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> If increased state autonomy and reduced federal case loads can be purchased only with the coin of more constitutional violations and fewer constitutional remedies, the price is high . . . .
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> If we want to nominate a particular group of cases for exclusion from the federal courthouse, we should look at groups in which federal law is not sensitively at issue rather than at one in which fundamental constitutional rights are at stake.
>
> —Justice Harry A. Blackmun[1]

INTRODUCTION

The objective of section 1 of the Civil Rights Act of 1871[2] was to open the federal courts to persons who sought to vindicate violations of their civil rights. Congressional debates on the Act focused on the need for a federal right of action to protect private rights in the face of the failure of state courts to enforce the law with an equal hand.[3] Section 1983, the cornerstone of the Act, was premised on the view that a state denied constitutional protection of private rights whenever its judicial or executive authorities consistently,

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1. Speech of Justice Harry A. Blackmun at the New York University School of Law (Nov., 1984), *quoted in* Kaplan, *Justice Blackmun, In Talk, Makes A Plea For Sec. 1983*, 7 NAT'L L. J., Nov. 26, 1984, at 23, col.1.

2. 42 U.S.C. § 1983 (1982).

3. *See* CONG. GLOBE, 42nd Cong., 1st Sess. at 342, 368, 374, 428, 444, 457-59, 460, 476, 505-06, 653, App. 78, 167, 185, 248-49, 252.

"permanently[,] and as a rule"[4] refused to enforce its laws for the protection of a class of persons. Congress vested jurisdiction in the federal courts to enforce this Civil Rights statute.[5]

Beginning with *Monroe v. Pape*,[6] the Supreme Court rendered a series of decisions that significantly expanded the scope of section 1983. In its analysis of the legislative history of the statute, the Court stressed the fact that: "the purposes [of § 1983] were much broader. The . . . aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[7]

The reasons why section 1983 suits should have a federal forum are at least threefold. First, where there are allegations that a wrong was committed under color of state law, there is "an inherent potential for bias" in the state court.[8] Second, judicial review of allegations involving activities that are unpopular locally is best conducted by life-tenure federal judges whose jobs are not subject to parochial pressures.[9] Finally, because the essence of a section 1983 action is the assertion of a national right,[10] federal judges may have a greater understanding of and sympathy with constitutional goals. Review of their decisions through the federal appellate system will help ensure the uniform application of civil rights principles.[11]

Subsequently, in *Monell v. Department of Social Servs.*,[12] and *Owen v. City of Independence*,[13] the Court held that the Civil Rights Act of 1871 was also intended to provide a federal remedy for municipal conduct that violates fundamental constitutional rights. The Court has consistently declined to order abstention in cases involving civil rights claims.[14] That the rights of property are fundamental

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4. *See* CONG. GLOBE, 42nd Cong., 1st Sess. at 334.

5. *See* 28 U.S.C. §§ 1331, 1343 (1982).

6. 365 U.S. 167 (1961).

7. *Id.* at 174.

8. *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358 (1970).

9. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 427 (1964) (Douglas, J., concurring); Romero v. Weakley, 226 F. 2d 399, 400 (9th Cir. 1955); *cf.* THE FEDERALIST Nos. 80 & 82 (A. Hamilton).

10. *See* Chevigny, *supra* note 8, at 1356-58.

11. *See* Averitt, *Federal Section 1983 Actions After State Court Judgment*, 191 COLO. LAW REV. 191, 192 (1972).

12. 436 U.S. 658 (1978).

13. 445 U.S. 622 (1980).

14. Harman v. Forssenius, 380 U.S. 528, 533-34 (1965); Griffin v. County School Bd., 377 U.S. 218, 228-29 (1964); Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964). *But see* Harrison v. NAACP, 360 U.S. 167 (1959). *See also* Procunier v. Martinez, 416 U.S. 396 (1974).

civil rights deserving of protection under 42 U.S.C. § 1983 is now well established under the decisions of the Supreme Court.[15] Land use cases brought in federal court under 42 U.S.C. § 1983, therefore, should not constitute an exception to the federal courts' congressionally-mandated duty to adjudicate cases properly before them.

