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Sierra Club v. San Antonio: In Search of the Appropriate Application of the Burford Abstention*

I. INTRODUCTION

Burford v. Sun Oil Co.1 was decided in the 1943 Supreme Court term. The well known "Burford" or "administrative" abstention doctrine evolved from this important case.2 A departure from the recently created Pullman abstention, Burford was to become another of the difficult to apply abstention doctrines whose appropriate application and scope remain something of a mystery. The Supreme Court has had other opportunities to utilize the Burford abstention, but has found it appropriate in only one instance eight years after the abstention was first articulated in Burford. The lower courts have found the Burford abstention more attractive and have had more occasions in which to apply it, but the courts remain in conflict regarding the proper application and scope of the Burford abstention. Considering the lack of consensus among the courts some scholars question whether it has been well enough defined to appropriately be called a "doctrine" at all.3

In this climate of controversy every application of the Burford abstention is closely scrutinized and critiqued in an effort to find the appropriate scope and definition of the abstention. Such is the backdrop to the Fifth Circuit's application of the Burford abstention in Sierra Club v. City of San Antonio.4

This Note will compare and contrast the application and scope of the Burford abstention in Sierra Club with the Supreme Court's treatment of the doctrine. It will also consider the propriety of the Fifth Circuit's alternative application of the Burford abstention and whether there is sufficient justification for abstention in the absence of a substitute state forum. This Note will then discuss a possible conclusion to what the appropriate scope and application of the abstention might be.

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

375
II. BACKGROUND

It is widely recognized that the jurisdiction which Congress has chosen to confer upon the federal courts is not a matter of the courts' discretion, but is generally mandatory. However, over the years some judicially developed exceptions to the mandatory jurisdiction requirement have evolved. These so-called “abstentions” allow a federal court to decline to exercise jurisdiction over a suit otherwise properly within the jurisdiction of the federal court. These abstentions are considered to be the exception rather than the rule because they pose one important problem: litigants are deprived of an intended federal forum in which to litigate their claims.

Because the abstentions are not water-tight compartments and are closely related, a basic understanding of the Pullman abstention is helpful in a discussion of the Burford abstention. The Pullman abstention originated in 1941 in Railroad Commission v. Pullman two years before Burford was decided. Scholars summarize the Pullman abstention as a doctrine that “involve[s] challenges to state action in which resolution of an unsettled state law issue could eliminate the need to decide a difficult federal question.” The 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. Burford broadened the justifications for abstention, allowing federal courts to abstain in certain cases in order to prevent interference with state law. This broadening of the abstention doctrine is, in part, what made Burford controversial.

Burford involved a suit brought by the Sun Oil Company in federal district court seeking to enjoin an order by the Texas Railroad Commission which granted Burford a permit to drill four oil wells on a relatively small plot of ground in East Texas. They order was attacked on both federal due process grounds as well as on Texas statutory grounds. Jurisdiction was achieved under the parties' diversity of citizenship and under federal question jurisdiction. The Court cited precedent for

6. 312 U.S. 496 (1941).
7. HART AND WECHSLER, supra note 3, at 1247.
9. Id. at 1077.
11. Id. at 317.
12. Id. at 316-17.
federal court discretion (whether jurisdiction was invoked under diversity of citizenship or under federal question) to "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." The Court went on to say that when it is appropriate to preserve public interest, federal courts should abstain from exercising jurisdiction over some cases in order to promote the proper independence of state governments in carrying out their policies.

The Court focused on the complexity of oil and gas regulation, the Texas state interests in the conservation of gas and oil, and the impact on the entire industry and state economy. The Court recognized that Texas had given the Texas Railroad Commission, which had broad discretion in administering the law, the task of regulating the oil industry as well as balancing the other relevant interests. The Court expressed concern that the exercise of federal equity jurisdiction would disrupt "the well organized system of regulation and review which the Texas statutes provide," which would also require state policy-makers to forge policy "in the light of the remotest inference of federal court opinions."

Writing for the Court, Justice Black thought it significant that the Texas state courts were "working partners" with the Railroad Commission in the area of creating a regulatory system for the oil industry. The Court also identified what was to become a very important aspect of the Burford abstention in subsequent cases: state court de novo review of the Railroad Commission's orders.

