152] The injunction could also harm public perceptions of agency expertise by seemingly inserting a federal caretaker between the agency and the people it purports to serve. The default rule proposed here would recommend abstention in cases like the one above where the act of agency policymaking—as opposed to strictly remedial proceedings or judicial review of agency determinations—would be interrupted by federal adjudication.

Although certainly reasonable on its face, especially in light of existing precedent and the importance of federal court protection of federal rights, current abstention doctrine neglects to consider the potentially significant costs that federal interference could create for the legitimacy of agency conduct and, ultimately, the agency itself. This is not a significant problem in enforcement-style proceedings, but is a potentially significant—and entirely overlooked—issue in non-enforcement proceedings. Only by committing to a more holistic, cohesive abstention regime can this gap be closed and the institutional costs to states of administrative abstention be properly regarded.

B. Anticipating Potential Objections

At first blush, this new proposal for administrative abstention may well appear like a potential windfall for state governments. A default rule in favor of abstention for state administrative proceedings represents a new perspective on what has traditionally (and for good reason) been an extremely narrow equitable doctrine. Federal courts have both the power and responsibility to vindicate federal rights by virtue of their constitutionally assigned judicial power and their statutory obligation to exercise jurisdiction in certain cases.[153] Moreover, the jurisdictional statutes

151. 505 U.S. 144, 168 (1992).

152. *See id*. at 169 ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

153. *See*, *e.g.*, 28 U.S.C. § 1331 (2012) (granting (non-discretionary) original jurisdiction to the federal courts over cases "arising under" federal law); Burford v. Sun Oil Co., 319 U.S. 315, 345 (1943) (Frankfurter, J., dissenting) ("Congress has chosen to confer diversity jurisdiction upon the federal

give litigants the right to seek their own choice of forum. How, then, can such an apparent expansion of abstention be justified?

The answer is four-fold. First, as discussed in detail above, administrative law is structurally and practically different from judging. Agencies' tenuous place in our constitutional system requires careful articulation and preservation of the legitimizing features of expertise, accountability (including transparency and public participation), and efficiency. Any federal abstention regime must at least be cognizant of its effect on the legitimacy of state administrative government to preserve the integrity of both state government and of our federal structure. The fact that current abstention doctrine fails to consider the institutional consequences for state governments is a serious weakness that cannot continue to be ignored simply because it always has been.

Second, the caveats to the proposed default rule maintain powerful protections for federal rights. Ensuring an adequate state forum guarantees that federal rights will be adjudicated by a competent judicial authority even when a federal court abstains. Moreover, excepting out administrative proceedings that closely resemble civil trials tailors the proposed default rule to those instances where critical issues of legitimacy are likely to arise. This of course raises important questions about how federal courts are to identify which administrative proceedings are excepted from the proposed default rule. The answer is that state agencies engage in far too broad a range of activities and proceedings to create a prescriptive rule as to which proceedings implicate agency legitimacy enough to merit abstention. Courts would have to look at the entire range of procedures and participants in a specific proceeding to make that determination, and at the boundaries it will indeed be a close call. In many other cases, however, like rulemakings or public hearings supporting adjudications, the nature of the proceeding for abstention purposes will be far easier to discern. The fact that limiting the default administrative abstention rule could force courts to make some difficult decisions is a worthy concern, but not one that should derail the project. On one hand, courts are well equipped to engage in the fact-specific inquiry regarding the nature of the proceeding at issue—in fact, they are required to do so in a slightly different context under the Supreme Court's recent decision in *Jacobs*.[154] To the extent the decision appears too challenging in certain cases, courts can exercise a presumption in favor of abstention, with the understanding that an adequate alternative

courts. It is not for us to reject that which Congress has made the law of the land simply because of our independent conviction that such legislation is unwise."); Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 764–65 (2013) (discussing *Burford*'s inherent tension with federal courts' duty to exercise jurisdiction).

154. Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591–92 (2013).

forum for vindicating federal rights is available and the court may revisit the decision to intervene at the judicial review stage.[155]

Third, federal courts are not required to fully abdicate their jurisdictional responsibilities, but rather to delay them. The default position in favor of abstention for ongoing administrative proceedings does not include state judicial review of those proceedings. This is due to the fact that the legitimacy of agency conduct is far less, if at all, impacted by federal interference with a state court review proceeding. By the time an agency decision is on review in the courts, agency expertise, accountability, and efficiency have already been fully exercised. At the review stage, traditional issues of federalism and state sovereignty attach, but institutional concerns about the legitimacy of state policymaking do not. Rather than completely foreclose federal courts from state administrative functions, the proposed model of administrative abstention shifts federal judicial involvement to a more familiar context—the interaction of federal and state courts in cases where the two entities share jurisdiction. This limitation on federal courts' involvement is similar to the finality requirement prevalent in both state and federal administrative law. The finality doctrine prohibits judicial review of federal agency proceedings until those proceedings are "final."[156] There is some debate as to whether and how that requirement attaches in cases where agency conduct does not result in binding rules or orders,[157] but it is clear that courts may not interfere in agency proceedings that are not yet concluded. The presence of a final agency action is important in order to, *inter alia*, "provide[] the agency with every reasonable opportunity to resolve the matter by using its special expertise."[158] Much like the finality doctrine serves to protect agencies from undue interference by courts in their own system, abstention can play a similar role by protecting *state* agencies' expertise (and, in turn, legitimacy) from interference by the *federal* courts.

Lastly, the default rule for administrative abstention is not an undue threat to either the federal judiciary or to litigants seeking to bring federal claims because it will overlap with existing abstention doctrines. Although incomplete, modern abstention doctrine already empowers courts to refrain from getting involved in cases involving ongoing agency activity as well as ongoing judicial review of that activity.[159] The current proposal does not change the abstention calculus at the judicial review stage at all, and does

155. *See* discussion *supra* Part IV.A.

156. 5 U.S.C. § 704 (2012); Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

157. *See* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 250–51 (D.C. Cir. 2014).

158. William A. McGrath, et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 685–86 (1991).

159. *See supra* Part II (outlining the scope of existing abstention doctrine).

not apply abstention to ongoing trial-like proceedings at the agency level. To the extent it offers a broadly applicable rule in favor of abstention for agency policymaking activities, that is only by way of supplementing *Younger* and *Burford* in those areas. The major change to existing abstention would be its applicability to ongoing agency proceedings, including rulemakings, that more closely resemble the work of the political branches—through broad public participation, the exercise of specific agency expertise, etc.—than the civil courts.

Adopting the proposed default rule for administrative abstention addresses the previously overlooked threat to administrative legitimacy without unduly limiting the federal courts' ability to protect federal rights. Moreover, by adding the legitimizing principles of expertise, accountability, and efficiency to the overall abstention analysis, this new approach to administrative abstention can unlock a range of benefits for both federal and state institutions, while still managing to minimize any attendant costs.

V. THE BENEFITS OF A NEW APPROACH

Skeptics may view the idea of redefining administrative abstention with an eye toward preserving administrative legitimacy as an unduly difficult analysis without the commensurate payoff for the individuals or institutions involved. A closer look, however, reveals that bringing legitimacy issues into the fold offers some institutional and doctrinal benefits that are on the whole consistent with the broader goals of abstention law. In particular, additional benefits accrue in the areas of federalism, separation of powers, and administrative abstention doctrine.

A. Federalism

The principle of federalism is unquestionably advanced by an abstention doctrine that also protects the legitimacy of state administrative agencies. Administrative agencies are a powerful source of state authority, depended upon by the state legislature to set state policy on a wide range of important issues. The legitimacy of agency governance is thus critical to the sovereignty of the state. Moreover, current abstention doctrine is not as effective in protecting the proper functioning of state government because it does not take an institutional view of the state administrative system. Existing doctrine applies a case-by-case approach to protect certain types of state policy decisions but does not expressly take into account the

consequences of abstention for the entire state administrative machine.[160] Incorporating an institutional approach focused on the critical issue of administrative legitimacy expands the federalism benefits of administrative abstention beyond their existing boundaries.

