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Anthony Sanders 00:06
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on March 18, 2021. In about a month on April 20th, will be the 150th anniversary of the adoption of what we now know as Section 1983. The civil rights law that allows for a private cause of action against persons who violate your rights under color of law. As we previewed here a few weeks ago, we at the Center will be celebrating this anniversary with an online program that day that all of you are welcome to. Our guests will include historian Paul Finkelman, law professor Fred Smith, and civil rights attorneys Kelsi Brown Corkran, Victor Fleitas, and IJ's own Bob McNamara, and your hosts will be yours truly, and the producers of our podcast Bound by Oath, Anya Bidwell and the one and only John Ross. Please register today. We have a link up on this episode's web page, the one you're listening to right now, which should also be on your podcast app. Or you can go to ij.org/cje as in center for judicial engagement, and then click on the icon that says "Outrage Legislation Civil Rights and Section 1983 at 150 years." Back here on Short Circuit joining us today are IJ's own Jeff Redfern and Diana Simpson. Welcome back to both of you.

Diana Simpson 01:38
Thank you.

Anthony Sanders 01:40
Well, Jeff and Diana will break down two recently remarkably complicated but fascinating cases in a moment. They're both so dramatic in their own procedural way that I thought you might even attach the adjective "Shakespearean" because to en banc or not to en banc? That is the question whether it is nobler in the 10th Circuit to suffer the slings and arrows of Chevron analysis or to take quote, "machine guns" end quote against a sea of waivers of administrative deference, and by opposing a preliminary injunction, but not on the issue of irreparable harm for the case to die. To vacate as in providentially granted, and by a vacation order to say we effectively end a challenge to a new regulation of bump stocks, likely illegal under the Administrative Procedure Act, not a consummation devoutly to be wished. Meanwhile, to die, to remand, to remand to Louisiana State court, perchance to dream. Aye,

there's the rub, for in that remand, what questions of state law may come when we have shuffled off this federal courts coil? Let's give us pause in the Fifth Circuit. There's the respect for not only state court competency, but also Congress and Article Three's investiture of federal diversity jurisdiction that may calamity of so long an appeal of a generally unappealable remand order. That's my attempt to summarize these two again, remarkably complicated cases, as the sweet prince might. But Jeff and Diana will do a much better job putting poetry to these opinions. Jeff, let's get back to my original question. To en banc or not to en banc. What did the 10th Circuit say?

Jeff Redfern 03:23
Well, I don't know if I'm going be able to explain this in iambic pentameter, but hopefully

Anthony Sanders 03:28
Neither did I by the way.

Jeff Redfern 03:33
This case is Aposhian v. Wilkinson. It's a really interesting case out of the 10th Circuit. It involves machine guns, Chevron deference, weird appellate procedure. This is about the National Firearms Act, a 1934 statute, which among other things, makes it illegal for most people to own quote, "machine guns." The act also defines a machine gun as "a gun that fires multiple rounds with a single function of the trigger." Well, the Bureau of Alcohol, Tobacco and Firearms issued regulations recently stating that this definition of machine gun encompasses what is what are known as "bump stocks." These are stocks that you attach to a gun, which use the recoil of the gun to help people fire them extremely quickly. But it's all through multiple pulls of the trigger, the gun itself is bouncing back and forth and the trigger is being pulled very rapidly. So ATF said that these are machine guns and that they're illegal under the National Firearms Act. Well, plaintiff owned a bump stock and brought a challenge to this regulation, arguing that it is contrary to the plain text of the NFA because machine guns fire multiple rounds with one trigger action and bump stocks just fire with many, many, fast trigger actions. A 10th Circuit panel upheld this regulation over dissent. And what's interesting is how the court got there. It applied Chevron deference, which is going to be familiar to listeners of this podcast, see administrative law principle that courts will defer to an agency's reasonable interpretation of a statute that the agency administers. But what's weird here is that the ATF never argued for Chevron deference in this case, its regulation just said that the plain text of the statute required that bump stocks be considered machine guns. Now, the panel applied Chevron deference anyway, based on what's been called the invitation theory of Chevron, so in other words, the government doesn't have to base its interpretation of a statute

