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INTRODUCTION

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. This restriction is made applicable to the states by the fourteenth amendment prohibition against the deprivation of property without due process of law.[1] Since a federal question is presented, it would seem to be beyond dispute that an action for just compensation resulting from the taking of private property for public use would lie in the federal courts.[2] A recent line of

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1. United States v. Powelson, 319 U.S. 266 (1943); Appleby v. City of Buffalo, 221 U.S. 524 (1911); and Chicago B & Q R. Co. v. Chicago, 166 U.S. 226 (1897).

2. Jurisdiction in a case alleging the taking of private property for public use without just compensation is ordinarily obtained under the Federal Question Statute, 28 U.S.C. § 1331 (1970). In addition, federal jurisdiction can be invoked by reason of 28 U.S.C. § 1343 (1970) providing federal jurisdiction for actions brought

cases, however, has invoked the little-known doctrine of abstention as an effective bar to the adjudication of such cases in the federal courts.

The abstention doctrine, while recognizing the proper invocation of federal jurisdiction, permits a federal district court, in narrowly limited "special circumstances,"[3] to postpone the exercise of its jurisdiction pending the resolution of so-called "state issues" in state courts. This application of the doctrine contemplates that the district court will retain jurisdiction over "federal issues" so that, if such issues remain upon final determination of the state issues in the state courts, the federal court will exercise its jurisdiction to adjudicate them. In a more drastic application of the abstention doctrine, the federal district court may simply refuse to exercise its jurisdiction and dismiss the case.

Application of the abstention doctrine in cases alleging the taking of private property for public use without just compensation has become particularly important in the last year due to the intervention of the Attorney General of the State of California as amicus curiae on behalf of local municipalities in several federal actions involving such issues.[4] The essence of the Attorney General's position is that

> legal disputes arising from the exercise of the state's police power control of land use [should] be decided promptly by the state courts who are familiar with the complex regulatory scheme of land use controls in California.[5]

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under the Civil Rights Act, usually §§ 1983 (1970) and 1985 (3) of 42 U.S.C. (1970). In limited situations diversity jurisdiction under 28 U.S.C. § 1332 (1970) is also available.

3. *See* Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509 (1972); Zwickler v. Koota, 389 U.S. 241, 248 (1967); and Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

4. Amicus curiae briefs have been filed by the State Attorney General in M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975); Sederquist v. City of Tiburon (N.D. Cal., C 75 0297 RHS); Gariffo v. City of Tiburon (N.D. Cal., C 75 0296 RHS); Maun v. City of Sacramento (E.D. Cal., s 74 571 TJM); Rancho Palos Verdes Corp. v. City of Laguna Beach, 390 F. Supp. 1004 (C.D. Cal. 1975); and Santa Fe Land Improvement Co. v. City of Chula Vista (S.D. Cal., Civ. No. 76-0024-E). In the *Maun, Rancho Palos Verdes Corporation and Santa Fe Land Improvement* cases, the district court abstained. The *Rancho Palos Verdes* decision was recently affirmed by the Court of Appeals for the Ninth Circuit on *Pullman* grounds. In *Brock*, the court reached a contrary decision, questioning the ruling in *Rancho Palos Verdes*. In American Sav. and Loan Assn. v. County of Marin (N.D. Cal., C 74 2435 ACW), and Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975) the district court refused to apply the abstention doctrine. However, in the last two cases the Attorney General did not file an amicus brief.

5. Amicus Curiae Brief of the People of the State of California in Support of Appellee and Cross-Appellant City of Laguna Beach, et al., p. 2, submitted in Rancho Palos Verdes Corp. v. City of Laguna Beach, docketed, No. 75-1813, Cross-Appeal docketed, No. 75-2193 (C.A. 9th).

It appears that the Attorney General's objective in seeking application of the abstention doctrine in federal cases involving inverse condemnation issues is to seek the forum most favorable to the governmental entities involved.[6] While the Attorney General's efforts to direct all inverse condemnation cases out of the federal courts and into the state courts is understandable, familiarity with state law should not be sufficient justification for application of the abstention doctrine. As will be discussed more fully below, the abstention doctrine should be applied only in certain limited situations justifying the delay and expense inherent in such a ruling. By these standards, the cases in which the Attorney General has requested the federal courts to abstain are not appropriate for the application of the doctrine.

