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Cover Page Footnote
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SORTING OUT FEDERAL AND STATE JUDICIAL ROLES IN STATE INSTITUTIONAL REFORM: ABSTENTION'S POTENTIAL ROLE

*By Charles R. Wise and Robert K. Christensen**

INTRODUCTION

The Kansas City School District will move vigorously to raise achievement levels of its students after a federal judge dismissed what had become one of the costliest desegregation cases ever, Superintendent Benjamin Demps has vowed.

Demps hailed the decision Wednesday by U.S. District Judge Dean Whipple to free the district from federal court supervision in a case that had dragged on 22 years and cost the state $2 billion.

. . . .

In dismissing the case, Whipple said further court involvement would only get in the way of the district's efforts to improve student achievement. He said court involvement over the years had probably contributed to turmoil in the district—citing infighting on the school board and the revolving door that led to 18 superintendents in 30 years.

Whipple praised the district for its attempts to meet federal court orders since a lawsuit was filed in 1977 seeking to desegregate the district through an exchange of students on both sides of the state line.

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> Despite those positive steps, Whipple refused to overturn the state Board of Education's decision Oct. 21 to strip the district of accreditation beginning in May. The board found that the district failed to meet 11 performance standards used by the state to measure student achievement.
>
> Whipple said the district's appeal of that decision was the latest example of how the district had used the court to shield itself from accountability for the continued performance of its students.[1]

If a plaintiff sues a state or local institution for violating constitutional or federal statutory rights, when should federal courts intervene, and when should they defer to state courts? Federal courts must consider many factors when framing a remedy designed to reform a state or local institution. The consistent application of these factors has proven particularly troublesome for federal courts in situations where institutional reform is sought.

Institutional reform remedies involve not only social, economic, and political factors, but also complex organization and management issues intertwined with considerations of policy and science—issues federal courts often have little familiarity with. Courts have, for example, been attempting to sort out the findings of social studies and discern their meaning for remedial policies in desegregation cases.[2] Judicial decrees that involve budget allocations and taxations have forced courts to repeatedly revisit their decisions in the face of changing economic, macro-budgetary, and cost conditions. Remedial options are further complicated by the existence of state common law and statutes already governing state or local institutions. Superimposed on these complexities are the actions of state officials and state courts, who may already be addressing the very problems the plaintiff has brought to federal court. The result is a vexing dichotomy of competing imperatives. On one hand, state courts are responsible for overseeing state and local agencies and applying federal and state laws to their operations. On the other hand, federal courts are fundamentally responsible for ensuring the vindication of federal rights.

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1. Craig Horst, *Federal Judge Ends Decades Old KC School Desegregation Suit*, Nov. 18, 1999, *available at* WESTLAW, Associated Press Newswires Plus.

2. In reviewing literature on the use of sociological research in judicial lawmaking, one author concluded, "What is striking is that the considered views of thoughtful commentators on the indispensability of social science, and the impossibility of developing a methodology for dealing with it have remained relatively constant." William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648 n.45 (1982).

The U.S. Supreme Court has attempted to sort out these competing imperatives by according federal courts the authority to abstain from hearing certain cases. This doctrine has never been fully articulated and, as a result, has led to confusion among federal courts. Further, state courts and institutions lack sufficient clarity to foresee when, and under what conditions, a federal court will defer to their judgment.

The ambiguity surrounding the abstention doctrine in institutional reform cases hinders the effective reform of state and local institutions.[3] Such ambiguity also threatens the legitimacy and effectiveness of federal courts and their role in safeguarding individual rights.[4] Abstention has the potential to play an increasingly useful function in sorting out the roles of state and federal courts in institutional reform litigation. That potential will only be realized, however, if the requirements for abstention are better articulated and if a clear rationale, grounded in sound law and administration, is supplied. This piece attempts to do exactly that: to clarify the abstention requirements and provide a clear rationale for the doctrine.

Part I of this piece discusses the origin and development of the abstention doctrine, focusing specifically on *Burford* abstention, a kind of abstention particularly salient to institutional reform cases. Part I also illustrates the inconsistencies inherent in the application of the abstention doctrine in its current form. Parts II and III propose that federal courts, in considering whether to grant *Burford* abstention, should analyze three requirements: judicial capacity, federalism, and administrative responsibility. This piece concludes that all three requirements play a significant role in achieving a reasonable division of labor between federal and state courts and can assist policymakers in initiating institutional reforms in agencies implicated in rights violations.

I. ABSTENTION

A. Roots of Abstention

The abstention doctrine permits federal judges, at their discretion, to decline to decide cases otherwise properly before the federal courts.[5] Abstention is grounded in principles of comity and

3. *See infra* notes167-68 and accompanying text.

4. *See infra* notes 169-72 and accompanying text.

5. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATIONS 74 (1999).

federalism.[6] It is based on the notion that federal courts should not intrude in sensitive state political and judicial controversies unless absolutely necessary.[7] Proponents of abstention feel such controversies should instead be settled by state courts.[8]

The debate surrounding the abstention doctrine, in existence for seventy years, is by no means settled. Some would greatly limit abstention's potency by emphasizing the word "virtually" in the Supreme Court's depiction of a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[9] Abstention's supporters emphasize Justice Frankfurter's statement of federalism in *Railroad Commission of Texas v. Pullman Co.* that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies."[10]

Abstention, as a doctrine, owes its heritage to the seminal cases *Railroad Commission of Texas v. Pullman Co.*[11] and *Burford v. Sun Oil Co.*[12]

B. *Pullman*

On March 3, 1941, the Supreme Court gave its first articulation of the abstention doctrine: *Pullman* abstention.[13]

The plaintiffs in *Pullman*, the Pullman Railroad Company and its porters, attacked a Texas Railroad Commission order forbidding sleeping cars from being operated on Texas railroads unless controlled by Pullman conductors (not porters).[14] The Pullman Company argued the order violated Texas law and the U.S. Constitution's Equal Protection, Due Process and Commerce Clauses.[15] The Company's protest centered on the fact that, in many cases, a train would carry only one Pullman passenger car.[16]

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6. *Id.* at 74.
7. *Id.*
8. *Id.*
9. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1970).
10. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941).
11. *Id.*
12. Burford v. Sun Oil Co., 319 U.S. 315 (1943).
13. *See* 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, 5-6 n.26 (1986).
14. *Pullman*, 312 U.S. at 497-98 (quoting the Texas Railroad Commission's applicable order).
15. *Id.* at 498.
16. *Id.*

The Company felt, in such cases, a Pullman porter was sufficient to attend the car.[17] The Pullman porters, who were black, echoed the Company's objections but mainly objected to the order as racially discriminatory under the Fourteenth Amendment.[18]

Although the Supreme Court recognized the presence of significant constitutional questions,[19] the Court abstained from judgment for several reasons. The *Pullman* Court's decision was couched in terms of a duty of judicial economy.[20] The Court noted the tradition of federal courts avoiding constitutional adjudication if the controversy could be resolved by ruling on a state issue.[21] The Court also rationalized its decision to abstain out of a respect for the independence of state governments.[22] *Pullman* abstention, then, allows federal courts to abstain so that state courts can settle an underlying issue of state law and, in so doing, avert the need for a federal court to solve the federal constitutional question.

C. *Burford v. Sun Oil Co.*

Burford abstention arose in the Supreme Court in 1943, approximately two years after *Pullman*. *Burford* involved the validity of the Texas Railroad Commission order granting the defendant Burford a permit to drill four wells in an East Texas oil field.[23] Federal jurisdiction was sought on the basis of the diversity of citizenship, and because of Sun Oil's contention that the Commission's order granting Burford the drilling permit denied Sun Oil its right to due process concerning its interest in the oil.[24] Pertinent to *Burford*'s background is that Texas,

> [w]ith full knowledge of the importance of the decisions of the Railroad Commission both to the State and to the oil operators . . . ha[d] established a system of thorough judicial review by its own state courts. The Commission orders may be appealed to a state district court in Travis County, and are reviewed by a

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (stating that "[s]uch 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.").

21. Davies, *supra* note 13, at 6 (citing *Pullman*, 312 U.S. at 498).

22. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (quoting Cavanaugh v. Looney, 248 U.S. 453, 457 (1919)).

23. *Burford*, 319 U.S. at 316-17.

24. *Id.* at 317.

> branch of the Court of Civil Appeals and by the State Supreme Court.[25]

Despite having proper federal jurisdiction, the *Burford* Court abstained from decision. Unlike *Pullman*, where the federal district court was given jurisdiction while the issue of state law was being decided by a state court, the *Burford* Court entirely dismissed the case.[26] The reason for dismissal defines the core of *Burford* abstention:

> [Q]uestions of regulation of the industry by the state administrative agency . . . so clearly involves [sic] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. 'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .'[27]

In essence, the *Burford* Court abstained to prevent federal judges from interfering with complicated state administrative schemes.[28]

D. Ensuing Abstention Doctrines

In the years following *Pullman* and *Burford*, additional decisions added texture to general abstention doctrine.

Younger v. Harris[29] involved a constitutional challenge to the California Criminal Act. Harris, indicted under California's Criminal Syndicalism Act, filed in federal district court to enjoin Younger, the county District Attorney, from prosecuting him.[30] Harris contended the Act violated his constitutional freedom of speech and press.[31] The Supreme Court held that federal courts should not enjoin pending state criminal prosecutions absent ex-

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25. *Id.* at 325. The court went on to add that "[t]o prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the state district courts of Travis County." *Id.* at 326.

26. *See id.* at 334. *See also* Davies, *supra* note 13, at 12.