B. Separation of Powers

This new perspective on administrative abstention also has separation of powers implications. State administrative proceedings are policymaking vehicles.[161] Even agency adjudications require administrators to make value judgments consistent with the principles outlined by the legislature.[162] This is a very different mission than that of the courts in a separation of powers regime. Courts are primarily tasked with deciding cases between adverse parties in accordance with the legal constraints put on them by the legislative and executive branches.[163] This division of labor is not only intentional but desirable in that it offers litigants an objective arbiter to resolve their disputes free of the influences and burdens of policymaking. It is potentially problematic, then, when the judicial branch becomes entwined in the policymaking activities of administrative agencies. Yet that is precisely what happens in administrative abstention cases.

Traditional abstention—federal courts deciding whether to intervene in state court proceedings—is symmetrical (and thus benign) from a separation of powers perspective. The branch of the federal government responsible for exercising the "judicial Power of the United States"[164] decides whether the branch of state government tasked with the same set of powers and responsibilities must yield to its federal counterpart.[165] This symmetry does not solve the oft-discussed separation of powers problem between the federal courts and Congress over which branch gets to determine when courts may or may not exercise their statutorily assigned

160. *Id.*

161. *See* Woolhandler & Collins, *supra* note 5, at 643–44.

162. *See* CHARLES H. KOCH, JR., WILLIAM S. JORDAN III, RICHARD W. MURPHY, & LOUIS J. VIRELLI III, ADMINISTRATIVE LAW: CASES AND MATERIALS 94 (7th ed. 2015) (explaining how an agency's power to adjudicate comes from its enabling act).

163. There are, of course, exceptions, such as when courts adopt their own codes of ethics or develop rules of procedure or evidence, but these non-adversarial responsibilities first occupy a small minority of the courts' time and energy, Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675–76 (1975), and second are derivative of their dispute resolution role.

164. U.S. CONST. art. III, § 1.

165. For present purposes, the fact that a federal court may order dismissal or a stay of the state court proceeding is immaterial. *See, e.g.*, Cty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

jurisdiction.[166] It does, however, avoid an additional separation problem that arises in the administrative abstention context—under what circumstances may the judicial branch interfere with the policymaking activities of a political (in this case the executive) branch?

This question is all but lost in the abstention literature for at least two reasons. First, the separation of powers is generally thought of as an intra-governmental question. Interactions between branches of the federal government, for example, are seen as raising separation of powers issues. Conflicts between branches of different governments—state versus federal, for instance—are most often categorized as questions of inter-governmental authority, more closely associated with federalism than the traditional separation of powers.[167] The consequence is that concepts like institutional competence and checks and balances, which are most closely associated with the separation of powers, are not brought to bear in cases of inter-governmental conflict. Despite involving such an inter-governmental conflict, administrative abstention raises questions at the heart of the separation of powers. It asks when, if at all, courts are competent to interfere with the ongoing policymaking efforts of the executive branch, and what level of interaction should be allowed to ensure that neither the judicial actors (the federal courts) nor the executive actor (a state agency) exceeds their authority vis-à-vis the other.

It is worth noting that this is not an argument in favor of federal courts making an independent decision about how the separation of powers regime of a particular state bears on a specific exercise of agency authority. That question is one for state courts, and thus would merit abstention on traditional *Pullman* grounds—federal courts should defer to state courts regarding interpretation of state constitutional questions.[168] Perhaps more importantly, the benefits of treating administrative abstention as an independent concept do not depend on the intricacies of state constitutional structure. The salient point for present purposes is that focusing on the policymaking features of administrative activity puts federal courts in a position not only to honor state sovereignty in general—as federalism principles would require—but also to make a finer distinction based on ideas of democratic legitimacy and checks and balances that are relevant to all tripartite governmental systems. The Court hinted at this idea when it

166. *See* Olsen, *supra* note 153, at 778–81.