THE PULLMAN DOCTRINE

Any discussion of the abstention doctrine must begin with *Railroad Commission of Texas v. Pullman Company.*[7] This case involved a challenge to an order of the Texas Railroad Commission that all sleeping cars operated in Texas must be in the charge of a pullman conductor. This ruling had a discriminatory effect because blacks were excluded from consideration for positions as conductors. The order was attacked on the grounds that it was unauthorized under Texas law and that it violated the commerce, due process and equal protection clauses of ths federal constitution. A three-judge district court held that the Texas statute which gave the Commission power over railroads and which made it the duty of the Commission to correct and prevent abuses in the conduct of the business of such railroads did not authorize the Commission to issue the order as the correction of an "abuse;" therefore, the court enjoined enforcement of the Commission's order.[8]

On direct review, the Supreme Court held, in an opinion by Mr. Justice Frankfurter, that the district court should have ab-

6. *Compare* Selby Realty Company v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973), and H.F.H. Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *with* Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974), and Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975).

7. 312 U.S. 496 (1941).

8. Pullman Co. v. Railroad Comm'n of Texas, 33 F. Supp. 675 (W.D. Tex 1940).

stained from deciding the case.[9] The Court was concerned that the Texas Supreme Court had not ruled on the authority of the Commission to issue the order in question. Since the ultimate determination of the authority of the Texas Railroad Commission would have to be made by Texas courts, any judgment of the federal district court as to the extent of the Commission's authority would necessarily be "a forecast rather than a determination."[10] Since a decision by Texas courts could render moot the constitutional issues which provided the basis for federal jurisdiction, Justice Frankfurter concluded that the district court should have abstained from exercising its jurisdiction pending state court determination of the underlying state issue.[11] If federal questions still remained upon resolution of that issue, return to the federal courts would be appropriate.

Subsequent applications of the *Pullman* doctrine by the United States Supreme Court have reaffirmed the basic requirements of (1) an unclear issue of state law, and (2) the possibility that state adjudication of that issue could avoid the necessity of reaching the federal question.[12] If a state court decision on the underlying question of state law can substantially modify the constitutional questions, and the state issues are unclear, abstention is also justified under the *Pullman* doctrine.[13]

The United States Court of Appeals for the Ninth Circuit has enumerated the elements necessary for application of the Pullman abstention doctrine as follows:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
> (3) The possibly determinative issue of state law is doubtful.[14]

One of the features of *Pullman* abstention is the retention by the federal district court of jurisdiction over the federal issues pending determination of the state issues by the state courts. This

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9. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).
10. *Id.* at 499.
11. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498 (1941).
12. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972); Askew v. Hargrave, 401 U.S. 476 (1971); Harrison v. NAACP, 360 U.S. 167 (1959); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944). *See also* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1084-1101 (1974); Pell, *Abstention—A Primrose Path by Any Other Name*, 21 De Paul L. Rev. 926 (1972); Wright, Law of Federal Courts (2d ed. 1973).
13. Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).
14. Canton v. Spokane School District 81, 498 F.2d 840, 845 (9th Cir. 1974).

amounts to a recognition that the jurisdiction of the federal court has been properly invoked but that, at least with respect to certain issues in the case, the state courts are the more appropriate forum for their adjudication.[15] Thus, an action brought in a federal court may, through application of the *Pullman* doctrine, be "stayed" pending state court determination of the "unclear state issues." After this time-consuming determination, which could entail an appeal to the highest state court, the action is returned to the federal court for adjudication of any remaining federal issues. The delay inherent in such a system is obvious. There are instances of cases bouncing between state and federal courts for periods of up to ten years.[16] Recognizing that application of the *Pullman* abstention doctrine can lead to such excessive delays, the Supreme Court has suggested that where delay would work an undue hardship, the doctrine should not be applied.[17]

A litigant denied access to the federal courts until resolution of state issues in the state courts will certainly be tempted, due to considerations of time and money, to resolve all issues in the state courts. If, however, both state and federal issues are unreservedly submitted to the state courts for decision and are there litigated, under what is known as the *England*[18] doctrine, a litigant will be unable to reapply to the federal court for adjudication of the federal issues even if that court has retained jurisdiction over such issues.[19]

THIBODAUX, BURFORD AND YOUNGER

Abstention is also deemed appropriate in cases involving "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."[20] This application is drawn primarily from

15. Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Zwickler v. Koota, 389 U.S. 241 (1967).