27. *Burford*, 319 U.S. at 332 (quoting *Pullman*, 312 U.S. at 501); *see also* Lewis Yelin, Note, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1875-76 (1999) (citations omitted).

28. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 75-76 (1984).

29. Younger v. Harris, 401 U.S. 37 (1971).

30. *See id.* at 38-39.

31. *See id.*

traordinary circumstances.[32] In essence, the *Younger* decision urged federal courts to refrain from interfering with pending state criminal proceedings.[33] In its modern form, *Younger* abstention is thought appropriate (1) if the state action is an ongoing judicial proceeding (2) implicating important state interests, and (3) the plaintiff has adequate opportunity to raise constitutional challenges in the state proceeding.[34]

In practice, *Younger* provides that a federal court may not enjoin an ongoing state criminal proceeding, even to protect federal constitutional rights. The Supreme Court has also applied the *Younger* doctrine to declaratory relief actions and certain state civil proceedings implicating important state concerns.[35]

In 1976, the Supreme Court heard *Colorado River Water Conservation District v. United States*.[36] Considering a dispute over water rights, the *Colorado River* Court held that while a federal court generally may not decline jurisdiction in the face of a concurrent or parallel state proceeding, circumstances justifying such a stay, though exceptional, do exist.[37]

In *Colorado River*, where the United States brought suit in federal district court to clarify water rights in Colorado Water Division No. 7, several defendants filed a motion to dismiss on the basis that the federal court "was without jurisdiction to determine federal water rights" under the McCarran Amendment.[38] In particular, the type of abstention pronounced in *Colorado River* was energized by the "considerations of '[wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[39] Seemingly based more on concerns for judicial economy than federalism,[40] the type of abstention pronounced in *Colorado River* allows a federal court to abstain where

32. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 364 (1989).

33. Carl E. Brody, *Abstention in the Federal Courts: A Suggested Bifurcated Standard of Review to Create Procedural Reliance Where States and Localities Regulate Constitutionally Protected Activity*, 13 ST. THOMAS L. REV. 539, 556 (2001).

34. *Id.* at 545 (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982)).

35. Redish, *supra* note 28, at 75.

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

37. Redish, *supra* note 28, at 75 (quoting *Colo. River*, 424 U.S. at 818).

38. *Colo. River*, 424 U.S. at 806.

39. *Id.* at 817 (citing Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).

40. *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1092 (1994).

litigation involving parallel issues of law and fact are simultaneously ongoing in both the state and federal courts.[41]

E. Evolution of Abstention

Each named abstention doctrine[42] arose from unique facts and procedural circumstances, and despite the guidance of case law, abstention remains shrouded in confusion.[43] Indeed, fifteen years ago, Julie Davies highlighted the abstention doctrine's "lack [of] sufficiently concrete boundaries."[44] This led federal courts to make highly subjective evaluations of the proper allocation of power between federal and state courts.[45] The confusion also has resulted in vast disparities in the availability of federal courts to hear constitutional cases in certain eras.[46] As the following examples illustrate, inconsistencies and gaps in the abstention doctrine still persist.

1. *Gaps and Inconsistencies*

One of the most glaring incongruities in the general doctrine of abstention is the controversy as to which of the named abstention doctrines constitute abstention at all. For example, a federal district court in Maryland recently declared the Supreme Court had acknowledged only three general categories of abstention: *Pullman*, *Burford*, and *Younger*.[47] This holding contradicts the scholar-

41. Brody, *supra* note 33, at 556.

42. Named abstentions are, for example, *Pullman*, *Colorado River*, *Younger*, and *Burford* abstention, as opposed to the general doctrine of abstention, under which the named abstentions fall.

43. *See, e.g.*, Brody, *supra* note 33, at 539-40 (noting that federal courts, while acknowledging that the various abstention doctrines allow them to refrain from exercising jurisdiction, apply these doctrines inconsistently); David Carter, Sierra Club v. San Antonio: *In Search of the Appropriate Application of the* Burford *Abstention,* 12 BYU J. PUB. L. 375, 375 (1998) (observing that "Burford was to become another of the difficult to apply abstention doctrines whose appropriate application and scope remain something of a mystery. . . . [T]he courts remain in conflict regarding the proper application and scope of the Burford abstention."); Davies, *supra* note 13, at 3 (stating that "[s]ome courts appear so baffled by the distinctions between Pullman and Burford that they apply [both] doctrines in aggregate form").

44. Davies, *supra* note 13, at 36.

45. *Id.* at 54.

46. *Id.*

47. MacFadden v. Balt., No. H-00-3037, 2001 U.S. Dist. LEXIS 984, at *7-8 (D. Md. Jan. 30, 2001) (illustrating Davies' concern that courts confuse the boundaries of named-abstention doctrines and apply them in aggregate when the court said that "[t]he two doctrines [*Burford* and *Pullman*] overlap and mix together to form the basis for abstention in particular cases." (internal citations omitted)).

ship suggesting that *Colorado River* should be added to the list.[48] Others suggest that *Rooker-Feldman* abstention,[49] and possibly even *Thibodaux* abstention,[50] are more than abstention corollaries, and should be classified as separate abstention doctrines.[51] That scholars cannot agree on what constitutes abstention illustrates the subjectivity and inconsistencies in the outcomes of abstention cases.[52] Said another way, the controversy highlights an abiding, conceptual misunderstanding of the fabric of the abstention doctrine.

This misunderstanding also makes it difficult to differentiate abstention from non-abstention doctrines, like primary jurisdiction.[53] In *Arsberry v. Illinois*,[54] for example, the Seventh Circuit Court of Appeals explained that

> [c]ases in which a court refers an issue to an agency because of the agency's superior expertise . . . rather than because of the

48. Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV 669, 692-93 (1995) ("The Supreme Court has recognized four [Pullman, Burford, Younger, and Colorado] primary abstention doctrines each . . . named after the case in which its principles were first enunciated . . . ."). *But see* Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 101 (1986) (emphasizing that *Colorado River* should not be included as a named abstention doctrine because it is really only "a doctrine of judicial convenience").

49. *See* Brody, *supra* note 33, at 556 (explaining that "[t]he *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart, *Rooker v. Fidelity Trust Co.*,[263 U.S. 413 (1923)] and *District of Columbia Court of Appeals v. Feldman* [460 U.S. 462 (1983)].").

50. *See* Davies, *supra* note 13, at 11-12 (suggesting that although *Thibodaux*, L.A. Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), has been considered a corollary of *Burford*, "the cases present an important distinguishing characteristic"). Although many view *Thibodaux* as an expansion of *Burford*, some confusion remains as to *Thibodaux*'s relation to *Pullman*. *See* Rehnquist, *supra* note 40, at 1079 (noting that "[b]ecause the only justification for *Thibodaux* abstention was the presence of an unsettled question of state law, *Thibodaux* is arguably not a separate form of abstention from *Pullman*. Regardless, *Thibodaux* warrants separate treatment for two reasons: First, it provides a fuller explanation of the "tentative decision" problem cursorily discussed in *Pullman*. Second, recent Supreme Court dicta may revive a brand of *Thibodaux* that is independent of *Pullman* abstention").

51. As to *Rooker-Feldman*:

> *Rooker-Feldman* doctrine . . . limits the jurisdiction of federal courts to hear certain cases that have their roots in state litigation. The doctrine is applicable where a case has been litigated to some point of finality in the state system because preclusion rules bar re-litigation of any issues that either were or could have been raised in the state courts.

Brody, *supra* note 33, at 55 (internal quotation omitted).

52. Davies, *supra* note 13, at 54.

53. *See generally* Sidney A. Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75 (1974).

54. Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001).

> agency's jurisdiction, are not felicitously described as cases of primary jurisdiction. They are akin to those Burford abstention cases that . . . concern arcane regulatory issues . . . . [where] either court and agency have concurrent jurisdiction to decide an issue, or only the court has the power to decide it, and seeks merely the agency's advice. (In the core of the [primary jurisdiction] doctrine, in contrast, the court has jurisdiction of the case, but the agency of the issue.).[55]

The distinction is important because primary jurisdiction, unlike *Burford* abstention, is exclusive agency jurisdiction.[56] Primary jurisdiction only applies when an issue arises within the exclusive original jurisdiction of the regulatory agency to resolve, although usually subject to judicial review.[57] While the misunderstanding appears to be merely technical, a clearer view of abstention is necessary to resuscitate its consistent application.

Facing abstention's inconsistencies, one could try to decipher a pattern of abstention application based on stare decisis. However, the inconsistent application of the abstention doctrine transcends such a practical approach. For example, in *Capital Bonding Corp. v. New Jersey Supreme Court*,[58] a federal district court abstained from a case exploring the legitimacy of a New Jersey court rule imposing certain limits on the bail bonding business.[59] The *Capital Bonding* court reasoned abstention was appropriate because the state court offered adequate review to test the legitimacy of the new bail bonding rule. Nonetheless, the court acknowledged that, in *Felmeister v. Office of Attorney Ethics*, the case most on point with *Capital Bonding*, another district court found abstention inappropriate.[60] Regardless of the apparent factual similarities, the *Capital Bonding* court found that failure to abstain could significantly disrupt the state's efforts to reform the bail process in New Jersey's courts,[61] whereas the *Felmeister* Court ruled that regulating attorney advertising, unlike the regulation of oil and gas conservation as in *Burford*, does not involve peculiarly local conditions, and

55. *Id.* at 563-564 (citations omitted). *See also* Boyes v. Shell Oil Prods. Co., 206 F.3d 1397 (11th Cir. 2000).

56. *See Arsberry*, 244 F.3d at 563.