In the only other instance in which the Supreme Court used the Burford abstention, the Court concentrated on the fact that the appellants had bypassed state court review altogether even though the state legislature had provided for state court review as a matter of right. Because the opportunity for state court review was readily available the Court held that abstention was proper. The Court did not think that it was of great moment that the state court review was not de novo.

The most recent and possibly the most significant Supreme Court treatment of the Burford abstention came in 1989 when the Court took the opportunity to summarize the Burford abstention doctrine—providing what is possibly the clearest statement of the doctrine to date. Writing for

13. Id. at 318 (quoting United States v. Dern, 289 U.S. 352, 360 (1933)).
15. Id. at 320.
16. Id. at 320–21.
17. Id. at 327.
18. Id. at 329.
19. Id. at 326.
20. Id.
22. Id. at 348.
the Court in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, Justice Scalia defined the abstention in this way:

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 question 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."23

III. FACTS OF *SIERRA CLUB V. SAN ANTONIO*

The Sierra Club, an environmental protection group, brought an action against the City of San Antonio and various other municipalities and governmental and private entities in the United States District Court for the Western District of Texas. The claim alleged that the defendants’ usage of water from the Edwards Aquifer was killing the fountain darter, an endangered species, in violation of the federal Endangered Species Act. The district court granted a preliminary injunction regulating the withdrawal of water from the aquifer. The defendants appealed the preliminary injunction to the Fifth Circuit Court of Appeals which subsequently found that the district court’s grant of preliminary injunction was an abuse of discretion because the plaintiffs failed to show the requisite substantial likelihood of success on the merits. They failed to meet this requirement because abstention “appear[ed] so manifestly warranted under *Burford*.”24

IV. REASONING

The Fifth Circuit found *Sierra Club* to be, in many ways, similar to *Burford*.25 It discussed the similarities between the comprehensive regulatory schemes of oil and water in the state of Texas. The court concluded that the regulation of the state’s water supply was just as important, if not more important than the regulation of the state’s oil supply.26 The court stated that safeguarding the water supply was especially important during times of drought, such as the one in which Texas then found itself. The

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24. *Sierra Club*, 112 F.3d at 793.
25. *Id.* at 793.
26. *Id.* at 794.
court also explained that curtailing the water supply would have a substantial effect upon the communities and other entities involved. The court cited the testimony of a consulting engineer from the City of Leon Valley who testified that the restrictions which would result from the federal court injunction would cause damage to 50% of the foundations in the city, with damages to each foundation ranging from $2,000 to $20,000.27

The court also explained how both the aquifer and the endangered species were completely intrastate, "which makes management of the aquifer a matter of peculiar importance to the state."28 The court thought that these considerations prompted abstention because under Burford, these issues bore on policy problems of substantial public import that transcended the results of the case at bar.

A primary problem the court faced in applying the Burford abstention was that the suit arose under the Endangered Species Act, a federally created cause of action. The fact that only a federal question is involved generally urges the exercise of the federal court's jurisdiction. The court addressed this issue by explaining that application of the "Burford abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does on whether the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'"29 The court also explained that although the case is based on federal law, it is not distinguish from Burford, which also involved a federal constitutional claim. If abstention is warranted when there is an alleged constitutional claim, "then surely it is also warranted where the plaintiff claims a federal statutory claim."30

The district court, in granting the preliminary injunction, reasoned that because the Edwards Aquifer Authority had not had time to develop a plan for managing the aquifer, abstention was not merited.31 The circuit court did not share the district court's perspective and stated that they did not "believe that the Burford abstention is applicable only where the state regulatory scheme is fully in place."32 The court further commented that in their view Burford itself did not turn on whether the regulatory scheme was old or new, but only on whether or not it was a comprehensive scheme that governed a matter of important state interest and where uniform application of state rules was vital.33

27. Id.
28. Id.
29. Id. at 795 (quoting Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1726 (1996)).
30. Id. at 795-96.
31. Id. at 796.
32. Id.
33. Id.
The Sierra Club presented the biggest hurdle that the circuit court had to overcome when it contended that the Burford abstention was inappropriate because there was no opportunity for state court review for plaintiffs under the Edwards Aquifer Act. While the court agreed that the Sierra Club probably did not have a right of action in state court under state law it still found abstention to be appropriate because it found “no authority that the Burford abstention cannot apply unless the plaintiff himself has a private, judicial cause of action under the state regulatory scheme.” The court also said that “the Supreme Court had recently stated that there is no ‘formulaic test for determining when dismissal under Burford is appropriate.’ ”