16. *See* C. Clark, *Federal Procedural Reform and States Rights; To a More Perfect Union*, 40 Texas L. Rev. 211 (1961), C. Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 815 (1959).

17. Harman v. Forssenius, 380 U.S. 528, 537 (1965); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 418 (1964).

18. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

19. *Id.*

20. Colorado River Water Conservation District v. United States, 424 U.S. at 814.

Louisiana Power & Light Co. v. City of Thibodaux[21] and *Burford v. Sun Oil Co.*[22] An examination of the cases upon which this doctrine is based gives some insight into its scope and applicability.

Louisiana Power & Light Co. v. City of Thibodaux[23] was a diversity suit originally brought in the Louisiana state courts but subsequently removed to the United States district court. The City of Thibodaux, relying upon an act adopted in 1900, sought to condemn poles, lines and other portions of the Louisiana Power & Light Co. system which serviced a newly annexed section of the city. The power company challenged the authority of the city to condemn only a portion of a utility system.[24] The statute upon which the city relied had never been judicially interpreted, but had been the subject of an opinion of the Attorney General of Louisiana in which it was concluded, in a strikingly similar case, that a Louisiana city did not have the power being asserted by the City of Thibodaux. The district court, on its own motion, stayed further proceedings pending a Louisiana state court decision on the interpretation of the expropriation statute in question. On appeal to the Supreme Court, the district court ruling was affirmed because (1) eminent domain is "intimately involved with sovereign prerogative" and (2) the question of Louisiana law involved was unclear and thus a federal ruling could not be determinative.[25]

The similarity between the *Thibodaux* and *Pullman* decisions is readily apparent; however, in *Thibodaux* there was no constitutional issue which could be avoided or modified by a state court interpretation of some underlying issue of state law. The case, therefore, does not fit into the classic *Pullman* mold, in spite of the fact that the Court clearly placed great reliance upon *Pullman*.

In addition to its discussion of *Pullman* and its principles, the Court noted the intimate involvement of the power of eminent domain with sovereign prerogative. In *Thibodaux* a decision by a federal court would have had the effect of interpreting an unclear Louisiana law and thus determining, at least in federal courts, when and how this power could be exercised. The Supreme Court stated:

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21. 360 U.S. 25 (1959).
22. 319 U.S. 315 (1943).
23. 360 U.S. 25 (1959).
24. *See* the factual discussion in the district court opinion, 153 F. Supp. 515 (1957).
25. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

> The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the state under whose statute eminent domain is sought to be exercised—rather than force himself into a dubious and tentative forecast.[26]

Another case cited by the Supreme Court in *Colorado River Water Conservation District v. United States*[27] as supporting *Thibodaux* type abstention is *Kaiser Steel Corporation v. W. S. Ranch Co.*[28] Like *Thibodaux*, this was a diversity case involving an interpretation of state law which would have far-reaching consequences. In the *Kaiser Steel* case, the question was whether water rights which had been granted by the state were available for use by a private individual. This, in turn, involved the interpretation of the term "public use" in the New Mexico state constitution. The court noted that:

> The state law issue which is crucial in this case is one of vital concern in the arid state of New Mexico where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved before the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon.[29]

Thus, in both the *Thibodaux* and *Kaiser Steel* cases, difficult and unclear issues of state law were raised involving fundamental state policies.[30]

Burford v. Sun Oil Co.,[31] the second case upon which the *Thibodaux-Burford* doctrine is based, involved an attack on the validity of an order of the Texas Railroad Commission granting Burford the right to drill four wells in the East Texas oil field. Jurisdiction of the court was predicated upon both diversity of

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26. *Id.* at 29.

27. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

28. 391 U.S. 593 (1968).

29. *Id.* at 594.

30. In the *Colorado River Water Conservation District* case, the Supreme Court appears to retreat from the much broader interpretation of *Thibodaux* set forth in a previous, though recent, decision. In Harris County Commissioner's Court v. Moore, 420 U.S. 77, 83-84 (1975), the Court cited Thibodaux for the proposition that " . . . when the state law questions have concerned matters peculiarly within the province of the local courts [citations], we have inclined toward abstention." This statement was in the nature of dicta, however, and in *Colorado River Water Conservation District* the Court substantially narrowed the permissible application of *Thibodaux*.