57. *Id.*

58. Capital Bonding Corp. v. N.J. Supreme Court, 127 F. Supp. 2d 582 (D.N.J. 2001).

59. *Id.* at 595 (noting that the reform arguably "penaliz[ed] bail bond insurers when defendants fail[ed] to appear for court").

60. *See id.* at 596 (holding that abstention was inappropriate where the New Jersey Supreme Court had attempted to regulate attorney advertising).

61. *Id.* at 597.

therefore does not warrant abstention.[62] Unfortunately, a thorough reading of both cases does not yield a navigable framework to interpret how state policy would be disruptive in one case but not the other.

2. *Organizing and Redefining*

Notwithstanding a landscape of inconsistency, recent scholarship has encouraged a refined understanding of the abstention doctrine, by suggesting various categorizations illustrating each named abstention component.

A recent law review article by Charles E. Brody suggests one conceptual model employing a bifurcated standard that contemplates abstention based on (1) judicial economy on the one hand, and (2) issues of federalism on the other.[63] This is a different model than that of James Rehnquist, who organized the named-abstention doctrines into two categories: cases not requiring a pending duplicative state suit (*Pullman*, *Burford*, and *Thibodaux*), and cases predicated upon a pending proceeding in state court (*Younger* and *Colorado River*).[64]

Organizational constructs aside, the doctrine of abstention is not static. As the named abstention cases shaped the general notion of abstention, other cases shaped and refined the seminal abstention cases. This may, in part, explain why courts have had such difficulty forging a homogenous application of the abstention doctrines.

a. Burford and Quackenbush

In *Quackenbush*, the Supreme Court limited *Burford*'s scope by declaring abstention is appropriate only in cases where the plaintiff seeks equitable or other discretionary relief.[65] The *Quackenbush* decision also modified *Burford* by holding that in damages actions a federal court cannot dismiss the action, but can enter a stay to

62. Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 534 (3d Cir. 1988).

63. Brody, *supra* note 33, at 556; *see also* Carter, *supra* note 43, at 376 (contending that "*Pullman* abstention is primarily concerned with avoidance of constitutional questions if the case can be resolved by resolution of a state law question. It is only secondarily interested in avoiding friction between federal and state law. The *Burford* abstention on the other hand is fundamentally concerned with preventing interference with state law mechanisms, especially in areas of complex state interests.").

64. Rehnquist, *supra* note 40, at 1053; *see also* Brody, *supra* note 33, at 556-57.

65. Front Royal v. Town of Front Royal, Va., 135 F.3d 275, 282 (4th Cir. 1998) (citing Quackenbush Ins. Comm'r v. Allstate Ins. Co., 517 U.S. 706, 728-731 (1996)). *See also* L.A. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); *Quackenbush*, 517 U.S. at 730 (noting that the Supreme Court has "not held that abstention principles are completely inapplicable in damages actions").

await the conclusion of state proceedings.[66] This modification of *Burford* abstention has created some ambiguity as to when a federal court might stay (rather than dismiss or remand) a damages action under *Burford*.[67]

b. Abstention after Colorado River and New Orleans Public Service, Inc. v. Council of City of New Orleans ("NOPSI")[68]

Use of *Burford* abstention was probably most significantly limited by the *Colorado River* Court's emphasis on the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[69] The *Colorado River* and *NOPSI* Courts also highlighted that appropriate *Burford* analysis requires a two-part test:

> First, a federal court sitting in equity should determine whether timely and adequate review of the challenged regulatory action is available in state court. Second, having decided that such review is available, the federal court, sitting in equity, must abstain if one of two circumstances are present: (1) "when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"[70]

Unfortunately, the Supreme Court's *Burford* analysis in *Colorado River* and *NOPSI* has not resulted in the uniform application of *Burford*. Other tests have been articulated by the Circuit Courts of Appeals on *Burford*'s application. One test promulgated by the Tenth Circuit Court of Appeals suggests that

> [a]bstention under *Burford* is justified if and only if (1) a state has created a complex regulatory system on a matter of substantial importance to the state, (2) there exist no federal interests in the matter that override the state interests, and (3) the state legislature has made the state courts integral to the administrative scheme by delegating to them broad discretion so that they may participate in the development of regulatory policy.[71]

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66. *Front Royal*, 135 F.3d at 282.
67. *Id.* at 1875.
68. New Orleans Public Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989).
69. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).
70. Capital Bonding Corp. v. N.J. Supreme Court, 127 F. Supp. 2d 582, 591 (D.N.J. 2001)(quoting *New Orleans Public Serv.*, 491 U.S. at 361) (internal citations omitted).
71. Yelin, *supra* note 27, at 1881.

Continuing with this final prong, one of the possible results of the existence of varied forms of *Burford* analysis is illustrated by the disagreement on whether *Burford* abstention is premised on the existence of prior state administrative agency action.[72] Consistency in applying *Burford* would intuitively necessitate clarification of the agency's role with respect to abstention actions.

III. CLARIFYING *BURFORD* ABSTENTION

Much confusion surrounds the factors federal courts should consider in deciding whether to grant *Burford* abstention. The *Burford* doctrine has been a mysterious form of abstention, never carefully justified by commentator or judicial opinion.[73] Supreme Court formulations of *Burford* have been abstract, leading to a variety of views concerning its requirements among the federal circuits.[74]

The following discussion focuses on three primary requirements federal courts should consider in deciding whether to abstain under *Burford*. Focusing on these three areas can potentially alleviate confusion regarding the doctrine's application.

A. Capacity

A concern about the capacity of federal courts to improve state administrative schemes permeates the original *Burford* decision and should be a factor when considering *Burford* abstention. Justice Black, the author of *Burford*'s majority opinion, thought abstention would eliminate the confusion that would have resulted if the federal courts were allowed to review the order of the Texas railroad commission.[75] There has been considerable debate in

72. *Id.* n.53. Courts are divided on this question. *Compare* Quackenbush Ins. Comm'r v. Allstate Ins. Co., 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) (noting that "[t]he fact that a state court rather than an agency was chosen to implement California's scheme provided more reason, not less, for the federal court to stay its hand") *and* Nelson v. Murphy, 44 F.3d 497, 500-01 (7th Cir. 1995) (stating that an agency's role in the dispute is not essential to *Burford* abstention), *and* Friedman v. Revenue Mgmt., 38 F.3d 668, 671 (2d Cir. 1994) (upholding *Burford* abstention in an action seeking the involuntary dissolution of a state corporation in the absence of agency action), *with* St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 589 (5th Cir. 1994) (finding that "[t]he concerns governing the *Burford* abstention doctrine are not present in the instant case. St. Paul's lawsuit does not involve a state administrative proceeding.).

73. Gordon G. Young, *Federal Court Abstention and State Administrative Law from* Burford *to* Ankenbrandt*: Fifty Years of Judicial Federalism under* Burford v. Sun Oil Co. *and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 979 (1993).

74. *Id.*

75. Burford v. Sun Oil Co., 319 U.S. 315, 326-27 (1943).

scholarly literature over the capacity of federal courts to handle complex state administrative schemes. While there is no clear consensus, this literature is instructive for *Burford*'s application.

Gerald N. Rosenberg's study identifies three ways the American political system prevents courts from effecting significant social reform: (1) the limited nature of constitutional rights; (2) the lack of judicial independence; and (3) the judiciary's lack of powers of implementation.[76] Many social reform goals, such as establishing rights to decent housing or clean air, cannot be plausibly presented in the name of constitutional rights. In addition, procedural doctrines (i.e., standing) deter participation by knowledgeable reform groups. Politicians, through judicial appointments and legislative action, can also constrain the judiciary from pursuing unpopular social reform on a sustained basis. Further, courts depend on other bodies to implement their decisions—their decisions cannot alienate the public and the politicians. Rosenberg also identifies four conditions conducive to helping overcome these constraints which contribute to court effectiveness: (1) the availability of incentives for compliance with court mandates; (2) the availability of sanctions for resistance to those mandates; (3) the relevance of markets to implementing the decisions; and (4) the degree to which institutional actors are ready to proceed with reform and can use courts to cover their intent.[77] Rosenberg's analysis of the effect of these conditions on the litigation of school desegregation, abortion rights, and the environment leads him to conclude that courts are generally in a weak position to effect change.[78] When the three constraints are overcome, however, and one of the four conditions is present, courts can produce significant social reform.[79] Accordingly, court induced change is effected when institutional, structural, and ideological barriers to change are weak.[80]

Critics of Rosenberg's analysis point to the fact that his analysis assumes social and economic forces cause changes in society that institutions cannot affect. In so doing, critics claim, Rosenberg misses the possible role of courts as regulators of social change.[81] Nonetheless, even Rosenberg's critics acknowledge that his analy-

76. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 1- 36 (Benjamin I. Page ed., 1991).

77. *Id.* at 33-35.

78. *See id.* at 338.

79. *See id.*

80. *See id.*

81. *See* Jonathan Simon, *"The Long Walk Home" to Politics*, 26 LAW & SOC'Y REV. 923, 925 (1992) (reviewing ROSENBURG, *supra* note 76).

sis nicely demonstrates the subtleties of the relationship between court effectiveness and contingent political and social conditions.[82] This relationship strongly suggests judges are unwise to assume that the remedies they order are certain, or even likely, to change governmental institutions given the extant political, institutional, and social conditions. What is needed is a clear-headed analysis of the constraints and specific conditions in any particular case that would foster or restrict judicial effectiveness.