167. Shapiro, *supra* note 1, at 580–85.

168. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (holding that federal courts should abstain from deciding issues of federal constitutional law where the case could be resolved on state law grounds).

focused on the legislative nature of ratemaking in *NOPSI*,[169] but it stopped short (mistakenly, I contend) from recognizing that nearly all agency activity involves the trappings of legislative policymaking. Viewing administrative abstention as a stand-alone idea allows federal courts to better appreciate the separation of powers principles implicated by judicial interference with state administrative activity without having to make specific pronouncements about state constitutional law that they are both unqualified and without authority to make.

A second reason why courts and commentators have largely overlooked the separation-of-powers aspect of administrative abstention is that they have unduly discounted the distinction between agency conduct and judicial review thereof. The failure to treat actual administrative activity differently from judicial review obscures the fact that administrative abstention involves different branches of government. Under the unitary theory of agency action articulated by the city council in *NOPSI*,[170] only symmetrical separation of powers issues are readily apparent. By contrast, an institutional view of administrative abstention like the one suggested here reveals the inter-branch tension created in administrative abstention cases and, hopefully, the impetus for federal courts to take the inter-branch nature of their decision into account in their abstention decisions.

Much like in the federalism context, a view of administrative abstention as an institutional issue affecting administrative legitimacy exposes a range of critical and previously underappreciated structural issues pertaining to the separation of powers.

C. Abstention Doctrine

A more holistic view of administrative abstention provides answers to two significant doctrinal questions that the current law of abstention either overlooks or ignores. The first involves the rule-order distinction in administrative law. The second addresses the relationship between agency action and judicial review of that action.

1. Rule-Order Distinction

Since the emergence of the administrative state, agencies' choices between (quasi-legislative) rulemaking and (quasi-judicial) adjudications

169. *See* discussion *supra* notes 96–97 and accompanying text (describing the Court's treatment of the legislative features of ratemaking in *NOPSI*).

170. *See supra* note 93 and accompanying text.

have had a powerful impact on administrative law and procedure. Rulemaking provides for generally applicable, prospective regulations. They are often developed through a process that shares much in common with legislation,[171] and can be very time-consuming and expensive to produce. Because of its similarity with legislation, rulemaking does not trigger an individual's due process rights, meaning that individually affected citizens are not entitled to a hearing before a rule can take effect.[172] Adjudications, on the other hand, are narrower decisions that target specific parties and culminate in the issuance of an order by the agency. Adjudications often act retroactively, by determining the legal consequences of a party's past actions.[173] Due process rights attach to adjudications, just as they do to judicial decisions.[174]

Despite these theoretical distinctions, agencies can use rules and orders almost interchangeably to affect policy.[175] Consider a local zoning board empowered by statute to combat overcrowding in its city. Assume that the board wanted to deal with the overcrowding problem by limiting the number of people living in each house in town. This outcome could be achieved via rule or order. The board could enact a rule limiting the number of people in each home to six, such that from that day on, every resident of the city would know that housing more than six people under one roof is a violation. Conversely, the board could simply choose to bring an enforcement action against every homeowner in town with more than six residents, on the basis that more than six inhabitants constitutes overcrowding under the statute. Over time, either the board will succeed in adjudicating every instance of housing more than six people under one roof, or it will successfully deter homeowners from having that many people in their houses. The point is that either method can achieve the desired policy outcome.

At the same time, agencies exercise near total control over the decision between rulemaking and adjudication.[176] The decision can be complex, requiring an agency to balance factors such as cost, efficacy, popular

171. *See* KOCH, JR. ET AL., *supra* note 162, at 141 (explaining that rules are "issued through a quasi-legislative process and have an effect comparable to the effect of legislation").

172. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915); Londoner v. Denver, 210 U.S. 373, 385 (1908).