31. 319 U.S. 315 (1943).

citizenship and the federal question raised by allegations of the denial of due process of law. The Commission was responsible for regulating the location and size of oil wells in the various Texas oil fields. Such regulation was needed to ensure continued oil field productivity—which productivity would be threatened by the presence of too many wells in a particular field or by unregulated pumping at too great a rate. Sun Oil Co. challenged the Commission's order granting drilling rights to Burford, alleging that such wells would severely diminish Sun Oil's ability to recover oil.

In effect, Sun Oil was requesting the federal court to review the reasonableness of the Commission's decision, a process which would have required the court to review a multitude of complex and unfamiliar factors. The Supreme Court dealt extensively with the vast potential for waste of an essential resource as a result of conflicting state and federal decisions which could upset the delicate balance necessary to achieve optimum utilization of that resource. To avoid conflicting decisions within the state, Texas had established a system of review whereby all Commission orders could be appealed to a single district court and then to the Texas Supreme Court. Therefore, this district court had a thorough understanding of the complex issues relating to oil and gas preservation. The Supreme Court concluded that such a central system for the determination of issues arising from the administration of the oil and gas reserves was essential to prevent undue waste. Emphasizing the adequacy of the remedy available to plaintiff in the state court, the Supreme Court ordered the lower federal court to decline to exercise jurisdiction and *dismiss* the action.

Similarly, in *Alabama Public Service Commission v. Southern Railway Company*[32] abstention was ordered to permit state courts to determine whether the railroad could legally discontinue service to certain municipalities. The need for some form of service to outlying communities and the overall transportation needs of the state counselled such a decision. As in *Burford*, appeals from decisions of the Public Service Commission regarding the discontinuance of service were made to a single state circuit court.

Burford abstention has been characterized by the Supreme Court as follows:

> In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of

32. 341 U.S. 341 (1951).

> the question in the 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.[33]

Thus, in *Burford* and *Alabama Public Service Commission*, the emphasis was to avoid disruption of some overriding state policy; however, in both cases, it is important to note that the policy in question was of such great importance to the state that a single court of review was established to ensure consistent policy.

One important distinction between the *Pullman* doctrine and the *Thibodaux-Burford* doctrine is that under *Pullman* the court retains jurisdiction over the federal issues and does not dismiss the case. Under the *Thibodaux-Burford* doctrine, however, the Court will dismiss the case in some instances. This drastic approach has only been applied thus far in *Burford* and *Alabama Public Service* type cases.

A third form of abstention, known as the *Younger* doctrine, arises out of the Supreme Court decision in *Younger v. Harris*[34] which directs abstention "where, absent bad faith, harrassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings."[35] This abstention doctrine is based upon the "traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution."[36] It has been applied in civil proceedings only when such proceedings can be characterized as being "more akin to a criminal prosecution than are most civil cases."[37] The Supreme Court has specifically refused to make any general pronouncements about the applicability of the *Younger* doctrine to all civil litigation.[38]

INVERSE CONDEMNATION ACTION ABSTENTION

Application of the abstention doctrine in any of its various

33. Colorado River Water Conservation District v. United States, 424 U.S. at 814.
34. 401 U.S. 37 (1971).
35. Colorado River Water Conservation District v. United States, 424 U.S. at 816.
36. Huffman v. Pursue, Ltd. 420 U.S. 592, 604 (1975).
37. *Id. See also* Owens v. Housing Authority of City of Stamford, 394 F. Supp. 1266 (D. Conn. 1975).
38. Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975). However, the doctrine has been used in at least one land use decision. Olinger v. City of Palm Springs, 386 F. Supp. 1376 (1975). This decision precedes Huffman v. Pursue, Ltd., however, and would not seem consistent with that case.