Other scholars have pointed to constraints arising from the traditional role of a judge and the difficulties judges face when deciding upon and implementing remedies in institutional reform cases. For example, William A. Fletcher observes that, in a suit against an institution, the judge manages the reconstruction of an ongoing social institution. In doing so, a judge moves far beyond the normal competence and authority of a judicial officer into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge—an arena where ordinary legal rules are frequently inapplicable.[83] Judges often, for example, confront decisions about the administration of transportation services, the construction and equipping of buildings, and personnel requirements in school reform cases. As one commentator observed, "Once one comprehends that the court is displacing the [school] board . . . the occasionally circus-like quality of the hearing becomes more explicable, if not more orderly. It doesn't, as the judge has remarked upon occasion, look much like a court, and for good reason: it really isn't one."[84] The task is complicated by the polycentric nature of the problems involved. Polycentricity is the property of a complex problem with a number of problem 'centers', each related to the others, such that the solution to each depends on the solution to all the others.[85] In these sorts of cases judges must consider legal and non-legal elements.[86] Institutional suits often involve non-legal polycentric problems resolvable only by reference to non-legal criteria. For example, what constitutes "remedial treatment" in a mental health facility cannot be resolved by reference to legal doctrines—it implicates multiple issues, including medical, scientific, and psychological theory. These questions require con-

82. *See id.* at 933.

83. *See* Fletcher, *supra* note 2, at 641.

84. Stephen Yeazell, *Interventions and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244, 259 (1977).

85. *Id.* at 645.

86. *Id.* at 646.

fronting questions of tactical and political judgment in implementing the remedies. Further, there are no legal norms to guide the judge internally, and the traditional means of appellate control through these legal norms are of little use.[87] Any decision-maker seeking to solve polycentric problems confronts a number of difficulties in that they continually required to perceive which facts are objective, determine what factors are interrelated, and repeatedly solve the same problems.[88] These difficulties are only accentuated in institutional suits:

> First, courts are less able than the political branches to apprise themselves of the "legislative facts" necessary to understand questions of public policy. Second, since courts normally enforce their judgments by compulsory process without a significant opportunity for reversal or modification by private parties affected by these judgments, they are less likely than other governmental decisionmakers to solve and re-solve a polycentric problem until an optimum solution is found. Third, since institutional decrees necessarily entail a great deal of discretion in their formulation, and since discretionary behavior is largely beyond the power of an appellate body to control, the primary means of external control over trial court behavior is virtually useless. Finally, and most important, courts have no institutional authority to assess normatively the ends of possible solutions to non-legal polycentric problems.[89]

These institutional difficulties or constraints will be confronted by the judge regardless of the policy area involved. As Fletcher concludes, "The formulation of the remedial decree thus depends to an extraordinary extent on the moral and political intuitions of one person acting not only without effective external control over his or her actions, but also without even the internal control of legal norms."[90]

On a related issue, Fuller concludes that when an attempt is made to deal with a polycentric problem, three things can happen at once. First, the adjudicative solution may fail. Second, the judge ignores judicial properties, experimenting with various solutions in post-hearing conferences, consulting parties not represented at the hearings, guessing at facts not proved and disregarding a need for judicial notice. Third, instead of altering judicial procedures to fit the problem being confronted, a judge may reformulate the prob-

87. *Id.* at 660.
88. *Id.* at 648.
89. *Id.* at 641.
90. *Id.*

lem so as to make it amenable to adjudicative procedures.[91] That being said, while it may be possible to specify the legal rules being implicated so as to ensure that the issues of the case fit adjudication, such an approach is not likely to solve the real world problems the institution is facing.

Federal courts may be tempted to redefine the issues because courts are structurally worse at developing an intellectually coherent solution to social problems than other arms of government.[92] Courts are experienced at determining historical fact and causation. But, in designing structural remedies, they must also predict how the remedies will affect and be affected by the political, economic, and social context within which the remedy is implemented. When, for instance, a court puts a magnet school plan into effect, it is making a prediction about how thousands of budgeting, administrative, and educational processes will interact with the perceptions of a diverse community, and, ultimately, how enrollment will be effected. Courts are not well-suited for these tasks because they have little experience in administering complex institutions and social programs.[93] Institutional reform also requires the allocation and reallocation of resources—a role which courts are often ill-equipped to undertake.[94]

Formulating and administering institutional reform remedies greatly strains the adjudicative model of decision-making because it defies the usual logic of the judiciary. Institutions are multi-polar and have shifting relationships requiring the continual adjustment of interests.[95] The judiciary, in contrast, usually confronts a static and precisely defined conflict in which it looks for an optimal, comprehensive, and final solution.[96] Consequently, to be effective in

91. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 401 (1978).

92. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1137-1138.

93. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 156-61 (1983).

94. *See* Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH & LEE L. REV. 949, 965 (1978), noting that:

> [a]n institutional remedy inevitably involves allocation of state resources, at times in major amounts. To such decisions, the more abstract problems, possible countervailing considerations, and possible competing claims are all highly relevant. There is nothing in the nature of litigation which necessarily brings these matters out, or indeed, which provides a good vehicle for their development even if tried.

95. Colin S. Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 63 (1979).

96. *Id.*

institutional reform cases, judges must abandon their adjudicative role and become brokers among several diverse groups. Strategically, this alternative approach is predicated on a belief that the reform process is a series of continuing bargaining games.[97] These bargaining games afford the judge a broad range of choices in defining a proper judicial role, but the judge's capacity to manipulate the political impact exceeds all other actors in the game, and he is in a position to mold the political context of the case before him.[98] This "political bargaining model" of litigation implies a redefinition of the appropriate standard of efficacy of the litigation process with the underlying objective essentially becoming a political goal.[99]

To accomplish this goal, a number of capacity issues must be considered. Does the judge have sufficient information? Judges need access, not only to social facts, but also to political facts—information about the principal players and their agendas, power, and bargaining skills.[100] Many important political actors may be beyond the reach of the court's formal powers.[101] Courts also often lack resources for marshaling political and public support for their decrees, without which their efforts will likely fail.[102]

Does the judge have sufficient time to continuously administer the decree? A judge can, to a limited extent, delegate.[103] But, the judge must maintain a fairly intensive, continuing, and personal involvement in the case.[104] Can the judge effectively communicate the substance and intent of the remedial orders to ensure effective action by others? Courts possess imperfect tools for communicating their decrees.[105] Often, they must rely upon the institutional defendant to disseminate and implement their orders.[106] Does the judge have enough power to change behavior? Given that institutional reform requires cooperation among many actors, a successful reform must be flexible, targeted, and potent enough to influence a wide range of behavior.[107] Most of the direct inducements a judge has are negative: citing someone for contempt, clos-

97. *Id.* at 64.
98. *Id.* at 77-79.
99. *Id.* at 92.
100. *Id.* at 95.
101. *Id.* at 96.
102. *See* Yoo, *supra* note 92, at 1138. *See also* Schuck, *supra* note 93, at 167.
103. Diver, *supra* note 95, at 97.
104. *Id.*
105. Yoo, *supra* note 92, at 1138.
106. *Id.*; *see also* Schuck, *supra* note 92, at 162.
107. Diver, *supra* note 95, at 99.

ing an institution, or transferring authority to another official.[108] These inducements are often not feasible in politicized litigation, because their use can actually retard implementation.[109] Courts have fewer direct resources than bureaucracies and legislatures for guaranteeing compliance or creating positive incentives to encourage adherence to their orders.[110] Judges must rely heavily on the moral persuasiveness of their judgments to acquire legitimacy.[111] Further, the exercise of the political role runs the risk of undermining the court's legitimacy and its effectiveness in reforming the institution. The adoption of a political perspective can blur the distinction between right and remedy on which adjudicative legitimacy rests.[112] As time goes on, the judge can draw "less and less on the reserve of authority that the revered position of neutral lawgiver confers."[113]

Those who argue against limiting judicial capacity point to steps courts can take to overcome their limitations. For example, courts can appoint a special master to assist the judge.[114] Such masters can be chosen by the judge for their substantive expertise and knowledge of the bureaucracy in question. The master, it is claimed, can enter into negotiations with the parties and fulfill the political role, while shielding the judge from direct involvement. The problem with this argument is the lack of evidence linking the use of masters to the effectiveness of institutional remedies. Indeed, the masters have seldom, if ever, been effective in finding solutions that are both acceptable and constitutional.[115] One study of the use of masters in school desegregation cases found that masters were least suited to deal with institutions that needed the most

108. *Id.* at 99-102.

109. *Id.*

110. Yoo, *supra* note 92, at 1138.

111. *Id.*

112. Diver, *supra* note 95, at 104.

113. *Id.* at 106.

114. *See* Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformulation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739, 741 (1980); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond A Jurisprudence of Judicial Competence*, 14 LAW AND SOC'Y REV. 371, 407 (1980). *See also* Stephen L. Wasby, *Arrogation of Power or Accountability: 'Judicial Imperialism' Revisited*, 65 JUDICATURE 209, 215 (1981).

115. *See* HOWARD KALODNER, LIMITS TO JUSTICE 9 (Howard Kalodner & James Fishman eds., 1978).

help and best able to work at a distance with institutions that needed the least help.[116]

Colin Diver cautions against having the master act as a political broker to whom a judge can delegate his authority.[117] Authority can be delegated only to a limited extent and a judge must still maintain a fairly intensive personal involvement with the case.[118] An independent monitor such as a master becomes a new actor in the equation whose position the judge must figure in the political calculus.[119] "Because the monitor can disrupt operations or alienate potential allies, the court must exercise extreme caution in using this device to extend the reach of its physical capacity."[120] In other words, the crucial question of under which conditions special masters will be effective has not been answered.[121]

Another mechanism purported to extend court capacity is the retention of jurisdiction. In theory, if an institution experiences difficulties, the parties can return to court if the decree requires modification or is not being implemented.[122] Nonetheless, the judge is not in any better position to sort through conflicting claims or assess the technical, bureaucratic, and political facts on an ongoing basis than he or she was at designing the initial remedy. If anything, experience has shown that conflicts among multiple parties become magnified as the implementation difficulties mount.[123] Further, actors that were not involved in the original litigation are impacted during the course of reform and react.[124] Significant social reform requires long-term planning and serious consideration of costs. It is unclear how piecemeal decisions over implementation conflicts accomplishes the desired ends.