in Chevron when it issues regulations. Even a footnote in a brief, that arguably suggests the Chevron issue is enough to trigger deference. The court also declined to apply what's called the rule of lenity. This is a very old substantive canon of statutory interpretation, says that when courts are interpreting a statute that has criminal consequences, they interpret ambiguity in the statute in favor of the criminal defendant. The theory here is pretty straightforward. It's you shouldn't be held criminally liable for something unless it's perfectly clear that what you did is wrong. Now, normally, the Supreme Court has held that these substantive canons of interpretation are supposed to be applied by the courts before the court turns to Chevron deference. The idea being that if the normal tools of statutory interpretation, like the rule of lenity, are sufficient to tell you what the statute means, then there's not really any ambiguity for the agency to interpret. There's just one meaning of the statute. So the case gets even more interesting, because what happens next, the full 10th Circuit granted en banc review, the case was fully briefed and argued before the full 10th Circuit. And then the court dismissed the en banc review as improvidently granted what's known as “digging the case.” So in other words, they said “Just kidding, we don't want to rehear this.” So we don't get a ruling on the merits from the full court and the panel decision stance. Now this happens from time to time in the Supreme Court, usually when the court determines at oral argument that there's some defect in the case that will prevent the court from reaching the issue that it wanted to decide. But this is almost never happened with en banc circuit courts. Now, Josh Blackman over at the Volokh Conspiracy blog was able to locate only three other examples of an en banc dig, all of them from the 10th Circuit. But these other three cases pretty much fit the pattern of Supreme Court digs. There is one where the original panel reheard the case. So in that situation, there's no need for an en banc review if the panel itself is going to change its position. Second, there was a case where the court determined that the issue it granted review on was not actually preserved below. And then finally, there was a case where the parties changed their positions that oral argument, and the court was not happy about being asked to decide a different issue than the one that granted review on. This case is different. There's no apparent reason that the 10th Circuit couldn't or shouldn't decide the case, the issues were preserved. And the arguments raised before the full en banc were essentially the same arguments raised before the panel. Now, there were several dissents from the dig. And the principal one was by Judge Tymkovich. He argued first that Chevron is a waivable argument by the government. Now, when the government doesn't argue that it is exercising its expert discretion to fill in gaps in the statute. he said that courts should respect that decision, and simply interpret the statutes plain language. He also argued that lenity is a principle that should be applied before Chevron deference. Now, it's mostly clear that the normal canons of statutory construction do apply before we get to Chevron. Lenity is admittedly a little bit more complicated because there's some language in older Supreme Court cases suggesting that maybe it doesn't apply

before Chevron. There's also an interesting issue here about what ambiguity means under the rule of lenity versus under Chevron. Now, the general rule is that the rule of lenity only applies when there is a, quote, “grievous ambiguity in the criminal statute.” Now, Tymkovich, says that this appears to be the same level of ambiguity necessary to trigger Chevron, but I'm not sure that's actually right, because lenity is one of those doctrines that gets raised a lot but is honored more in the breach than the observance. Whereas Chevron is everywhere. Courts defer to agency interpretations of statutes left and right even when the statutes are not really ambiguous.

Anthony Sanders 09:59
One helps the government, one hurts the government. So that's not terribly surprising.

Jeff Redfern 10:04
Not at all. Unfortunately. The panel also, interestingly, rejected the government's concession that the irreparable harm prong of the preliminary injunction test was satisfied. This is really weird. Everyone knows that when you're filing for preliminary injunction, one of the things that you have to do besides demonstrating that you're likely to succeed on the merits of your claim, is that if you don't get your PI, you'll be irreparably harmed. Now, this means that if the panel decision is correct, that parties have to prove all elements of their entitlement to a preliminary injunction even when there's no opposition. And as Judge Carson pointed out, in his separate dissent, the plaintiff here didn't present any evidence of irreparable harm, because it didn't think it had to the government had conceded this point. Now, this is particularly strange in the PI context, because speed is of the essence and relief is temporary. As Carson pointed out, parties often stipulate to the entire entry of a preliminary injunction. So if you can stipulate to all the elements, then why not just one. So, what's going on here? It's always a dangerous business, guessing the silent motivations of judges, particularly when they're taking action that's entirely discretionary, like deciding to grant en banc review. And I'm always hesitant to ascribe inappropriate motives. But it does seem at least plausible that what happened here is that at least one judge who voted to dig this case was one, persuaded that the dissents here were correct or likely correct, and two not eager to reverse a panel decision in a case about guns. Now, obviously, it would be a total violation of a judge's ethical duties to vote a policy preference over the judge’s best understanding of the law. This is one step removed from that, because it's only denying discretionary review. But it still seems troubling. So I hope that there is a better explanation behind the scenes that we are not aware of, because this isn't really how courts are supposed to operate.