forms to federal actions alleging inverse condemnation would not ordinarily seem justified. The "paradigm" case for the application of the *Pullman* doctrine arises when a state statute is susceptible to an interpretation which can avoid or substantially modify the federal constitutional questions presented.[39] For example, abstention has been justified under *Pullman* when a state pollution control act under constitutional attack might not have prohibited the discharge of sewage from a watercraft allegedly violating the act,[40] or a challenged administrative order might not have been authorized under the applicable state law.[41] In most cases alleging inverse condemnation, however, no interpretation of state law can avoid or modify the constitutional issues presented. In these cases jurisdiction is predicated upon the Federal Question Statute.[42] Although state "taking" issues are frequently included in the federal complaint, these issues are joined under the federal court's pendent jurisdiction. The primary question in these cases is whether certain actions of local government have so limited the use of the complaining party's property as to constitute inverse condemnation. There is no question in such cases of lack of validity or authorization for such acts. Such issues are immaterial for even if the acts alleged to constitute a taking were unauthorized or otherwise invalid under the applicable state law, they have nevertheless taken place. The only issue requiring resolution is whether the acts are sufficient to constitute a taking under the fifth or fourteenth amendments.[43]

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39. Lake Carriers Ass'n v. MacMullen, 406 U.S. 498, 510 (1972).
40. *Id.*
41. Railroad Commission of Texas v. Pullman Company 312 U.S. 496 (1941).
42. *See* note 2, *supra*.
43. See Ballard Fish & Oyster Co. v. Glaser Construction Co., 424 F.2d 473, 474-75 (4th Cir. 1970); Lerner v. Town of Islip, 272 F. Supp. 664, 667 (E. D. N.Y. 1967); Steel Hill Development Inc. v. Town of Sanbornton, 355 F. Supp. 947, 952 (D.N.H. 1971); Eleopoulos v. Richmond Redevelopment Agency, 351 F. Supp. 63, 64 (N.D. Cal. 1972).

In *Ballard Fish*, plaintiff brought an action against Commonwealth Natural Gas Corporations alleging, *inter alia*, that the State of Virginia's grant of a certificate of convenience and necessity to lay and maintain a gas pipeline across the James River, the authorization of Commonwealth as a public corporation to exercise the state's power of eminent domain, and Comnonwealth's subsequent occupancy of plaintiff's oyster bed without instituting condemnation proceedings or obtaining an easement "constituted an unlawful taking of private property without just compensation in violation of the Fourteenth Amendment." *Id.* at 474.

The Court commented:

> The fact that Commonwealth occupied Ballard's oyster beds without first acquiring an easement either through grant or by condemnation is irrelevant. Its occupancy, though gained through misuse of the power granted it to acquire easements, is nonetheless action taken under color

Applying this logic, federal district courts have refused to apply the abstention doctrine.

In *M.J. Brock & Sons, Inc. v. City of Davis*,[44] the landowner alleged that the city council, planning commission, planning director, and individuals associated with these agencies had "engaged in a series of acts which collectively have denied plaintiff of the lawful use of its land."[45]

Plaintiff alleged violations of the fifth and fouteenth amendments, denial of due process, equal protection, and privileges and immunities, as well as violation of civil rights under 42 U.S.C. 1983 and 1985. Also alleged were state law causes of action based on misrepresentation, breach of contract and inverse condemnation.

The court, in denying defendant's request that it abstain from exercising federal jurisdiction, held that since the case did not fall within the dictates of the *Pullman* or *Burford* doctrines, there was no valid reason to do so.[46] The court said:

> [T]he question whether there has been an unconstitutional taking under the Fifth Amendment in the instant action would not be answered by a resolution of the state claims; therefore abstention is inappropriate here because the controversy would not be terminated.[47]

Donohoe Construction Company, Inc. v. Maryland-National Capital Park and Planning Commission[48] and *Rasmussen v. City of Lake Forest, Illinois*[49] presented situations in which federal courts were requested to abstain on grounds that the constitutional questions raised could be obviated by interpretation of the state constitutional provision involved. Both courts declined, reasoning that abstention was unwarranted "when it would merely permit the state court to consider the state counterpart of a federal constitutional claim."[50]

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of state law. (Ballard Fish & Oyster Co. v. Glaser Construction Co., 424 F.2d 473, 474-75 (4th Cir. 1970).

See also Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913).

44. 401 F. Supp. 354 (E.D. Cal. 1975).

45. *Id.* at 356.

46. M. J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354, 357-58 (E.D. Cal. 1975).

47. *Id.* at 358.