V. Analysis

Sierra Club did not completely imitate either Burford or Alabama Public Service Comm’n, the two instances in which the Supreme Court found the Burford abstention to apply. Both of those cases involve challenges to the orders of a state administrative agency, whereas Sierra Club involves a suit brought under federal law not against administrative agencies, but against private parties. Still the exercise of federal jurisdiction in such a case has the propensity to interfere with the proceedings or orders of the administrative agency and would naturally turn to a discussion of the Burford doctrine.

The decision in Burford gave a less than ordered and concise formula to apply when lower courts considered abstention, causing confusion among the applications of the Burford abstention in various federal law cases.

34. Id.
35. Id. at 797.
36. Id. (quoting New Orleans Public Service, Inc., 491 U.S. 350, 361 (1989)).
courts. In subsequent cases the Supreme Court condensed the doctrine, producing a much shorter and clearer rule.

To present an ordered and concise analysis of Sierra Club it is useful to separate and categorize the most recent and authoritative "restatement" of the Burford abstention found in New Orleans Public Service, Inc. The distillation of the Burford doctrine given by Justice Scalia can be broken down into four factors that must be taken into consideration when a federal court contemplates abstaining under Burford. The first, and arguably the most important, is whether or not timely and adequate state court review is available. The second is whether the federal court is sitting in equity.


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

(a) Congress left the regulation of oil and gas to the states;
(b) the state regulation was important because of the significance of conservation of oil and gas generally, but more particularly, in light of the vital importance of those mineral to the Texas economy;
(c) each oil and gas field had to be regulated as a unit because of great factual complexities;
(d) because the standards applied in a given case involving oil leaseholds necessarily affected the 'entire state conservation system,' suits such as Burford were seen as public in nature, not merely as suits between private parties;
(e) because of the public ramifications surrounding private activities within the oil industry, the Texas legislature delegated to the Texas Railroad Commission the task of adjusting the complex relationships among those with interests in the oilfields;
(f) the Commission was given 'broad discretion in administering the law';
(g) judicial review of decisions of the Railroad Commission was confined to a single expert court, under a statutory directive to acquire a specialized knowledge of oil and gas regulation;
(h) by statutory directive, the function of the specialized court was not simply to engage in ordinary judicial review, but also to act as a 'working partner' with the Railroad Commission, having some arguably 'legislative powers' in 'shaping' regulatory policy;
(i) there was a history of mistaken federal court predictions of state regulatory law regarding oil allocation so disruptive that at one point the governor thought it necessary to impose martial law.

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

39. Id.
The third is whether there is a state administrative proceeding or order.\textsuperscript{40} The fourth contains two prongs: (1) whether 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) whether the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.\textsuperscript{41}

A. Timely and Adequate State Court Review

Satisfaction of the other \textit{Burford} factors does not appear to be enough to warrant abstention if there is no timely and adequate state court review. The Supreme Court has explained that "while Burford is concerned with protecting complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential conflict' with state regulatory law or policy."\textsuperscript{42} Given the Court's explanation it is curious that the Fifth Circuit was willing to hold that abstention is proper under the \textit{Burford} doctrine in light of the fact that no adequate and timely state court review existed, which is probably the most important factor in the \textit{Burford} analysis. In \textit{Sierra Club}, it is likely that no state court review could occur for these plaintiffs because under the Edwards Aquifer Act, the Sierra Club does not have a private right of action.\textsuperscript{43} Judge Reavely explains his position with the words, "we find no authority that Burford abstention cannot apply unless the plaintiff himself has a private, judicial cause of action under the state regulatory scheme, and the Supreme Court has recently stated that there is no 'formulaic test for determining when dismissal under Burford is appropriate.'"\textsuperscript{44}