Attempts to effect fundamental social change through public institutions can also take years. Multiple implementation difficulties, coupled with the often intractable nature of social, economic, and political conditions, prolong this process. In 1994, federal judicial

116. David L. Kirp & Gary Babcock, *Judge and Company: Court Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 378 (1981).

117. Diver, *supra* note 95, at 97.

118. *Id.*

119. *See id.*

120. *Id.* at 99.

121. *See* ROSENBERG, *supra* note 76, at 30.

122. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1301 (1976); *see also* Wasby, *supra* note 114, at 215.

123. *See* Rosemary O'Leary & Charles R. Wise, *Public Managers, Judges, and Legislators: Redefining the 'New Partnership'* 51 PUB. ADMIN. REV. 316, 322-25 (1991).

124. *Id.*

orders regulated 244 prisons in 34 different jurisdictions.[125] They also set the level of inmate populations in 24 prisons.[126] A federal court must also consider the termination point of judicial supervision. The Supreme Court has made it clear that federal court supervision of state and local institutions was intended to be temporary.[127] This principle is in conflict with the fact that a district court will usually exercise jurisdiction over a case until the constitutional violation has been cured.

> "If the court defines its remedial goal in terms of reversing social trends and patterns, such as white flight, or in terms of compensating for irreversible losses, such as years spent in poor prison conditions, then there may be no foreseeable termination of the court's supervision of the state institution."[128]

The Supreme Court's rule regarding the lower court's use of their equitable powers to define the scope of a remedy provides little guidance to district courts. Courts often, therefore, fall into the trap of interminably pursuing a final remedy. The basic principle articulated by the Court is that "the nature of the violation determines the scope of the remedy."[129] The Court says this simply means federal court decrees must directly address the constitutional violation itself.[130] Whether a remedy directly addresses a violation often rests in the eye of the beholder, and only in the rarest of cases will an appellate court overturn a trial court's decree for exceeding the scope of the violation.[131] An expansive remedy designed to alter a fundamental social, institutional, economic, and political landscape runs the risk of involving federal courts in the perpetual supervision of state and local institutions. If that is the only option, a federal court might well decide the wiser course of action is to leave the supervision to a state court. State institutions will likely confront a state judge more familiar with the substance of what they do (in that state courts interact with them continuously over a wide range of matters). Additionally, state judges are more conversant with the political facts that condition institutional

125. *See* THE CRIMINAL JUSTICE INSTITUTE, INC., THE CORRECTIONS YEARBOOK 6 (1995), *cited in Enhancing the Effectiveness of Incarceration: Hearings on Prison Reform Before the S. Judiciary Comm.*, 104th Cong. (1995) (statement of Sen. Orrin G. Hatch); *see also* Yoo, *supra* note 92, at 1124.

126. *Id.*

127. *See* Board of Ed. of Okla. City v. Dowell, 498 U.S. 237, 238 (1991).

128. *See* Yoo, *supra* note 92, at 1128.

129. *See* Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1, 16 (1971).

130. Milliken v. Bradley, 433 U.S. 267, 281-82 (1977).

131. Yoo, *supra* note 92, at 1132.

response than federal judges. This solution also obviates important federalism concerns, which will be elaborated upon later in the article.

So far we have raised several questions federal courts could consider in assessing their capacity to provide a remedy for the sought petition. First, can the court fulfill the informational requirements, both technical and political, that would enable it to effect a successful remedy? Second, will the court have sufficient time to frame and reformulate the remedy and conduct as it supervises the institutions involved? Third, are the communication tools available to the court effective? Fourth, are the powers available to the court sufficient to gain cooperation among the multiple actors? Fifth, is there an identifiable goal for the remedy and a foreseeable end to judicial supervision of the institution?

We already know federal courts consider such capacity questions in their determination of abstention. For example, three homeless women asked a federal district court to issue an injunction requiring the Commissioner of New York City's Human Resource Administration to provide lawful emergency housing to meet their needs.[132] The court granted abstention declaring:

> Allocation of resources for welfare programs is a task uniquely within the sphere of local control. Placing that task under the supervision of this court is a course fraught with dangers. This court has no particular expertise in structuring welfare programs, or allocating scarce resources among competing needs. Nor is it on familiar terms with the state and local political and procedural apparatus which could come under its receivership were it to proceed with deciding this case.[133]

This is an accurate assessment of the court's capacity in terms of the issue and context of the service involved.

B. Federalism

During the 1990s, the Supreme Court extensively reinforced the role of federalism in federal jurisprudence.[134] This reinforcement has important implications for *Burford* abstention.[135] The Court has stressed the fundamental importance of maintaining a balance

132. Canaday v. Koch, 608 F. Supp. 1460, 1463 (S.D.N.Y. 1985).

133. *Id.* at 1470.

134. *See generally* Charles R. Wise, *The Supreme Court's New Constitutional Federalism: Implications for Public Administration*, 61 PUB. ADMIN. REV. 343 (2001) (arguing that decisions made by the Supreme Court since the early 1990's constitute a new judicial federalism).

135. *Id.*

of power between the federal government and the states. The Court has also repeatedly stressed the importance of preserving the notion of states as sovereign political communities (with governmental institutions responsive to its people). In *Printz v. United States*, the Court stated, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[136] In *New York v. United States*, the Court opined:

> Where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished . . . . Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. 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.[137]

In *Alden v. Maine*, the Court stated:

> If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen . . . . When the Federal Government asserts its authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.[138]

Federalism was also a primary concern of the majority in *Burford*.[139] In affirming *Burford* abstention, the Supreme Court put particular emphasis on the priority federalism concerns play in the doctrine:

> Equitable relief may be granted *only* when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all time actuate the federal courts" is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "few public interests have higher claim upon the discretion of a federal chancellor than avoidance of needless

136. Printz v. United States, 521 U.S. 898, 920 (1997).
137. New York v. United States, 505 U.S. 144, 168-69 (1992).
138. Alden v. Maine, 527 U.S. 706, 751 (1999).
139. Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

> friction with state policies," the usual rule of comity *must govern* the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.[140]

Thus, the Supreme Court is clearly emphasizing that the basis for abstention rests heavily on principles of federalism and that district courts should assign a high priority to those principles in weighing the case for abstention.

In *NOPSI*,[141] the Supreme Court emphasized the broad interpretation of the state interest and the primacy it should receive in the district court's assessment of the case for abstention:

> Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction. That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State. . . . Because pre-emption-based challenges merit a similar focus, the appropriate question here is not whether Louisiana has a substantial legitimate interest in reducing NOPSI's retail rate below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates. It clearly does. The regulation of utilities is one of the most important functions traditionally associated with the police power of the States.[142]

The Court's emphasis on the importance of generic proceedings being mandated to the state clearly comports with the belief that state courts constitute an independent system of adjudication with sovereignty over matters of particular concern to them.[143] It is also consistent with the recognition that state courts are responsible for upholding the Constitution and its guarantees. Thus, it is appropriate for state courts to adjudicate cases raising constitutional claims when they have a strong interest in adjudicating a particular type of dispute.[144] This implies a reduction of the role of the federal trial

140. Ala. Pub. Service Comm'n v. S. Ry. Co., 341 U.S. 341, 349-50 (1951) (emphasis added) (citations omitted).

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

142. *Id.* at 365 (citations omitted).

143. *See* Davies, *supra* note 13, at 24 (1986)

144. *See* Moore v. Sims, 442 U.S. 415, 423-35 (1979). *See also* Steffel v. Thompson, 415 U.S. 452, 460-63 (1974).

courts as adjudicators of federal constitutional rights in certain instances.[145]

In *Burford* abstention, the federal claim is dismissed. This is distinct from *Pullman* abstention which calls for a postponement of federal jurisdiction. Given that state courts are constitutionally obligated to protect federal constitutional rights, there is no apparent need to retain federal trial jurisdiction.[146] Any errors in interpreting the U.S. Constitution may be corrected by *certiorari* to the United States Supreme Court.[147] Yet, the emphasis on deference to state courts is not unbounded. The Supreme Court has directed district courts to assess several factors to ensure deference is warranted, as demonstrated in *NOPSI*:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[148]

The first requirement is that both timely and adequate state court review is available to the plaintiff. The mere existence of an administrative process or a potential conflict between a federal law and a state regulation is not sufficient to warrant *Burford* abstention.[149] The discretion vested in state courts makes them working partners in the development and administration of state regulatory policy. State courts develop expertise and become competent partners of state agencies through the repeated exercise of their own discretion. Federal courts do not have the opportunity to develop such expertise and, thus, are not institutionally qualified for the enterprise.[150]

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145. *See, e.g.*, Davies, *supra* note 13, at 25. *See also* David Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 LOY. L. REV. 659, 660 n.100 (1979).

146. *See* Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 81 (1991).

147. *Id.*

148. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 365 (1989) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

149. *Id.* at 362

150. Yelin, *supra* note 27, at 1882.

The second requirement for federal court abstention is that the federal suit must be limited to suits brought in equity. By confining the use of the abstention doctrine to these cases, the court is able to comply with statutory grants of jurisdiction to the federal courts and its ensuing obligation to hear such cases. Cases in equity require more discretionary judicial decision-making, so it is reasonable to emphasize federalism principles in the use of such discretion.