48. 398 F. Supp. 21 (D. Md. 1975).

49. 404 F. Supp. 148 (N.D. Ill. 1975).

50. Donohoe Construction Company, Inc. v. Maryland, National-Capital Park Planning Commission, 398 F. Supp. 21, 29-30 (D. Md. 1975); Rasmussen v. City of Lake Forest Illinois, 404 F. Supp. 148, 153 (N.D. Ill. 1975).

In *Rasmussen*, the court distinguished *Rancho Paolos Verdes Corp. v. City of Laguna Beach*,[51] where abstention was based upon the "complex California scheme of land-use control, much of which [had] not yet been interpreted by state courts."[52]

In ruling out *Thibodaux-Burford* abstention, the court noted that the instant case presented "no complex of unconstrued Illinois land use law whose construction would obviate this dispute,"[53] nor did the Illinois law "appear to coordinate the zoning ordinances or municipalities toward any particular state objectives."[54]

Two recent federal court of appeals decisions have concluded, however, that abstention is appropriate in cases involving allegations of a taking for public use without just compensation. In *Fralin and Waldron, Inc. v. City of Martinsville, Va.*,[55] the allegations of a taking were based upon the refusal of the city to issue a special use permit. The court concluded that a decision by the state courts could modify the constitutional issues or at least present them in a different posture by interpreting the city ordinance in light of pertinent state law.[56] In *Muskegon Theatres, Inc. v. City of Muskegon*,[57] the complaint alleged that certain urban renewal activities had amounted to the taking of plaintiff's leasehold interest. In that case, the court concluded that a state court determination of state issues could avoid an unnecessary and premature decision of federal constitutional issues.[58]

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51. Rancho Palos Verdes Corporation v. City of Laguna Beach, et. al., 390 F. Supp. 1004 (C.D. Cal. 1975).

52. *Id.* at 1006.

53. Rasmussen v. City of Laks Forest Illinois, 404 F. Supp. 148, 154 (N.D. Ill. 1975).

54. *Id.*

55. 370 F. Supp. 185 (W.D. Va. 1973), affd. 493 F.2d 381 (4th Cir. 1973). Plaintiff, a Virginia real estate development corporation, had submitted to the City of Martinsville, Virginia, a request for a special use permit to build apartment dwellings pursuant to the Housing and Development Act of 1968. HUD had already approved the construction plans and committee $1,771,200.00 in participating federal funds to the project. Refusal by the city to grant plaintiff's application was contested as an arbitrary and unreasonable exercise of local authority because it rendered the policy of the United States Government, embodied in the act, subservient to city ordinances which effectively thwarted that policy.

It was argued that local land-use law could possibly be construed to find that the action taken by the city was in excess of its avowed discretion and thereby moot the constitutional questions.

56. *Id.* at 191.

57. 507 F.2d 199 (6th Cir. 1974). The basis of plaintiff's allegation was the city's delay in assessing his leasehold interest, as prescribed by the applicable ordinance, until renovations had been commenced. This practice resulted in depressed property values. However, resort to state authority could initiate repudiation of the ordinance.

58. *Id.* at 205.

While the courts in both cases relied heavily on *Pullman*-type abstention principles, in neither case did the court describe just how a state court determination could avoid or modify the underlying constitutional issues.[59] It would seem that the courts were manufacturing a justification for abstention based upon a belief that the issues were more appropriate for adjudication in state courts. This is an inappropriate basis for abstention where federal jurisdiction is properly invoked and none of the elements for application of the *Pullman* abstention doctrine are present.[60]

Of course, many state constitutions contain provisions prohibiting the taking of private property for public use without just compensation.[61] It can be argued, therefore, that a decision under a state constitutional taking provision could "avoid or substantially modify" the federal constitutional question and thus justify application of the *Pullman* abstention doctrine. Where, however, a state constitutional provision is essentially the "mirror" of its federal counterpart, both the United States Supreme Court and the Court of Appeals for the Ninth Circuit have rejected application of the *Pullman* abstention doctrine.[62]

Abstention based upon the *Thibodaux-Burford* doctrine is equally inapplicable to cases raising the issue of inverse condemnation. *Thibodaux-Burford* has been used with caution by the Supreme Court and cited only sparingly in the Ninth Circuit. The reason for this is the potential breadth of a doctrine which allows abstention to avoid deciding "difficult questions of state law" which are of overriding state concern or to avoid disrupting "state efforts to establish a coherent policy with respect to a