Diana Simpson 12:14

I imagine that's something we'll find out in, you know, several decades from now, when judge's papers become available, you know, reminds me of a case I had several years ago out of the Fifth Circuit where we had lost on the panel, petition for en banc review. And then it just sat there pending for eight months. And then they denied it no dissent. So something was going on. We don't know what it's a question that has plagued me since and will plague me for many years down the road. And I get the same sense here that that perhaps we'll know someday, what happened. But we don't now. And it's just a mystery. Until then.

Jeff Redfern 12:53
It's also possible that the judges who voted to dig thought that the panel decision was correct, and just decided that they wanted to save the time and not have to write a whole bunch of opinions arguing with their fellow judges. Normally, that's the kind of thing that would cause you not to grant in the first place. But who knows how minds may have changed.

Diana Simpson 13:15
One of the things that really struck me with this case is that it's yet another example of courts kind of standing up to assist the government in its litigation. And so rather than the parties standing on equal footing, and being presented with kind of the same opportunity to make their own arguments, to choose the arguments that they wish to make and abandon those that they don't, the court here has revived an argument that the government decided it didn't want to make. And so the government never invoked Chevron deference in this case, until, you know, the court decided that maybe they should they shouldn't talk about Chevron deference. And it's really frustrating when they do that, because this isn't a jurisdictional issue. And so courts can certainly sua sponte raise jurisdictional issues. In fact, they're required to make sure that Article Three jurisdiction exists, but to raise a non jurisdictional argument, just because they feel like it is really to give this helping hand to the government that they wouldn't give to a private party, and, you know, really makes you question the very nature of the judicial system, and that we're all supposed to be on equal footing, and we're not. And that's something that I just find very frustrating. And I think Tymkovich put it in stark relief in his, in his dissent talking about this. And, you know, it's what are you supposed to do as a private litigant?

Anthony Sanders 14:38
It's the Article Three co-counsel, as our friend Clark Neely likes to say,

Diana Simpson 14:43

That's cynical, and it fits.

Jeff Redfern 14:46
Right. And and there's also just a question here of notice, even if judges are going to raise some of these issues sua sponte. The parties challenging government action, don't know what they have to argue. You essentially have to write a brief that raises every possible issue, just in case the court comes up with it. And that that puts litigants in a very difficult position.

Anthony Sanders 15:09
The hook how they got to Chevron deference to was very well, how Tymkovich says it seems the court got the chevron deference, is that, you know, it was cited in a footnote in the plaintiff's brief, which seems quite, you know, if you're going to say that, well, that that opens the door for talking about Chevron, you might as well just say, look, a court can bring it up sua sponte, because of courts, including the Supreme Court bring up kind of wacky constitutional arguments that maybe haven't been argued much at all, if, if at all, by the parties all the time. They say that, you know, an amicus, for example, can't bring up an issue that the parties haven't raised, like that can't force the court to address it. But the court itself can do whatever it wants. So it seems like a pretty thin read. I mean, there are reasons why a court shouldn't address things that are Prudential doctrines, why courts shouldn't address things. But if the court really wants to address something, why did they have this? Why did they have this excuse of this one random footnote instead of instead of bringing it up?

Diana Simpson 16:21
Well, they shouldn't be addressing things sua sponte. Except for jurisdictional issues

Anthony Sanders 16:25
Right, because it's not argued. But I mean, if they want that excuse, I don't see why they have the paper at over with this with this one footnote is my point.