However, in the period since *Monell* and *Owen*, the lower federal courts, and the U.S. Supreme Court in the *Hamilton Bank*[16] and *MacDonald*[17] cases, have increasingly applied doctrinal and statutory bars to causes of action in land use cases brought under section 1983. In particular, the federal courts have applied the doctrines of ripeness and abstention to either dismiss or stay constitutional challenges to land use decisions, in effect, leaving the federal courthouse door only slightly ajar for land use cases which involve only the most egregious examples of arbitrary action by local governments.

A hypothetical case illustrates the problems that these two doctrines pose in land use cases brought under section 1983. Assume a zoning ordinance restricts a landowner's land to single-family residential use. The landowner submits a development plan application to a city, accompanied by a request to rezone his property from single family residential to multifamily. The planning commission's recommendation is forwarded to the city council for final action.

Before any action is taken by the city, the landowner receives permission from the commission to withdraw to discuss alternative development plans which might be acceptable to the city. After a period of six months, during which the landowner engaged in numerous discussions with the planning staff and submitted a new conceptual proposal, which was discouraged by staff, the landowner decides to resubmit his original proposal. The proposal is rejected by the planning commission again and the city council upholds the commission's recommendation. The landowner sues in federal court under 42 U.S.C. § 1983, alleging a taking of his property and substantive due process and equal protection violations.

The federal court will dismiss the landowner's case on the ground that he failed to first seek just compensation through available state procedures, as required by the ripeness doctrine. Even if the

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15. *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); McNeese v. Board of Educ., 373 U.S. 668 (1963).

16. Williamson Co. Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172 (1985).

17. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).

landowner had first utilized the state's inverse condemnation procedures, the court might still dismiss the case on ripeness grounds because the record indicates that the landowner submitted only one formal development proposal. Evidence that the city rejected only one formal proposal may not be sufficient to convince the court that the landowner obtained a final determination of the nature and intensity of development that the city would permit on the property. Without such a determination, the court would reason that it would be unable to evaluate the economic impact of the challenged decision and the extent to which it interferes with reasonable investment-backed expectations. Unless the landowner can demonstrate to the court that the six months of negotiations are evidence that reapplication to the city could be futile - the exception to the ripeness doctrine — his case will be dismissed for lack of ripeness. This dismissal will also encompass the landowner's substantive due process and equal protection claims because the court is likely to regard these two additional claims as integrally related to his taking claim.

Even if the landowner overcomes the jurisdictional obstacle posed by the ripeness doctrine, the federal court may decide that the local nature of the landowner's dispute involves unsettled questions of state law which require the court to abstain from any further proceeding until those state law questions have been resolved in state court.

This article analyzes constitutional challenges to land use cases brought in federal court under section 1983 as well as under the fifth and fourteenth amendments. Its purpose is to document the jurisdictional and practical obstacles that have been erected by the federal courts over the past 15 years in response to constitutional challenges to land use controls and to show how these obstacles are both overburdensome and inconsistent with the purposes of section 1983 and constitutional principles. It is the author's contention that the pendulum has swung too far, particularly in the imposition of these doctrinal barriers to land use cases brought under 42 U.S.C. § 1983 — a statute whose fundamental purpose is to provide a federal remedy for deprivations of constitutional rights, especially where the state courts have been less than even-handed in their review of property owner's claims.

In Part I below, the doctrines of ripeness and abstention are defined and analyzed as they have been applied in the context of land use cases. The discussion in Part II examines the federal court ripeness and abstention decisions in more detail, on a circuit-by-cir-

cuit basis, identifying the differences in the application of the doctrines among the circuits and suggesting trends where apparent. Finally, Part III analyzes the issues which remain unresolved in the application of the ripeness and abstention doctrines to the field of land use and addresses the substantive and procedural pitfalls which property owners face in seeking redress in federal court for violations of their constitutional rights.