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59. Fralin and Waldron, Inc. v. City of Martinsville, Va., 370 F. Supp. 185, 192 (W.D. Va. 1973) aff'd, 493 F.2d 381 (4th Cir. 1973); Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 204-05 (6th Cir. 1974). *See also*, Maun v. City of Sacramento, E.D. Cal., 574, 571 TJM; Rancho Palos Verdes Corp. v. City of Laguna Beach, et al., 390 F. Supp. 1004 (C.D. Cal. 1975).

60. *See* Zwickler v. Koota, 389 U.S. 241 (1967), Canton v. Spokane School District 81, 498 F.2d 840 (9th Cir. 1974), M. J. Brock & Sons, Inc., v. City of Davis, 401 F. Supp. 354 (E.D. Cal. 1975).

The United States Supreme Court recently held that a federal district court may not refuse jurisdiction merely because it is "too busy." Thermtron Products, Inc. v. Hermandorfor, 423 U.S. 336, 344 (1976).

61. *See*, 29 A CJS Eminent Domain § 3, n.28 (1976).

62. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Examining Board of Engineers, Architects and Surveyors v. Flores De Otero, – U.S. –, 96 S. Ct. 2264 (1976); Stephens v. Tielsch, 405 F.2d 1360 (9th Cir. 1974).

matter of substantial public concern."[63] The potential for misuse of such a doctrine has led the courts to restrict its application to cases in which there is such an overwhelming state interest in the litigation that a decision by the federal court would work an undue or great hardship on the state involved.

As previously discussed, the Supreme Court has justified abstention under the *Thibodaux-Burford* rule to avoid the necessity of a federal court decision regarding the scope of the eminent domain law in the state of Louisiana where the provision in question had never been interpreted by Louisiana courts[64] and to avoid the necessity of a federal court determination of the right of the state of New Mexico to allocate an extremely scarce resource, namely, water.[65] As previously indicated, the similarity between these cases and the *Pullman* decision is marked. The only distinction is found in the fact that in these cases there was no constitutional issue that could be avoided by adjudication in the state courts.

Abstention under this doctrine has also been deemed appropriate to avoid disruption of state regulation of the Texas oil fields[66] and to allow a state to determine its local needs with respect to train services where those services are essential to the economic well-being of the state.[67] Emphasizing that abstention under this rule is applicable only when the issues are of overwhelming importance to the state, the United States Supreme Court has ruled that, in cases in which *Burford* has been the basis for abstention, the district court should *dismiss* the action completely to allow resolution of all issues in the state courts.[68]

In cases involving the issue of inverse condemnation, however, there is no overriding state interest to justify abstention based on the *Thibodaux-Burford* doctrine. There is no state question involved. An inverse condemnation action brought in federal court presents questions based upon the fifth amendment prohibitions against a taking without just compensation, with jurisdiction founded upon the Federal Question Statute.[69] No state policy with regard to inverse condemnation is involved. The question of whether local govermnental action has precluded any reason-

63. Colorado River Water Conser. District v. United States, 424 U.S. at 814.
64. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).
65. Kaiser Steel Corporation v. W. S. Ranch Co., 391 U.S. 593 (1968).
66. Burford v. Sun Oil Co., 319 U.S. 315 (1943).
67. Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951).
68. Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943).
69. See Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974).

able and beneficial use of the property in question is solely one of fact under the fifth amendment. This is quite unlike the fact situation in *Louisiana Power & Light Co. v. City of Thibodaux* where a federal court decision would have had the effect of interpreting the scope of the Louisiana eminent domain laws and thus of infringing upon what the United States Supreme Court characterized as the "sovereign power of eminent domain."[70] A federal court determination that a taking has occurred will not disrupt the efforts of the state "to establish a coherent policy with respect to a matter of substantial public concern."[71] Again, the question of whether a taking has occurred is solely one of fact. A determination that property has been taken and that compensation is required does not disrupt some coherent state policy unless it is argued that a state has the right to establish a policy with respect to inverse condemnation.[72]

Application of the *Thibodaux-Burford* doctrine has been rejected in two cases involving municipal efforts to "downzone" property so as to constitute a taking.[73] The Texas eminent do-

70. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29 (1959).
Further complicating the situation is the apparent inconsistency between *Thibodaux* and Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959), decided the same day. *Allegheny County* was also a diversity action involving the question of whether the taking of plaintiff's property under the power of eminent domain for an airport enlargement was improper as constituting a taking for private use as opposed to public use. In *Allegheny County* the Court refused to apply the abstention doctrine using a *Pullman* analysis. The apparent inconsistency between the two decisions has been the subject of considerable law review commentary. *See* Field, Abstention in Constitutional Cases, 122 U. Pa. L. Rev. 1071, 1148-1153 (1974); Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 FRD 481 (1959); *See also*, C. Wright, *Law of Federal Courts*, (2d ed. 1973).

71. Colorado River Water Conser. Dist. v. United States, 424 U.S. at 814.

72. In Colorado River Water Conser. Dist., *Id.* at 816, the Supreme Court noted that the *Thibodaux* and *W. S. Ranch Co.* decisions based federal jurisdiction upon diversity, whereas the *Burford* and Alabama Public Service Commission cases were federal question cases. The Court then opined that "[t]he presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." Colorado River Water Conser. Dist. v. United States, supra at 815, n. 21.

73. See Lerner v. Town of Islip, 272 F. Supp. 664 (E.D. N.Y. 1967); Steel Hill Development, Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D. N.H. 1971), plaintiffs made no allegations concerning the construction of state law or clarity of local ordinances, and did not indicate whether or not there was a comprehensive state regulatory system which demonstrated state policy in the field. Consequently, there were no preliminary state issues to litigate. Plaintiffs' sole contention was that the amended zoning ordinances were unconstitutional as applied to

main statutes were not deemed sufficiently analogous to a state-wide regulatory system of natural resources preservation to justify application of *Burford* abstention.[74] Finally, no complex state regulatory scheme was found in an action challenging the procedure for release of a pre-judgment attachment of bank funds on the grounds of taking property without due process of law, improper reading of the applicable statute and denial of equal protection.[75]

CONCLUSION

The ability of government to tie up land in a Gordian knot of regulation and inaction places an undue burden upon landowners which was not contemplated by the framers of the Constitution. The injustice of compelling an individual to shoulder too great a share of a burden properly belonging to the community as a whole has long been recognized. In such situations, courts have consistently noted that such an individual should be compensated or the burden should be removed.[76] The federal courts have always stood ready to provide a remedy for the imposition of such unequal burdens. For them to now refuse landowners access would be a grave injustice. The court in *Joiner v. City of Dallas*[77] recognized that

> Abstention is a formidable doctrine in the federal forum comprised of medusan components that, absent the most meticulous inspection, will transfix and render powerless both litigants and jurists. Its application should be grounded upon fixed principles, strictly applied to the facts of the federal litigation, for an equally formidable doctrine obligates the federal judiciary as much to exercise jurisdiction properly invoked as to dismiss a proceeding where jurisdiction is wanting. Abstention must rest on sound jurisprudential underpinnings; it must not be a label for a visceral aversion to our Article III obligation to adjudicate.[78]

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their property. It was held abstention would be impermissible because this single constitutional issue could not be eliminated by deference to state courts.

74. *See* Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Texas 1974), aff'd. 419 U.S. 1042 (1974). Defendant posed the argument that the eminent domain statute was in the nature of a state-wide regulatory system which would be disrupted by a premature federal court holding since the state had not yet formulated its policy. The court held abstention was unwarranted where plaintiff did not take issue with state law and defendant could not establish a comprehensive state-wide regulatory system.

75. Liquifin Aktiengeselischaft v. Brennan, 260 U.S. 93 (1922). Pursuant to levy on an order of attachment the sheriff of the City of New York charged plaintiff with fees and expenses as provided for by statute. These payments were contested as an unconstitutional taking of personal property without due process of law. Since scrutiny of the statute could only result in a reduction and not complete exoneration of liability, and since no state-wide regulatory scheme was found, the constitutional infirmities remained vital and abstention was inapposite.

76. Pennsylvania Coal Company v. Mahon, 260 U.S. 93 (1922).

77. 380 F. Supp. 754, 763 (N..D. Texas 1974).

78. *Id.*