Jeff Redfern 16:35
Right. Well, as Tymkovich points out, it's also pretty common for courts to issue decisions about statutory interpretation questions where they explain what a statute means on a basis that's slightly different than what the parties argued. But this isn't a question of what the statute means. Chevron is a question of power, it's about the executive branch's ability to use their expertise to tell the court what it means, it's not about the plain meaning of statutes.

Anthony Sanders 17:03

So I was curious about these judges and how they were voting. So I looked up the rules of the 10th Circuit's en banc procedure. And it's pretty much what you'd expect, it says, “a majority of the active judges who are not disqualified,” that's important in a moment, “may order rehearing en banc.” So there are 12 judges in the in the 10th circuit. One of them actually, who was in the majority here to vacate the en banc the decision, just went senior status, but is kind of grandfathered into this opinion, because was part of the en banc panel. I mean, just went senior status right after President Biden was inaugurated on February 1st, and then we had five judges dissenting. But then one judge was recused, we don't know why. But Judge McHugh was recused. So that really meant that it was six to five. So the original en banc order must have been six, but then the vacation order, you would assume, it doesn't exactly address that in the rules, but you'd assumed that the same rule is six. So that could be just one judge, right, changed his or her mind at or argument. And we don't know who that was. But you know, that could be the explanation here. Well, a case where all the judges were agreed, except with the district court judge is what was going on in the Fifth Circuit with Grace Ranch v. BP America, some funny Louisiana laws, but some not so funny, federal jurisdictional questions that Diana is going to walk us through. And as the case opened, if you were going to have a federal courts exam, this case would probably be right at the top of the examples you would use. So Diana, please tell us what's up in the Fifth Circuit?

Diana Simpson 19:13

Yeah, so this case is a smorgasbord of jurisdictional issues, which for me, is very exciting. And I hope it will be for you guys as well. So kind of the basic issue here is that Louisiana oil and gas operators have long disposed of their byproducts in these unlined earthen pits that basically just seep into the nearby soil and groundwater. This is obviously very bad for people living nearby and for those particular landowners. So these pits were ordered closed in the 80s. And the people who own contaminated land have been spending basically all of that time since trying to recover for all of these issues. And so there's a group of landowners called “legacy plaintiffs.” And these are landowners who have obtained contaminated land after the pits were closed. And so they have a very narrow potential route to victory, because it's to the extent that they want to recover for the contaminated land and get it fixed. Because the Louisiana Supreme Court closed the tort and contract avenues for all of these damages that were inflicted before a landowner acquired property. And so that's the normal route that one would go. And so the remedy that is left to these legacy plaintiffs is a statutory remedy. And basically, land owners ask Louisiana's Office of Conservation Commissioner to enjoin violations of the state conservation law. If