I. THE DOCTRINES

A. *Ripeness*

Ripeness is a specific category of justiciability.[18] Concepts of justiciability have been developed by the courts to clarify the limits that the Constitution places on the federal judiciary and to identify appropriate occasions for judicial action.[19] In the case of ripeness, the federal courts determine whether a dispute has matured sufficiently such that it warrants a decision on the merits in order to satisfy the "case or controversy" mandate of article III of the Constitution.[20]

In the land use context, the ripeness doctrine has developed in response to regulatory taking claims. It is applied to both components of such a claim, namely, (1) that the regulation has gone so far that it constitutes a taking of a landowner's property and (2) that whatever compensation is available through state procedures is "unjust." With regard to the first part of the regulatory takings claim, the ripeness doctrine requires the court to inquire whether the local government's decision regarding application of its regulation to the property was sufficiently "final" to enable the court to properly assess whether the regulation went "too far." This is referred to as the "finality" requirement.[21] In order to establish the second component of a takings claim, the plaintiff landowner must demonstrate that he or she sought and was denied "just" compensation through the state's inverse condemnation procedures, or that such procedures on

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18. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3529 (1984).

19. *Id.*

20. *Id.*, § 3532. The "cases and controversies" language of article III of the United States Constitution limits the types of cases that may be heard by federal courts having article III powers, *i.e.*, life tenure and compensation that shall not be diminished.

21. Williamson Co. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

their face are inadequate (or simply not available).[22] The answer to these questions will determine whether a court has jurisdiction even to hear the landowner's as applied takings claim, and may result in all related claims, substantive due process, procedural due process and equal protection claims, being dismissed as well.[23]

1. The Finality Requirement.—The finality requirement of the ripeness doctrine is best understood in terms of thresholds: an application threshold, an administrative relief threshold, and a reapplication threshold. Each must be satisfied in order to avoid dismissal of an as applied taking claim on the ground of prematurity.[24]

The application threshold requires that a property owner have applied for and been denied approval of a particular building plan before his or her claim is mature for federal court determination. The U.S. Supreme Court first applied the ripeness doctrine in a land use context in *Penn Central Transportation Co. v. New York City*.[25] The city's landmarks commission had refused to allow a high-rise building over Grand Central Terminal, a designated historic landmark, and Penn Central challenged this as an unconstitutional taking of its property. The Court rejected Penn Central's taking claim, in part because Penn Central had "not sought approval for the construction of a smaller structure" than the 50-story office building it had proposed.[26] The Court said that it could not decide the taking claim on the merits because it did not know whether the plaintiff would be denied *any* use of the airspace above the Terminal building.[27]

Two years later, in *Agins v. City of Tiburon*,[28] the Court emphasized that a landowner must submit a land use proposal and obtain a decision from the local government before an as applied challenge to the zoning ordinance will be considered ripe for

22. Inverse condemnation procedures may be either administrative or judicial. To date, most of the federal courts have looked to existing state court procedures in determining whether an inverse condemnation procedure is available.

23. *Hamilton Bank*, 473 U.S. 172 (1985).

24. *Id.* at 186.

25. 438 U.S. 104 (1978).

26. *Id.* at 137. The Court also supported its holding by arguing that the Grand Central Terminal property retained considerable value even after the limits imposed by the landmarks commission because the development rights in the airspace above the terminal building were transferable to other parcels in the vicinity, which were also owned by Penn Central. *Id.* at 138.

27. *Id.*

28. 447 U.S. 255 (1980).

adjudication. In *Agins*, the plaintiffs' land was classified under a zone that permitted single-family dwellings at a density of between one and five single family residences on their 5-acre tract. In order to enable the city to determine how many dwellings it would allow within this density range, the two adopted ordinances required developers to submit a development plan. The plaintiffs, without submitting a development plan, attacked the ordinances on their face, claiming that the enactment of the ordinances effected a taking of their property. The Court dismissed the case, reasoning that the plaintiffs were "free to pursue their reasonable investment-backed expectations by submitting a development plan to local officials."[29] The Court did not discuss its holding in terms of the ripeness doctrine. However, the minimum threshold requirement that emerged from the decision was clear: a claim that an ordinance as applied to a landowner's property constitutes a taking will not be considered ripe for judicial decision unless the plaintiff has submitted a development plan for approval when the ordinance authorizes such an application. Under the reasoning of *Agins*, a failure to seek not only zoning but other required approvals, such as site plan approval, would also cause dismissal of a taking case in federal court.[30]

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court articulated a second threshold requirement for ripeness — the requirement that administrative relief be sought before coming to court.[31] In that case, the planning commission gave a developer preliminary approval for the subdivision of a large single-family development and then gave final approval for some of the single-family dwellings the developer planned to build. The Commission required the developer to submit a revised preliminary subdivision plat before it approved the remaining sections of the development. By this time, the county had amended the zoning ordinance to reduce the number of dwelling units allowed in the development. The Commission rejected the revised plat because of a number of problems with the development. These included dwelling units in excess of the number permitted by the revised zoning ordinance, dwelling units placed on slopes where building was prohibited, and problems with roads and road grading.[32]

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29. *Id.* at 262.