In addition, there must be difficult state law questions bearing on public policy problems whose importance transcends the result of the case at bar.[151] In the absence of such questions, federalism principles direct that because federal questions predominate, there is little rationale to defer to state courts. Presumably, it is not enough for the case to merely involve some difficult matter of state law interpretation. More is required—the state law questions must bear on policy problems of substantial public import, and the importance must extend beyond the result of the immediate case. The potential for interference with a state regulatory scheme would, under the principles of federalism, compel deference to state courts. The absence of a significant impact on a state regulatory scheme removes the critical state interest and, it follows, leads to retention of federal jurisdiction.

The issue of whether federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern potentially comports with federalism principles. What would happen to the state regulatory scheme as a result of federal judicial intervention? Since federal courts lack intimate knowledge of state regulatory schemes and controlling state law, it can be problematic for them to make such projections. As a result of such unfamiliarity, federal judges may not foresee the impact on the state scheme of regulation.

Taken as a whole, however, these factors are a useful starting point for federal courts. In *Quackenbush*, the Supreme Court specified federal courts should conduct balancing tests based on a careful consideration of the federal interests in retaining jurisdiction and the competing concern for the importance of state's interest and the appropriateness of a state forum as the place to adjudicate the issue.[152] Unfortunately, the Supreme Court also introduced a measure of ambiguity in how federal courts are to strike a balance,

151. *New Orleans Pub. Serv.*, 491 U.S. at 361 (quoting *Colo. Riv.*, 424 U.S. at 814). *See also* Yelin, *supra* note 27, at 1892.

152. Quackenbush Ins. Comm'r v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (citations omitted).

when it stated, "This balance only rarely favors abstention, and the power to dismiss recognized in *Burford* represents an 'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'"[153] The purpose of this observation is hard to discern. It makes little sense to set out specific factors to be used by federal courts in striking a balance, only to issue a vague projection that concludes that the balance only rarely favors abstention. Such a generalized admonition is at odds with the more specific federalism principles offered by the Court, in addition to the specific factors that were derived from those principles. The most reasonable course of action for federal district courts is to focus on the specific factors, weigh them, and then use discretion. If the factors clearly weigh in favor of abstention, the court can assume the balance favors abstention.

C. Administrative Responsibility

In scrutinizing a state regulatory scheme, federal courts have tended to appraise state administrative agencies and state courts together. Nonetheless, the Supreme Court has only explicitly identified the availability of timely and adequate state court review as a criteria for *Burford* abstention.[154] One remaining issue is whether the use of *Burford* abstention would be aided if federal courts specified criteria for assessing agency action.

In *Burford*, the Supreme Court was asked to set a requirement that federal courts review an administrative agency's order not for its constitutionality, but for compliance with a standard of reasonableness under the state statute (which was said to differ from the constitutional standard of due process).[155] The Court refused, declaring that "the whole cycle of federal-state conflict cannot be permitted to begin again by acceptance of this view. Insofar as we have discretion to do so, we should leave these problems of Texas law to the state court where each may be handled as 'one more item in a continuous series of adjustments.'"[156] Other than that, the Supreme Court has not had occasion to specify principles in the doctrine that focus exclusively on the actions of the administrative actor.

153. *Id.* (citations omitted).

154. *Id.*

155. *Id.*

156. Burford v. Sun Oil Co., 319 U.S 315, 332 (citing Railroad Comm.'n of Tex. v. Rowan & Nichols Oil Co., 310 U.S. 573, 584 (1940)).

Anthony Bertelli and Lawrence Lynn propose that a primary criterion for *Burford* abstention should focus on the actions of the administrative actor alone.[157] They argue, in essence, that a federal district court should abstain from adjudicating constitutional claims raised by plaintiffs seeking structural remedies where the management is not the proximate cause of the infringement of the right, and the management is responsible.[158] The proximate cause criterion is directed at cases where the management has not been given the opportunity to put into effect a plan or where there is simply no proof that challenged managerial decisions in a given agency are producing rights violations.[159] The administrative responsibility criterion is met when the managerial decisions comport with a "precept of managerial responsibility."[160] This precept is composed of four distinct, demonstrable qualities: (1) accountability, (2) judgment, (3) balance, and (4) rationality.[161] In determining whether the administrative actor had demonstrated administrative responsibility sufficient to justify abstention, courts would weigh each quality.

Bertelli and Lynn ground the precept of managerial responsibility in an extensive review of the American administrative experience. They argue that a federal court can ascertain the central tendency of an agency as it pertains to administrative responsibility.[162] If a federal court determines the central tendency of administrative responsibility is sufficient, then it would grant *Burford* abstention. Bertelli and Lynn claim this test permits administrative discretion in agency management that is responsibly exercised.[163] There are three advantages to this approach. First, it provides latitude for public managers to frame actions in a manner that deserves the approbation of the courts.[164] Second, the precept of managerial responsibility would allow courts to encourage innovative solutions to policy problems by state and local governments, reinforcing an important function of modern federalism.[165] Finally,

157. Anthony M. Bertelli & Lawrence E. Lynn. Jr., *A Precept of Managerial Responsibility: Securing Collective Justice in Institutional Reform Litigation*, 29 FORDHAM URB. L.J. 332 (2001).

158. *Id.*

159. *See id.*

160. *Id.*

161. *See id.* at 334, 347, 375-81.

162. Specifically, they state that "[r]esponsible public administration must incorporate such a precept at every level of managerial responsibilities." *Id.* at _____.

163. *See id.* at 332.

164. *See id.* at 384-85.

165. *See id.* at 334.

it would improve democratic governance and further notions of collective justice.[166]

In this regime, judicial review would take place in state courts where the development of state administrative law would provide a check against the misuse of power by public managers in state and municipal agencies. State administrative law, more attuned to the operational realities of a particular service, would encompass the concerns of state legislatures and state courts— vindicating the interests of the public. This, in turn, would foster the development of a common law rooted in the precept of managerial responsibility, which would improve the check on administrative discretion. A common law would allow for questions of responsibility to be adjudicated over time, rather than the ex ante structure that is imposed when a federal court accepts a plaintiff's formulation of a public agency's ills.[167]

Can this precept of managerial responsibility be fitted into the doctrine of *Burford* abstention? If so, what advantages and risks might be encountered?

If achieved, the objective of providing latitude for public managers and encouraging discretion would be a valuable goal. Nonetheless, too much institutional reform litigation, while intended to enable professional managers to bring about sought reforms, has handcuffed them.[168] Managers are, thus, prevented from operating the agency effectively and providing the necessary direction to ensure productive institutional reform.[169] While the intent of the managerial responsibility precept is to provide increased latitude for managers and promote discretion, there is a risk that if it is not defined and implemented judiciously by the federal courts, it could reduce managerial discretion even further. The reasons for this

166. *See id.* at 339-40; *see also* 342-47 (discussing the shortcomings of judicial review and the effect it has on notions of collective justice).

167. *See id.* at 335.

168. *See* Jenkins v. Sch. Dist., 73 F. Supp. 2d 1058 (W.D. Mo. 1999) (terminating federal court supervision of the Kansas City Metropolitan School District, *rev'd en banc*, 213 F. 3d 720 (8th Cir. 2000). The district court cited to a long list of dislocations that the litigation and judicial supervision had caused and concluded that "[t]hese byproducts of court oversight suggest that retention of judicial control may be more disruptive than beneficial to the KCMSD. The court is drawn even closer to this conclusion by the fact that the KCMSD and the Kansas City community have repeatedly used the court's presence as a shield from responsibility." *Id.* at 1079.

169. *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 748 (1992); Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J.L. & PUB. POL'Y 395, 406 (1984); O'Leary, *supra* note 123, at 324.

will be discussed below in conjunction with the analysis of the qualities of managerial responsibility.

The goal of respecting and preserving managerial discretion should be taken seriously by the courts. In *Marbury v. Madison*, Chief Justice Marshall pointed out the limited nature of judicial review of administrative discretion: "The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties, in which they have of discretion."[170] Federal courts have moved away from Marshall's view of judicial review and replaced it with a judicial scrutiny that has displaced agency expertise and political bargaining, which is central to regulatory politics.[171] O'Brien observes that the "new era" in administrative law presumes that agencies cannot be politically accountable for carrying out their delegated responsibilities and that judicial judgment and competence are superior to that of administrative agencies.[172] He concludes both these assumptions, as *Marbury* recognized, are antithetical to the principle of separation of powers and the role of the judiciary in a constitutional system of free government.[173] Of course, the task of "deciding on rights" inevitably impinges on how executive officers perform their duties. There is no easily drawn line. Nonetheless, as Shapiro points out, "Many judicial decisions holding that an administrative act fails for 'clear error of law' really arise in situations where a statute allows a discretionary choice of interpretations and a court believes that an agency has made a poor choice."[174]

The ability of executive agencies to fulfill their mandate to implement programs necessitates the centrality of political control so that the discretion used by administrators can be monitored:

> Too often the search for legal control of discretion becomes frantic and counterproductive because it conceives itself as either the only or the necessarily best mode of controlling discretion. The result may be an unrelenting pressure to introduce formalized, courtlike proceedings and courts themselves into more and more phases of government decision-making. There are frequent complaints today that a climate of "adversary legal-

170. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

171. David O'Brien, *Administrative Discretion, Judicial Review, and Regulatory Politics*, *in* ADMINISTRATIVE DISCRETION AND PUBLIC POLICY 29, 47 (Douglas H. Shumavon et al. eds., 1986).