173. *See* KOCH, JR. ET AL., *supra* note 162, at 100 (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947)).

174. Withrow v. Larkin, 421 U.S. 35, 46–47 (1975).

175. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("[A]n administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity."); Bonfield, *supra* note 27, at 167.

176. However, in a few states, "the state legislature or legislative committees are given far broader oversight roles . . . with respect to agency rulemaking than the U.S. Congress." Rossi, *supra* note 13, at 1172.

opinion, and efficiency.[177] The fact that it is entirely up to the agency creates a problem for the doctrine of administrative abstention. Under existing abstention law, federal courts are only required to consider abstaining when the state proceeding is "judicial in nature." Regardless of how one defines this admittedly nebulous term (as evidenced by the courts' difficulty in fashioning a clear definition), it must be understood to at least exclude traditional rulemaking proceedings.[178] The result is that current abstention doctrine applies only to (a subset of) agency adjudications,[179] and not at all to rulemaking. Put another way, abstention depends for its applicability on an agency's decision to employ adjudication over rulemaking.

This is problematic for two distinct reasons. The first is that it is potentially arbitrary. If the operative equitable concern in an abstention proceeding is the interference with state sovereignty, it should not matter appreciably whether the federal interference affects a rule or an order. This is especially true when the choice is driven by a range of factors that themselves are irrelevant to the abstention inquiry. The second problem created by abstention's total exclusion of rulemaking is that it creates an incentive for state agencies to choose rulemaking—regardless of whether it is otherwise thought to be the more desirable policymaking device—simply to protect against federal interference. In this instance, abstention adds a complicating factor to the rule-order choice that burdens state policymakers and takes focus away from the issues of good government that should drive that decision. Abstention's focus on orders interferes with state sovereignty by tipping the scales in favor of rulemaking, even when rulemaking would otherwise not be in the best interests of the state.

The proposed institutional view of administrative abstention is thus superior to existing abstention doctrine because it does not discriminate against rulemaking in favor of adjudication. This is a significant improvement because it opens up space for courts to consider the full and true impact of their abstention decisions on state administrative proceedings in general, rather than focusing on the nature of those proceedings in a way that is either arbitrary or unduly disruptive to state policymaking.[180]

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177. Shapiro, *supra* note 117, at 927–28, 930–37.

178. In fact, none of the Supreme Court's decisions on the topic have ever included rulemaking as the operative administrative proceeding.

179. *See supra* Part II.B.

180. One possible response may be that courts assume—independent of abstention—that they cannot interfere with ongoing state legislative proceedings, such that the issues raised above about the impact of the rule-order distinction on abstention doctrine are mere paper tigers. The difficulty with this response is that there is no obvious reason why a federal court could not be *asked* to enjoin an ongoing state rulemaking proceeding due to an alleged violation of a federal right, and there is no obvious legal

2. The "Unitary" Theory of Judicial Review

Another conundrum addressed by a more inclusive, institutional view of administrative abstention is the "unitary" theory of judicial review. Under current abstention doctrine, a state's interest in its proceeding is a critical component of the court's analysis.[181] Yet courts have been reluctant to parse out the different stakes for the state at the policymaking stage—the period of actual agency conduct—and the review stage, where courts engage in often highly deferential review to protect against clear derogations of agency responsibility, such as arbitrariness.[182] Instead, they have looked to the substantive importance to the state of either the issue under consideration or the type of proceeding in deciding whether to abstain.