30. The Court did address the one question which was properly before it, namely, whether "the mere enactment of the zoning ordinances constitutes a taking." *Id.* at 260.

31. 473 U.S. 172 (1985).

32. *Id.* at 179-180.

The plaintiff sued in federal court under section 1983 of the federal Civil Rights Act.[33] The jury awarded compensation for a temporary taking, and the court of appeals affirmed. The Supreme Court held the case was not ripe for decision because it could not decide a taking claim until the administrative agency had "arrived at a final, definitive position" that applied the regulation to the plaintiff's land.[34] Even though the plaintiff had submitted a plan for development, as *Agins* required, it had not sought variances authorized by the subdivision and zoning ordinances that would have overcome the Commission's objections. The Court acknowledged that in *Patsy v. Board of Regents*[35] it had previously held the exhaustion of remedies is not required in section 1983 actions. However, it distinguished exhaustion of remedies from the finality requirement that underlies the ripeness doctrine, explaining:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[36]

The Court illustrated this distinction by comparing the variance procedures in the county ordinances with procedures that the plaintiff would not have to exhaust under the *Patsy* rule. The Court gave two examples: (1) the plaintiff would not have to bring a declaratory judgment action to review county zoning and planning actions; this procedure was "clearly remedial"; furthermore, (2) the plaintiff would not have to appeal the Commission's rejection of its subdivision to the Board of Zoning Appeals because the Board was authorized only to review a rejection, not to participate in the Commission's decision making.[37] According to the Court in *Hamilton Bank*, for the plaintiff to have satisfied the second threshold it must have given the Commission an opportunity to render a final decision. This required the plaintiff to have sought variances that would have possibly overcome the Commission's objections; one application and de-

33. 42 U.S.C. § 1983.

34. 473 U.S. at 191.

35. 457 U.S. 496 (1982).

36. 473 U.S. at 193.

37. The Court's language also suggests that the ripeness rule does not require a plaintiff to seek judicial review of an adverse decision.

nial before the Commission was not enough to establish a taking.

The third threshold requires that the plaintiff has sought reapplication of his or her proposed development. Until the Supreme Court's decision in *MacDonald, Sommer & Frates v. County of Yolo*,[38] if a landowner satisfied the first threshold by applying for development approval and was turned down, a court would likely find a subsequent takings claim ripe for consideration under the reasoning of *Hamilton Bank* if the landowner could demonstrate that he or she had also satisfied the second threshold: use of administrative procedures to seek an exception or "use" variance to authorize the development as originally proposed. However, in *MacDonald*, the Court created a third threshold, which the plaintiff had to meet before a takings claim would be deemed ripe for adjudication.

In *MacDonald*, the Court considered an appeal from a California Court of Appeal, which had dismissed a complaint seeking monetary damages for an alleged taking of property resulting from the planning commission's denial of a subdivision proposal for 159 single-family and multifamily residential lots. The appellants argued that by denying all permit applications, subdivision maps and other requests to implement any other use, the county and the city had in effect restricted the property to an open space agricultural use. The Court dismissed for lack of ripeness and embraced the California court's reasoning:

> Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner *does not preclude less intensive, but still valuable development*. Accordingly, the complaint fails to state a cause of action.[39]

The Court here expressed confidence that the land use and development control process could easily yield an alternative acceptable to

38. 477 U.S. 340 (1986).