172. *Id.*

173. *Id.*

174. Martin Shapiro, *Discretion*, *in* HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 501-517, 511 (David H. Rosenbloom et al. eds., 1994).

> ism" is strangling the regulatory sphere of American government, creating inflexibility and inertia at huge costs both to economic development and protection of the public.[175]

Consideration needs to be given to the requirements of administrative responsibility and the contribution of public administrators to serve the public effectively. Numerous public administration scholars have found that administrators primarily try to limit their responsibility and risk in discretionary situations.[176] This behavior not only reduces the quality of government outputs for citizens, but also undermines an organization's ability to achieve its primary mission. Incentives are required to increase the engagement of such public servants in order to secure greater personal involvement for their work and its consequences.[177] What is not needed are systems and doctrines that provide additional disincentives for engagement. Engagement by public administrators requires "thinking administration."[178] Public servants need to "think of what ought to be done instead of merely doing that which must be done."[179]

Effective democratic administration requires more than adhering strictly to narrow legal prescriptions.[180] To serve the goals of democratic administration, administrative responsibility must extend beyond proving that administrators have avoided legal prohibitions. Administrators must foster thinking about, and com-

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175. *Id.* at 510.

176. Lois Recascino Wise, *Public Personnel Motivation: The Public Service Culture*, *in* PUBLIC ADMINISTRATION CONCEPTS AND CASES 342 (Richard J. Stillman II ed., 7th ed. 2000); *see also* Michael Lipsky, *Toward a Theory of Street Level Bureaucracy*, *in* THEORETICAL PERSPECTIVES ON URBAN POLITICS, 186-212 (Willis D. Hawley et al. eds., 1976); PETER M. BLAU, THE DYNAMICS OF BUREAUCRACY 50 (1955); *Bryan D. Jones, Distributional Considerations in Models of Government Services Provision*, 12 URB. AFF. Q. 291, 301 (1977).

177. *See* Louis C. Gawthrop, *1998 John Gaus Lecture: The Human Side of Public Administration*, 31 PS: POL. SCIENCE & POL. 763-769 (1998), *available at* http://www.apsanet.org.

178. *Id.* at 767.

179. *Id.* at 764-65 (citation omitted).

180. As Lois Wise observes:

> In this sense, the demand for engagement challenges the morality of rule-following behavior. A religious leader may perform the forms and rituals of the sacrament without engaging an internal spiritual emotion that creates an affective bond with the congregation. Similarly, a bureaucrat may go through the routines and motions of a job following the forms and rules prescribed but never engaging an affective emotion for the citizen clients he or she is positioned to serve, or in turn, feeling any concern for the outcome of their interaction.

Wise, *supra* note 176, at 349.

mitment to, the larger purposes of the programs being administered, spur innovative action to implement programs to achieve positive outcomes for the intended beneficiaries.[181] Focusing only on adhering to correct procedure undermines the very purpose of administrative responsibility and ultimately the legitimacy of the rule of law.[182] To be effective, implementation of public programs must be guided by an overall vision that cannot be realized by having public managers follow statutes and react to the political forces of the moment.[183]

While deriving purposes will be informed by statutory interpretation and political direction from elected officials, accomplishment of such a task inevitably requires the best judgment of the public administrator. Even an unlimited amount of judicial supervision and guidance will not substitute for such judgment. Inevitably, some judgments will prove to be wrong. But, if the reaction to wrong judgments is to attempt to legislate away all future errors, the objective of administrative responsibility will be defeated. As

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181. As applied to public management, the notion of professional responsibility is usually defined in terms of procedural obligations—for example, the obligation to adhere faithfully to legislative intent and the details of due process, the obligation to obey the law, and the obligation to recognize and respect the inviolability of organizational superior-subordinate relationships. If democracy, however, is viewed as a parabolic way of thinking about life in a community rather than as an institutional contrivance, the notion of professional responsibility assumes a role of major proportions in our democratic equation.

LOUIS C. GAWTHROP, PUBLIC SERVICE AND DEMOCRACY: ETHICAL IMPERATIVES FOR THE 21ST CENTURY 142 (1998) (footnote omitted).

182. Public managers must recover the truly authentic and creative freedom to decide what they should do ethically in resolving the daily conflicts and challenges that confront them. Until they are capable of freeing themselves from the bondage of habit, any attempt to define professional behavior as truly ethical is an exercise in futility that can only result in pathetic self-deception. The habits of the self-serving good allow public servants to pursue procedural, quasi-ethical life. The net result, to paraphrase H. Richard Niebuhr, is a government of persons without fault, operating in a society without judgment, through the ministrations of a Constitution without a purpose.

Id. at 139 (footnote omitted).

183. The implementation of public policy—like the rule of law, or the administration of justice, or the recognition of any of the inalienable rights we revere—involves much more than the mechanistic application of statutory and programmatic directives that can be shaped solely on the basis of immediate benefit or pragmatic expediency. The administrative implementation of policy must incorporate a teleological sense of purpose that clearly transcends the exigencies of the present.

Id. at 34.

former Supreme Court Justice Jerome Frank observed, it will not eliminate the effect of human error.[184]

In addition, the attempt to eliminate error by making every injury a constitutional issue will not eliminate error from the administration of programs. The Supreme Court recognized as much in *DeShaney v. Winnebago City Department of Social Services*, where a small boy was severely beaten by his father and suffered permanent damage.[185] The county department of social services had not placed the child into protective custody after investigating the situation.[186] The Court refused to find the department or its employees liable under 42 U.S.C. § 1983 and observed that the plaintiff could find relief under state tort law. But the Court went on to declare that "the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation."[187] The Court recognized that state employees may have made an error in not acting, but also faced the risk of error by acting prematurely.[188]

If public administrators are empowered to make judgments that sometimes may be in error, what legitimates their right to do so, and what are the implications for the assessment of administrative responsibility? The legitimacy of public administrators to make judgments in pursuit of public purposes is grounded in our constitutional traditions. In particular, the legitimacy is found in the executive power provided in the Constitution. As Hamilton explained, "energy in the executive" is essential to good govern-

184. It is imperative that in a democracy it should never be forgotten that public office is, of necessity, held by mere men with human frailties. . . .To pretend, then that government, in any of its phases, is a machine; that it is not a human affair; that the language of statutes– if only they were adequately worded– plus appeals to the upper courts, will, alone, do away with the effect of human weakness in government officials is to worship illusion. And it is a dangerous illusion.

JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF DEMOCRACY 3-7 (1942).

185. DeShaney v. Winnebago County. Dept. of Soc. Servs., 489 U.S. 189, 191 (1989).

186. *Id.* at 192.

187. *Id.* at 202.

188. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

Id. at 203.

ment.[189] Further, the legitimacy of public administration within our constitutional scheme is also derived from its role in the three branches of government—it is the provider of the public health, safety, and welfare. The constitutional system embraces public administration within its political design,[190] which makes public administration fully engaged in the development of public policy and in the acts of governing.

The Constitution may not have made public administrators equal players with the three branches of government, but it did so in an operational sense in that public administrators are asked to govern.[191] This, in itself, confers a measure of constitutional legitimacy to public administrators. A number of institutions and practices within the American governmental system are not explicitly referred to in the Constitution, including, perhaps most notably, the Supreme Court's power of judicial review, and the power of congressional committees. Although not express in the Constitution, these practices and groups are regarded as constitutional and legitimate. The constitutional legitimacy of public administration was manifest in the early understandings and practices of Congress, and has been reinforced and supplemented by the decisions of later Congresses.[192] This, of course, does not exempt public administration from ensuring the rights of individuals guaranteed by the Constitution. There is no *a priori* principle, however, that places public administration on a more unfavorable footing vis-à-vis the other institutions of government.[193]

If public administrators enjoy the constitutional legitimacy to make judgments in pursuit of public purposes, there are important implications for the judicial approach to assessing administrative responsibility. The threshold presumption cannot be a presump-

189. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

THE FEDERALIST No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

190. *See* Jeremy Rabkin, *Bureaucratic Idealism and Executive Power: A Perspective on the Federalist's View of Public Administration in* THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING 187-205, 196-97 (Charles R. Kesler ed., 1987).

191. *See* Charles Wise, *Public Administration is Constitutional and Legitimate*, 53 PUB. ADMIN. REV. 257, 257-61 (1993).

192. *See* JAMES FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 127 (1978).

193. *See* Wise, *supra* note 191, at 260.

tion of administrative irresponsibility which the administrative actor has the burden to rebut. That is, courts should not place the burden on administrators to prove that they are *not* guilty of administrative irresponsibility. Rather, the presumption of the court should be one of administrative responsibility.

Bertelli and Lynn's proposal for a precept of managerial responsibility embraces this idea. Whether "it works" will depend on how it is treated and developed by federal and state courts. Bertelli and Lynn advocate that federal courts should defer to the states when the institutional defendant is governed by a precept of managerial responsibility. In addition, they suggest a common law process in which the courts will flesh out the contours of the four qualities that constitute their precept of managerial responsibility: judgment, accountability, balance, and rationality.[194]

Two potential risks arise in their precept of administrative response. These must be avoided if the projected benefits for managerial discretion are to be attained. First, there is potential for duplication and conflict between federal and state courts in assessing the administrative responsibility of state administrative actors. Second, courts may become overly intrusive in defining the qualities that constitute administrative responsibility.