Indeed the Supreme Court has said that there is no formulaic test for determining when dismissal is appropriate, but in the same breath the Court has said that the federal court should conduct a balancing test "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum."\textsuperscript{45} The Court restated this important balancing test again in the same paragraph and then concluded the paragraph by confirming that "[t]his balance only rarely favors abstention, and

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 362 (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 815-16 (1976)).
\textsuperscript{43} Sierra Club, 112 F.3d at 796.
\textsuperscript{44} Id. at 797 (quoting Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712, 1726 (1996)).
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." 46

There is little evidence that the court in Sierra Club conducted any such balancing test. Indeed, even if a balancing test were carried out, the result becomes even more troubling. It is reckless for a federal court to set at naught the federally enacted Endangered Species Act in order to avoid conflict with a state regulatory scheme. Such an action allows the tail of state regulatory schemes to wag the dog of federal law. Furthermore, this revision of the Burford doctrine encourages states to drop state court review altogether from their administrative schemes, thus completely averting the annoyance of private rights of action against the states' administrative agencies both at the state and federal level.

The Sierra Club approach also creates the interesting situation where abstention becomes the rule instead of the exception. If every federal court were to abstain in cases brought under federal law because of the potential for conflict with a state administrative scheme, abstention would rapidly become the norm, a scenario which has been consistently denounced by the Supreme Court. 47

Even more troubling is the apparent disregard for the fact that the federal forum was the only forum available to the plaintiffs in this case. The Burford balancing test should place greater weight on the fact that the federal forum is the exclusive forum for this particular suit. Such a careless attitude offends a fundamental philosophy of American jurisprudence that a forum should be available for every controversy. 48

The dissent points out that the view taken by the Sierra Club court is inconsistent with prior precedent within the Fifth Circuit itself. The dissent identifies a case in which the Fifth Circuit held that the Burford abstention is inapplicable when a federal court has exclusive jurisdiction over the plaintiff's claim. 49 Sierra Club is not the first time that the Fifth Circuit has decided that state court review is not critical to the Burford analysis. In New Orleans Public Service, Inc., the Fifth Circuit did not think that the absence of a state law claim was momentous because the "motivating force behind the Burford abstention was a reluctance to intrude into state proceedings where there exists a complex state regulatory scheme." 50 In reversing that decision the Supreme Court responded by explaining that while it is important to protect complex state administrative processes from

46. Id. at 1727.
47. Id.
federal court interruption it is not dispositive. Given this treatment of their previous ruling it is mystifying that the Fifth Circuit decided to apply the Burford abstention in a similar manner.

B. The Federal Court Sitting in Equity

The second factor to consider is whether or not the suit is in equity. It is significant that the Supreme Court sought to limit the Burford abstention to suits in equity because the abstention doctrines originated from such equity suits. By limiting abstention to suits in equity the Court "provides a rationale (equitable discretion) for harmonizing abstention with the arguably mandatory nature of the statutory grants of jurisdiction to the federal courts." 52

In Sierra Club the plaintiffs asked the federal court to enjoin the City of San Antonio as well as various other defendants from pumping more water from the Edwards Aquifer in an alleged violation of the Endangered Species Act. In this way the second factor is satisfied and abstention is counseled, although it is not given the same attention which the other factors in the Burford analysis are given.

C. The Existence of a State Regulatory Scheme

When applying the Burford factors to the facts arising in Sierra Club it is clear that most of the factors are satisfied. There are certainly factors that would caution a federal court from issuing an injunction in this case. In this regard it is understandable that the circuit court would look to the Burford abstention as a means of averting a federal question whose resolution could have a substantial impact on, and could potentially conflict with Texas administrative law. 53 It is not questioned that there was in place a regulatory scheme created for the purpose of regulating the flow of water from the Edwards Aquifer. 54 The fact that the regulatory scheme was only recently created may counsel abstention if it is viewed from the perspective that the new administrative agency should have an opportunity to "get its feet wet" before a federal court preempts that scheme.

However, the regulatory scheme's recent creation can be viewed from another perspective which strengthens the argument against abstention. If the federal district court were to exercise its jurisdiction in a case where the administrative agency was relatively new and very little regulation had occurred it would not be as disruptive of the agency's efforts to establish a

52. Young, supra note 37, at 910.
53. Sierra Club, 112 F.3d at 796.
54. Id.
policy. Instead the agency would be able to create policy in light of the federal court’s interpretation of the Endangered Species Act.