39. *Id.* at 347 (emphasis added). *See also Id.* at 352 n.8.

both the property owner and planning agency. Such optimism, however, presumes more certainty and less discretion in the regulatory process than in fact exists. As discussed below, this third threshold, imprecisely defined by the *MacDonald* Court, has erected a potentially insurmountable barrier to federal jurisdiction in land use disputes involving takings claims.[40]

The Supreme Court did place some limitations on the reapplication requirement — allowing for an exception where reapplication would be futile. It noted in *MacDonald* that "[a] property owner is . . . not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain" a final determination on what development would be allowed.[41] The Court also indicated that the reapplication requirement did not mean that repeated "futile" applications are required. In the Court's view, the California courts had implied "not that future applications would be futile, but that a meaningful application had not yet been made."[42] The Court did not explain when an application will be deemed "meaningful," but did note that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[43]

2. Requirement to Seek Just Compensation in State Court.—According to the Supreme Court's decision in *Hamilton Bank*, for a plaintiff to satisfy the ripeness doctrine when bringing a federal taking claim he or she first must have sought just compensation in state court. When the state provides a procedure for securing compensation, a taking claim is not ripe for decision in federal court until a plaintiff has used the state procedure "and been denied just compensation."[44] The Court based this requirement on cases holding that the federal constitution does not require "pretaking compensation" but is satisfied by reasonable and adequate provision for compensation after a taking has occurred.[45]

3. Avoiding the Ripeness Doctrine.—There is one type of takings challenge that avoids the ripeness doctrine altogether: a claim

40. *See infra* Section III A.
41. 477 U.S. at 350 n. 7.
42. *Id.* at 353 n.8.
43. *Id.* at 353 n.9.
44. 473 U.S. at 195.
45. *Id.* at 196. In the case before it, the Court reviewed eminent domain legislation in Tennessee, where the case arose, and concluded that it authorized an action for compensation in land use cases.

that a regulation on its face and in its entirety (*i.e.*, as it applies to all affected property, including the landowner's) effects a taking.[46] The proper remedy for such a challenge is invalidation of the regulation.[47] However, as the Court noted in *Keystone*, plaintiffs "face an uphill battle in making a facial attack on [a regulation] as a taking."[48] Thus, while such a taking claim may enable a plaintiff to satisfy the requirements for subject matter jurisdiction, the effectiveness of such a claim on the merits may ultimately prove illusory.

B. *Abstention*

The Supreme Court has recognized three principal types of abstention, each articulated in a separate decision of the Court: (1) *Pullman* abstention,[49] (2) *Burford* abstention,[50] and (3) *Younger* abstention.[51]

1. Pullman Abstention.—The Supreme Court first fashioned the abstention doctrine in *Railroad Commission v. Pullman Co.* The case concerned the intervenor complaint of Pullman porters (all of whom were black) against the Texas Railroad Commission, challenging its order requiring Pullman conductors (who were white) to be in charge whenever sleeping cars were operated. The Commission justified its order on the basis of a Texas statute. The Pullman Company argued that the Commission's order not only was unauthorized by that statute, but was violative of the equal protection, due process and commerce clauses of the federal constitution. Commenting on this challenge to state law authority, Justice Frankfurter wrote for the Court:

> The complaint of the Pullman porters undoubtedly tenders a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.[52]

In subsequent decisions interpreting *Pullman*, the Supreme

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46. Keystone Bituminous Coal Assn. v. DeBenedictus, 480 U.S. 470 (1987). *But see* Pennell v. City of San Jose, 485 U.S. 1 (1988).

47. Agins v. Tiburon, 447 U.S. 255, 261 (1979).

48. 480 U.S. at 494.

49. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

50. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

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

52. 312 U.S. at 498.

Court has consistently held that two standards must be met before *Pullman* abstention can be ordered: (1) the state law in question must be unclear; (2) the state law must be subject to an interpretation that will avoid or substantially alter the federal constitutional question. These twin standards were best articulated in *Harman v. Forssenius*.[53] There, the Court stated:

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication . . . . The doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.[54]

If the federal court abstains under the *Pullman* doctrine, the proceeding in the federal court is stayed pending resolution by the plaintiff of the state issues in state court. Provided the plaintiff reserves the right to return to the federal court in advance, and does not "unreservedly" litigate his or her federal claims in state court, the plaintiff may return to the federal court to pursue those remaining federal constitutional claims under section 1983.[55]

The Supreme Court indicated in *Harman v. Forssenius* that the critical consideration in determining the applicability of *Pullman* abstention is whether in fact the state law in question is "uncertain." Even if the state law in question has never been interpreted by a state court, abstention is not warranted if the provision is not fairly subject to a construction that will substantially modify or avoid the federal constitutional questions.[56]

In order to satisfy the second standard of the *Pullman* doctrine, the burden is on a defendant to identify how, in fact, the constitutional issue can be avoided or limited by a state court decision on the state law question. The Supreme court emphasized this point more recently in *Hawaii Housing Authority v. Midkiff*,[57] stating:

> In the abstract, of course, such possibilities always exist. But the

53. 380 U.S. 528 (1965).