the commissioner does not take steps to enjoin these violations, the party who has asked the land the commissioner to do that may then sue in the commissioners place. And so this is under a law called Section 3016, which is not terribly exciting sounding but you know, is a big avenue for these landowners. And so some of these legacy plaintiffs have sued under Section 3016 to force compliance with a particular regulation that requires remediation of these unlined oilfield pits. And this case is the result of one of these legacy plaintiff's lawsuit. And so this case involves diversity jurisdiction questions, appellate jurisdiction questions about whether you can appeal a state court remand order on abstention grounds, as well as Burford abstention. So we'll go through all of those issues, but buckle up because it's really an exciting procedural avenue of cases. So the plaintiff here, Grace Ranch, is one of these legacy plaintiffs. They sued in state court under tort and contract law, apparently unaware that the Louisiana Supreme Court had already foreclosed that option. So then they shifted to this citizen suit type of case under Section 3016. So once they notified the commissioner, the commissioner did not act. And so Grace sued under Section 3016 in state court. The defendants, which were BP America, and another Petroleum Company called BHP removed the case to federal court under diversity jurisdiction. But Grace does not want to be in federal court. Grace wants to be in state court. And so they argued that Louisiana is the real party in interest by way of this, by way of the operation of Section 3016. And so because Louisiana is the real party in interest, so the argument goes, there is no diversity. But even if there is diversity, the court should abstain under Burford, so really just send us all back to state court. And the district court abstained under Burford. So the BP and bhp appealed from that order. So first, the court talks about diversity jurisdiction. Is Louisiana, the real party in interest such that it the presence of it destroys diversity. The Fifth Circuit says no. And so the reason that Louisiana could be the real party in interest, the reason that Grace Ranch is arguing this, is that once the private citizen sues, if the private citizen wins, and obtains injunctive relief, the commissioner has to be made a party to the suit, and then is substituted for the plaintiff, for the person who brought the suit in the first instance. And the injunction is issued as if the commissioner had been a plaintiff originally. And so Grace Ranch's theory is that makes the state the real party in interest. But the Fifth Circuit doesn't buy it, because it's not as though Grace Ranch is suing on behalf of the state. And if Grace Ranch gets an injunction, Grace Ranch gets an injunction, I guess on behalf of the commissioner, Grace Ranch is still the party really benefiting from that injunction because they would financially benefit from this land being cleared up. So they have this pecuniary interest in the outcome and what an injunction would look like, and not the state. Also, an injunction may never issue. Grace Ranch could win and not get an injunction at all. And so it's possible that the state could get involved at some point, not necessarily. And it's also the case that the way you evaluate diversity jurisdiction, is you look at it at the time of removal. And so these post removal events don't affect valid diversity jurisdiction. So if three years

down the road, it might be the case that diversity would be destroyed. Well, it's not you know, it exists today. So today, we're going to continue in federal court. So diversity, check, that continues. So moving on to appellate jurisdiction, can you appeal a remand order? The answer is usually no. Under 28 U.S.C. Section 1447(d). But SCOTUS said, the Supreme Court, excuse me, said in a case called Quackenbush that Section 1447(d) only prohibits appellate review of remand orders identified in Section 1447(c), which are remands due to a defect and removal procedure or because the district court lacks subject matter jurisdiction. Quackenbush said that abstention based remand orders could be reviewed on appeal. However, there's been an amendment to the statutory language. And so now it includes any defect other than the lack of subject matter jurisdiction. So if you read the word defect broadly to mean all non-jurisdictional reasons for remand, then 1447(c) covers all remand reasons non jurisdictional and jurisdictional. But that doesn't make sense. The court doesn't read it that broadly, and joins all of the other appellate courts that have considered the issue to not read defect that broadly. So the upshot is, you can appeal abstention based remand orders. So check two, we are appropriately in front of the Fifth Circuit. And box three is Burford Abstention. And so I have not had to deal much with Burford Abstention, it comes up occasionally. It's confusing. And the Fifth Circuit noticed that and said, you know, most courts that figure this out, or that wade through this, don't really agree with how it works, and they seem confused by it. And so it's, you know, not something that tends to occur. And then, of course, as with all abstention doctrines, there's all of the language about how it's disfavored and courts shouldn't do it. But this actually seems like a case where Burford Abstention is disfavored. That's not just, you know, language they throw in there to make litigants feel a little bit better. It actually is a disfavored kind of thing. And so basically, it's just a, you know, this five factor analysis, and Burford abstention is appropriate, when there's this timely and adequate state court review that's available. You then abstain with proceedings or orders of state administrative agencies when there are difficult questions of state law that bear on policy problems of substantial public import whose importance transcends the result in the case at bar? Or where the exercise of federal review of the question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern? So it's, that's I don't even know how to how to do that. But it's basically boiled down to these five factors. So question one is: does the cause of action arises under federal or state law? In this case, The Fifth Circuit says: state. So that's in favor of abstention. Factor two: does the case require inquiry into unsettled issues of state law or into local facts? Applied here? The question is, is whether landowners can even sue under this section is an unsettled question of state law. So factor two is in favor of abstention. Factor three: the importance of the state interest involved. And application here, the state has strong interest in remediating contaminated lands. So factor three is in favor of abstention. Factor four: the state's need for a coherent policy in that area. And the application here is that the

Federal resolution of this lawsuit won't disrupt state efforts to establish a coherent policy, because the commissioner can still enforce the same law elsewhere in the state. So factor four is against abstention. And then factor five is the presence of a special state forum for judicial review. And there is none here. So that is against abstention. So for those of us keeping track at home, we've got three factors in favor of abstention, two against.