In the end the court in Sierra Club did not think that the case should turn on whether the regulatory scheme was old or new, but on whether or not it was a “comprehensive scheme governing a matter of vital state interest, and one where uniform application of the rules was important.”

D. Difficult Questions of State Law of Substantial Public Import

The regulation of the water drawn from the Edwards Aquifer is undoubtedly of substantial public import. The Edwards Aquifer is the exclusive water supply for the City of San Antonio, a city of over one million people, as well as for many of its smaller neighbors. It is also quite possible that the result of this case would have far-reaching effects that would transcend its result. There is the possibility that an injunction would prevent any pumping of water from the Edwards Aquifer entirely. Furthermore, if the federal court were to have issued an injunction against the defendants the Edwards Aquifer Authority would have less autonomy and less control over the Edwards Aquifer. Indeed an injunction by a federal court in this case may well have left the Edwards Aquifer Authority with nothing to regulate if all pumping of the aquifer were enjoined. Equally important, the exercise of federal review in this case certainly had the propensity to disrupt the Edwards Aquifer Authority’s efforts to establish a coherent policy with regard to the pumping of the aquifer.

In light of these considerations it may seem proper to finesse the question of timely and adequate state court review and order abstention, as the Sierra Club court did. Certainly these latter Burford considerations are weighty and counsel abstention in this case, but there is no evidence that the Supreme Court ever intended for these considerations to be paramount especially in a case in which the impact is largely speculative. After all, the Court has said that “[w]hile Burford is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a ‘potential for conflict’ with state regulatory law or policy.”

Sierra Club seems to present the exact scenario that the Supreme Court envisioned when it warned against using the Burford abstention. While it is likely that an injunction would interfere with the state regulatory scheme, there is no guarantee that an injunction would be issued. Further, there is no guarantee that an injunction would have the feared far

55. Id. at 796.
56. Id. at 791.
reaching effects. Essentially, the problem that the circuit court cannot avoid is the one discussed above, that this is a case between private parties controlled exclusively by federal law which would affect the Edwards Aquifer Authority only indirectly. Ordering abstention in this case robs the Sierra Club of both a federal forum in which to litigate their claim and literally any forum in which it might bring its claim.

VI. CONCLUSION

The appropriate scope of the Burford abstention continues to be ambiguous, creating opportunity for apparent misapplications of the abstention such as in Sierra Club. This is in part due to the Supreme Court’s apparent vacillation in the area. 58 Another source of misunderstanding is the fact that the concise test laid down by the Court in New Orleans Public Service, Inc. includes a balancing test which leaves open the door for varying applications of the Burford doctrine as it is applied by different federal courts. 59 Balancing tests have been historically problematic because they require value judgments on the part of the court applying the test. Clearly, values may vary greatly among federal judges. As long as the Burford doctrine is subject to the balancing test, a spectrum of outcomes will result. The area confronted by the Burford abstention does not lend itself to a bright-line test that would eliminate the need for such a balancing test. As a result, the balancing tests will continue as will the varied results.

If the Sierra Club court’s view of the Burford abstention were the prevailing view, abstention would quickly become the rule instead of the exception. In a great many instances, a decision by a federal court may affect the actions and policy of a state administrative agency. If abstention is proper in such circumstances, abstention in federal courts will become the norm contradicting everything said by the Supreme Court in Burford regarding the abstention doctrines. The Court has envisioned an application of the Burford abstention in cases in which the state courts are working partners with the administrative agencies in formulating administrative policy, 60 or in cases in which state court review is available to the plaintiffs. 61 The Burford abstention was created to allow federal courts to avoid conflict with state administrative law when possible. But even this admirable goal becomes controversial in light of the basic principle of American jurisprudence that federal courts have no more discretion to decline to exercise their Congressionally established jurisdiction than they do to usurp

58. Quackenbush, 116 S.Ct. at 1726.
59. Id. at 1727.
jurisdiction where none has been granted. To avoid a potential conflict with state law, at the expense of providing a forum in which a plaintiff may litigate its claim, *Sierra Club* clearly extended the *Burford* doctrine beyond that which was originally envisioned in *Burford*.

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