In their amicus brief to the Supreme Court in *Sprint v. Jacobs*,[183] Professors Erwin Chemerinsky, Kermit Roosevelt, Paul Salamanca, and Christina Whitman challenged this one-dimensional view of the state administrative process, arguing that "the agency proceeding and the state-court review proceeding" should not be treated "as a unitary process presenting the same important state interest" for abstention purposes.[184] This recognition of the difference in a state's interests between the administrative and judicial review stages is analogous to the concerns presented here about administrative legitimacy. As the distinguished *amici* in *Jacobs* indicated, a state's interest in protecting its administrative processes may vary widely from its interest in protecting its own courts' review of those proceedings. This variance is perhaps most profound where administrative legitimacy is concerned. Issues of the expertise, accountability, and efficiency of policymakers are all highly relevant while the agency is conducting its own proceedings. Once the agency's policy determination goes to the courts, however, the legitimacy of the process is far less vulnerable. This is true for at least two reasons. First, and most importantly, the judicial system is constitutionally mandated in a tripartite

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basis to prevent the vindication of that federal right before the rulemaking process is completed. Moreover, the current equitable wisdom states that abstention is not available for state legislative proceedings like ratemaking, New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 371 (1989), such that federal courts can intervene with impunity against state rulemaking proceedings when they may have been required to abstain had the agency chosen to address the same policy issue through adjudication.

181. *See supra* Part II.B. for discussion of how the element of state interest affects an abstention analysis.

182. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2012) (articulating the standards of judicial review of agency action under the federal Administrative Procedure Act).

183. Brief of Law Professors as Amici Curiae in Support of Petitioner at 21, Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584 (2013) (No. 12-815).

184. *Id.*

regime,[185] such that its existence and function come with an imprimatur of legitimacy. Second, judicial legitimacy is dependent on a different set of criteria than that of agencies. Courts are neither experts in a particular area nor representative of the majority interest. In fact, they are often expressly insulated from political influence.[186] The judiciary's legitimacy thus comes from the public's perception of it as a fair and neutral arbiter,[187] rather than a willingness to accept its actions as a source of new and binding legal constraints. Regardless of any potential comparisons between these two sources of legitimacy, they are at minimum sufficiently distinct to make the broader point (and the only one necessary for present purposes) that legitimacy is not a singular concept that can be applied across all manner of government action. Once we establish that agencies' legitimacy implicates a different set of institutional features and standards than that of the reviewing courts, it necessarily follows that an abstention calculus that aims to take administrative legitimacy seriously cannot ignore the difference between agency conduct and judicial review.

A new approach to administrative abstention focused on legitimacy not only better protects state institutions, but also reinforces a number of principles at the core of our republican government. It enhances federalism by protecting state policymaking prerogatives from interference by federal courts. It promotes the concept of separation of powers by shielding a political branch of state government from the federal judicial branch. Finally, it helps resolve some of the doctrinal inconsistencies caused by the historical application of a judicial abstention doctrine in the very different context of administrative law.

VI. CONCLUSION

A federal court's decision to abstain from interfering with a state proceeding is a microcosm of the governing principles of our Republic. Observers have taken close notice of the impact that abstention has on critical questions of federal-state relations and the interaction between

185. *Supra* note 11 and accompanying text.

186. This statement is of course overly general, as elected state judges may not only be susceptible to political influence, but also intentionally so. For present purposes, it is enough to outline the broad distinctions between administrative agencies' roles and responsibilities in government and those of the courts. At this level of generalization, it is largely uncontroversial to say that courts derive their legitimacy from different institutional features and under different public expectations than agencies.

187. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.").

Congress and the courts. Underappreciated in those conversations, however, are the unique features of administrative abstention. Administrative agencies occupy a tenuous position in our tripartite democracy, yet perform many, if not all, of the functions of the three constitutionally mandated branches. Agencies are asked to make important public policy decisions, but do so within a procedural framework different from those of legislatures or courts. The result is a system of administrative governance that is critical to the public welfare, but that suffers from concerns about its legitimacy.

Abstention encounters all of these distinct features of administrative law but does not consciously account for them. This Article makes the case for reconceptualizing administrative abstention in order to focus it on perhaps the most pressing issue facing administrative government—its legitimacy in a representative democracy. Only by thinking of abstention in distinctly administrative terms can we fashion a relationship between federal courts and state agencies that protects the legitimacy of state administrative governance while still maintaining a robust forum for the vindication of our federal rights.