Anthony Sanders 28:49
So that means you should have extension, right, three to two?

Diana Simpson 28:52
But it's disfavored, Anthony, you have forgotten this, it's disfavored with an exclamation point that I have added the court didn't. I don't know that that exclamation points are always appropriate for procedure.

Anthony Sanders 29:03
Maybe it changes the numbers.

Diana Simpson 29:06
Well, maybe. And so the district court decided that Burford was appropriate in one paragraph. And so the defendant said that it should be reversed on brevity alone. But the Fifth Circuit says no, that they're not going to reverse the decision just because it is short. They say we disagree, because it did provide reasons to support its remand order. But in its quick analysis, the district court highlighted aspects of this case that only facially favor abstention. Once we dig deeper, we can see that they do not carry as much weight as the district court supposed. So even if you write, even if you're facing a one paragraph analysis that I mean, even spelling out those sentences, or even spelling out the factors really gets you to one paragraph,

Anthony Sanders 29:49
So the soul of wit, but perhaps not of abstention doctrines.

Diana Simpson 29:53
There you go. There you go. And so the Fifth Circuit says, “look, you've got the three factors in favor. Abstention, two against you expect to see the first three in basically all of these cases, there's not going to be a case where there's an unimportant state interest involved that is somehow important enough to

rise to the need of litigation. And so the fundamental Burford concern is that the federal court might undermine this comprehensive scheme governing a matter of vital state interest. And that's just not here. And so this should be in federal court." And it's going to continue to be in federal court, according to the Fifth Circuit. And so I imagine the appeal, if there is a subsequent appeal that will presumably be on the merits will be less interesting to those of us who are really excited about procedural stuff, because it feels like they kind of cleared the deck on that front and say, "No, no, this this should be in federal court. And, you know, let's go back and have a conversation about that."

Jeff Redfern 30:55
One of the things that I think is kind of interesting about this is that usually these abstention cases, we're dealing with plaintiffs who want to be in federal court and are getting kicked back to state court. And here, it's the reverse.

Diana Simpson 31:08
It is, and it's interesting, because one of the things about on the particular issues with abstention, generally and with kind of how the federal state court system operates is that there is supposed to be a presumption that a plaintiff can bring a lawsuit in the form of their choosing, provided that it's appropriate to be there. So is there jurisdiction, do they have an appropriate cause of action? That sort of thing? You know, but this this is a plaintiff that very much wants to be in state court, they filed in state court. You know, they brought an action only under state law. There aren't, you know, federal issues here. And yet, you know, they're doing everything they can to get back to state court. And the Fifth Circuit says, No, you were in federal court, and we are here for the long haul.

Anthony Sanders 31:49
Diana. Let me let me throw a curveball question at you about this abstention, which comes up in footnote 11 of the opinion. What is the difference between Buford abstention and Pullman abstention, both of which come from the early 1940s regulatory cases in Texas. I know and as the court points out, I am thoroughly confused as to the difference between them.

Jeff Redfern 32:16
I was wondering that too, Anthony.

Diana Simpson 32:19
I also am wondering

Anthony Sanders 32:20
They're both doctrines we have to deal with here at IJ often, and they involve state law being complicated. And that's the depth of my knowledge.

Diana Simpson 32:29
It is an interesting kind of historical note in here that, you know, Pullman abstention involved railroads, as the state agency had required sleeping cars to be staffed by white conductors. Burford involves the railroad Commission's more influential the less obvious responsibility of regulating the Texas oil and gas industry. So I don't know, you know, kind of all the intricacies of all of this, because as you said, we just we don't tend to litigate these issues much. But it's one of the numerous versions of a procedural roadblock that courts have made up.

Anthony Sanders 33:08
And the you know, the most the most famous abstention. Well, if we're talking about fame, that we at IJ have to deal with is Younger abstention that some listeners may know about where you have an ongoing state criminal proceeding that has to do with your client. And so you can't go to federal court to try and adjudicate that because it's already been in the state criminal system. And then there's other

Jeff Redfern 33:35
but Anthony, it doesn't have to be ongoing yet.