With regard to the potential duplication of effort, there is little in the precept that establishes the division of labor between federal and state courts. If a federal court conducts an assessment of the four qualities in order to determine whether it should grant *Burford* abstention, and, after abstention is granted, the state court subsequently conducts its own assessment of the four qualities, it is difficult to see how the state actor is going to gain more latitude. The four qualities could cause the federal court to inquire more deeply into agency decisions and operations in the context of the abstention decision than otherwise would be the case in preliminary matters. But, there is potential for two sets of common law associated with the four qualities to be developed (one federal and one state). If that is realized, the criteria for *Burford* abstention would become more muddled.

A division of responsibility between the federal and state courts needs to be established in order to coordinate their assessment roles. We recommend that instead of federal courts taking a "hard look" at the administrative responsibility of state actors, that they adopt a softer posture. This is analogous to what the Supreme

194. *See* Bertelli & Lynn, *supra* note 157, at 336.

Court specified in *Burford* for determining whether adequate and timely state judicial review of the regulatory action was available where there are difficult questions of state law bearing on important public policies.[195] In this instance, the federal court would look to see whether the state courts have developed a body of common law for assessing administrative responsibility. Or, in the case of relatively new agencies, if the regulatory scheme established by the state provides state court assessment of administrative responsibility. If a federal court finds that the requisite structure is in place, and the agency's action can be assessed in terms of administrative responsibility within that structure, then abstention would be granted.[196] The advantage of this approach is that it will obviate the need for federal courts to make subjective determinations of what constitutes administrative responsibility. Instead, the federal court will simply inquire whether the state is vigorously pursuing a course of fleshing out the principles of administrative responsibility, and whether it is resolving disputes in accordance with those principles. Another advantage is that the predictability, or foreseeability, which is desirable in the resolution of disputes, will be preserved.[197] States actively pursuing a course of elaborating principles of administrative responsibility can offer their citizens a forum that will predictably warrant abstention from the federal courts on issues of administrative responsibility.

Some may be concerned that deference to state courts will deprive plaintiffs of the opportunity to vindicate their claims in federal court. However, the Supreme Court has held that in procedural due process claims, the deprivation by state action of a constitutionally protected interest is not necessarily unconstitutional.[198] But, "What is unconstitutional is the deprivation of such an interest without due process of law."[199] What is significant constitutionally is that the claim or right be adjudicated and the admin-

195. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989).

196. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). The scheme would operate in a similar fashion to the two-step test in *Chevron* where the reviewing court asks: (1) whether Congress has spoken to the precise issue, and if not, (2) whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

197. *See* ALFRED C. AMAN & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 311-12 (1993).

198. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642-43 (1999) (citing Zinermon v. Burch, 494 U.S. 113, 125 (1990)).

199. *Id.*

istrative responsibility of the state actor be assessed—not that the original trial take place in a federal forum.

Avoiding over-intrusiveness by the courts in the definition of administrative responsibility is yet another concern. Given that the four qualities have not been the subject of previous adjudication, it is possible for them to be interpreted in ways that either respect or restrict discretion of administrative actors.

Martin Shapiro offers a telling review of judicial supervision of rule-making in the federal government that provides a basis for caution for judicial development of a common law for the assessment of rationality of administrative actions in the institutional reform context.[200] As Shapiro traces the development of the federal judicial approach to rule-making, he demonstrates how courts moved from a posture of deference, to one insisting on procedural correctness, to one demanding substantive rationality, to one requiring synoptic rulemaking: a perfect rule-making process.[201] What began as procedural review evolved into a review of the substance of rules and their rationality. Rationality, in turn, evolved into synopticism. Shapiro went on to point out that synopticism is about using the right process to arrive at the right decision—the decision that chooses the correct policy to arrive at the true values at the least cost. As such, it entirely merges the procedural and the substantive in arriving at a "right" answer.[202] Federal judges adopted the following posture toward administrative actors: "If you are claiming expert discretion, prove to us that your decision is expert—that is the correct decision based on scientific knowledge."[203] That, of course, is an impossible directive given the unknowns of scientific knowledge and uncertainties in human behavior. This policy forced agencies to "pretend" synopticism in their presentations and supporting documentation. The results were disastrous: the rule-making process slowed, decision-making shifted from responsible administrators to gun-shy lawyers, and documentation exploded.[204] Initially, this resulted in a major increase in judicial discretion over administrative policymaking.[205] Over time, however, agencies learned how to present their deci-

200. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 155-58 (1988).

201. *See id.* at 119.

202. *Id.* at 126-27.

203. *Id.* at 138.

204. *Id.* at 152.

205. *Id.* at 153.

sions as if they were synoptic decisions.[206] As a result, judges lost the ability to penetrate the presentations and documentation and began "to yield to the technocratic defense that they have forced the agencies to create."[207] Thus, instead of the synoptic standard for assessing the rationality of agency decisions, Shapiro argues that a standard of prudence is more realistic.[208] Prudence demands "the grave effort of experienced persons to make their best guess as to what course of future action ought to be pursued given our past experience, our current condition, and our sense of what others will do in response to what we do."[209]

The risk in assessing the rationale of administrative action in the institutional reform context is that courts will drift toward a synoptic standard rather than a prudential one. Similarly, with the qualities of judgment, balance, and accountability,[210] there will be the opportunity for courts to substitute their subjective notions for those of administrators and legislators. Bertelli and Lynn are correct in declaring that "there is no one right answer to the complex questions of governance, and reasonable legislators, stakeholders, and judges may well differ on the manager's exercise of responsibility."[211] The question, going forward, is will the courts be able to collectively develop a consistency of interpretation that provides sufficient forseeability and predictability for public managers. "An arguable gap in reasoning that one court finds egregious, another may find forgivable, if not defective at all."[212]

Whether courts will adopt a precept of managerial responsibility will depend, in part, on the circumspection of judges in assessing the constituent qualities of administrative responsibility. If judges continue to focus on the central tendency of the condition of administrative responsibility exhibited by a particular administrative agency the risk of over- intrusiveness should be minimized. In addition, having oversight of administrative responsibility of state agencies primarily assigned to state courts means that if overreaching occurs, it is more likely that the state legislatures will intervene and take corrective action.

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206. *Id.* at 154.
207. *Id.* at 155.
208. *Id.* at 142.
209. *Id.*
210. *See supra* note 161 and accompanying text.
211. *See* Bertelli & Lynn, *supra* note 157, at 384.
212. 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, 955 (1993).

The challenge for federal courts will be to oversee administrative agencies, but not to intervene too quickly and place agencies under federal court supervision. In other words, federal courts need to show deference when state agencies are confronting the same problems that federal courts face and are deeply committed to conducting detailed oversight. *Sierra Club v. City of San Antonio*[213] is an example of this very approach. In *Sierra Club*, the district court granted a preliminary injunction when it was alleged that the City's use of the Edwards Aquifer was killing the fountain darter, an endangered species, in violation of the Endangered Species Act.[214] The district court found that, because the state agency assigned to regulating the use of water had not had time to develop a plan for managing the aquifer, abstention was not merited.[215]

The Fifth Circuit Court of Appeals overturned the district court, saying it was an abuse of discretion and that abstention was appropriate under *Burford*. The appellate court rejected the contention that *Burford* abstention is applicable only where the state regulatory scheme is fully in place.[216] In fact, the court stressed the need to allow the state agency to address problems in a comprehensive way:

> In one appeal our court recognized abstention concerns, and particularly *Burford* abstention, as sometimes calling for federal court abstention. The Edwards Aquifer contains a finite amount of water, and as such, the need for uniform regulation is paramount. The Supreme Court has recognized that such circumstances sometimes require the federal courts to abstain to allow the state's comprehensive regulatory scheme to operate without the risk of competing attempts between the regulator and the federal courts to exercise control over the same entity.[217]

The Court of Appeals explicitly recognized a district court could be tempted to substitute its judgment for that of the state administrative agency and cautioned against federal courts giving into such temptation.[218] The court admonished the district court to avoid insisting the agency arrive at the same substantive decision that the

213. Sierra Club v. San Antonio, 112 F.3d 789 (5th Cir. 1997).

214. *Id.* at 793.

215. *Id.* at 793-94.

216. *Id.* at 796.

217. *Id.* at 792 (citing Sierra Club v. Babbit, No. 94-50260, slip op. at 6 (5th Cir. Oct. 18, 1995)).

218. *Id.* at 795-96.

district court would.[219] If appellate courts proceed in the direction of the Fifth Circuit, federal courts may be led to strike the appropriate balance between overseeing the administrative responsibility of agencies and respecting the right of agencies to exercise discretion in furtherance of their legal objections.

IV. CONCLUSION

If the purposes of *Burford* abstention are to be met, it is imperative for the doctrine to be more fully developed. This task is not an impossible one. The seeds of development can be found in *Burford* itself. Additional guidance can be found in the principles articulated by the Supreme Court and in the on-going learning that is inevitable where effective public administration is already being realized. To be effective, federal courts need to focus on the specific requirements for the doctrine and apply them with some specificity and consistency.

As we have reviewed here, specific requirements involved in the principles of capacity, federalism, and administrative responsibility all play a role in arriving at a sensible division of labor between federal and state courts. These principles also aid administrative agencies in advancing needed institutional reform in state and local agencies where rights violations are involved. No one principle provides the touchstone for resolution of the deference dilemma. However, used in combination with the right focus on the application to the specific state institutional context, the courts can potentially arrive at a more systematic and consistent treatment of institutional reform.

219. The court's action indicates it is willing to abstain as long as the state authority agrees with it. The purpose of *Burford* abstention is to discourage federal court second-guessing of state regulatory matters. *Burford* abstention is particularly appropriate where "by proceeding the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters."
Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 315 (5th Cir.1993).