Anthony Sanders 33:39
Well, that's what's often argued, isn't it.

Jeff Redfern 33:41
Sometimes in Younger cases, you have a situation where you're fearing enforcement, and you bring your action. And if they initiate the enforcement action, before anything has happened on the merits of your earlier civil case, they will still abstain and give the state the first chance to put you behind bars.

Diana Simpson 34:02
I mean, it's interesting to see like just how far you know, where these kind of cases and doctrines start, and then how far they spread. And so Younger started with somebody who ran to federal court to avoid a criminal prosecution. And now in the Supreme Court said, No, you can't do that, you know, well, we'll

have this particular type of abstention for people who are facing criminal prosecutions. And so it's now been expanded to not just criminal prosecutions, but like any kind of civil enforcement activity. And, you know, it's not just who's first it's, you know, does the federal court get beyond just this kind of beginnings of the case? Well, what the heck does that mean? I guess it depends on who you talk to. And, you know, we'll know it when we see it. But sometimes parties can be litigating for a year and still have to face Younger abstention, which is, you know, the whole point the whole thing, the whole problem with Younger abstention, and all of these abstention doctrines is that they are made up limitations on federal court review. And they're just made up by the judges who don't want to decide the case. And there are very specific reasons that parties and litigants don't want to be in state court. And, you know, the plaintiff is the one who's supposed to be able to pick the forum that they're litigating in, and you want to talk about 1983. And the whole point of it, you should definitely go listen to it to Bound by Oath, that's an excellent podcast that I'm enjoying very much. But, you know, part of the reason of it, of 1983 was that state courts weren't trustworthy, that people couldn't go into state court and actually get the kind of review of their problem that that the constitution required. And so federal courts are a great avenue to avoid that. You know, and even still, the federal courts will come up with a reason or make one up to kick you out.

Jeff Redfern 35:48
And I think with a lot of these doctrines, not just abstention, but a lot of things that courts use to avoid ruling on issues or to side with the government. Oftentimes, if you go back to the original case, it seems pretty reasonable, or at least defensible. But what's happened is that as the years go on, the doctrine just grows and grows and grows and become something really grotesque, that's quite different from the case that that gave rise to the doctrine in the first place.

Anthony Sanders 36:21
I like how you put that Jeff, about its the cases themselves originally, were reasonable and then this doctrine grows out of it. Because how I was taught federal jurisdiction by my old Professor Adam Samaha, is that abstention isn't really a set of doctrines, it's a set of cases. So we have Pullman, we have Burford in this case, we have Younger, there's Colorado River abstention, also, I'm sure I'm forgetting some, and these lines of cases come out of them. But they really are quite a mess. Because there's not really a coherent doctrine there. It's just a court trying to avoid doing what federal courts are charged by article three and Congress to do. By the way. Interesting. A side note I found in the case that we can end with, is there was diversity jurisdiction here because diversity jurisdiction, as Congress has granted it is between citizens of different states. So that's Grace Ranch. And that's these Texas oil

companies, on Grace Ranch being in Louisiana. But there is not jurisdiction, what Congress has done between a state and citizens of a different state because a state is not a citizen, although there could be constitutionally jurisdiction, they say, because there's the 11th Amendment. Remember that everyone? The 11th amendment, that was enacted to try to protect sovereign immunity of the states? Well, that only applies in a suit commenced or prosecuted against one of the United States. And here, it would have been the state of Louisiana effectively subbing in for the plaintiffs. So that would, that would be allowed, but because Congress hasn't allowed it, that's how we this argument went. But it was all for not because the court said didn't matter. Well, thank you both for your dramatic recitals of both of the sonnets cases, I very much appreciated them. I appreciate all of you for listening to what we had to say. And I hope that you're going to join us in the coming weeks for our event on April 20th, about Section 1983, where Younger abstention or other abstentions may even come up. But in the meantime, whether it's abstention cases, doctrines, or federal jurisdiction, I hope that all of you get engaged.