54. *Id.* at 534.

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

56. Harman v. Forssenius, 380 U.S. 528 (1965); Chicago v. Atchison T. & S. F. Ry., 357 U.S. 77 (1958); Doud v. Hodge, 350 U.S. 485 (1956). *See also* Toomer v. Witsell, 334 U.S. 385 (1948).

57. 467 U.S. 229 (1984).

> relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction". *Zwickler v. Koota*, 389 U.S. 241, 251 and n.14 (1967).[58]

The judicial policy considerations underlying *Pullman* abstention are related to the fact that, as Justice Frankfurter stated, Texas law was "far from clear."[59] In addition, the Texas decision construing the relevant statutory language did not resolve the matter at issue. Given the judicial policy of avoiding constitutional questions where it is possible to do so, a federal court that seeks to decide state law issues while they are still in an uncertain posture would run a significant risk of deciding such questions erroneously. If the challenged action were held to be incorrectly authorized under state law, then the court would reach the federal constitutional issues unnecessarily. A final decision upholding the action on constitutional grounds would also be erroneous. Conversely, if the federal court should incorrectly hold that the challenged action is not authorized under state law, it will have postponed adjudication of the federal constitutional questions but with the consequence of having enjoined a valid state program. Should the state courts ultimately decide the state law issue differently than the federal court, the federal decision would be subject to reopening.[60]

The section 1983 land use cases in which the courts have considered *Pullman* abstention reflect the fundamental tension between the imperative of carrying out the legislative purposes of the Civil Rights Act of 1871 and the federal courts' intuitive preference to leave land use cases to the state courts. When confronted by alleged civil rights violations in the context of land use cases, the federal courts, without hesitation, have acknowledged that section 1983 cases are the "least likely candidates for abstention."[61] However, as discussed below, the courts' holdings have broadened this judge-

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58. *Id.* at 237.

59. 312 U.S. at 499.

60. *See e.g.*, Lee v. Bickell, 292 U.S. 415 (1934); Glenn v. Field Packing Co., 290 U.S. 177 (1933). *See also* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Doctrine*, 122 U. PA. L. REV. 1071 (1974).

61. Canton v. Spokane School Dist. #81, 498 F.2d 840, 845-46 (9th Cir. 1974) (quoting Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967)).

made exception to the general rule that a federal court should decide a case properly before it.[62]

In those section 1983 land use cases in which the federal courts have invoked *Pullman* abstention, only a minority have involved clearly identified unsettled state law questions.[63] In the majority of the decisions that apply *Pullman* abstention, the courts have not addressed the extent to which the state law question is unsettled, but rather have emphasized the second standard of *Pullman*, namely, that state court adjudication of the state law issues would avoid or substantially alter the federal constitutional questions.[64]

The section 1983 cases in which the federal courts have declined to abstain on *Pullman* grounds fall into three general categories: (1) cases in which the state law in question is clear and would not obviate the need to address the constitutional questions;[65] (2) cases in which there is no state law question at issue;[66] (3) cases which involve specific "conduct," including conspiracy, or discriminatory intent which has allegedly violated a plaintiff's civil rights.[67] The cases which fall into these categories are discussed in the review of the federal circuits in Part III below.

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62. *See infra* Figures 3 and 4, notes 102-259, 275-344, and accompanying text..

63. *See e.g.*, Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984) (authority for state and/or municipal agencies to grant request for sewage treatment facility building permit and the standards to be applied); P.C. Util. Corp. v. Division of Health of Dept. of Health & Rehabilitative Servs., 339 F. Supp. 916 (S.D. Fla. 1972), *aff'd without opinion*, 472 F.2d 1406 (5th Cir. 1973) (constitutionality of town's moratoria ordinances under state statutory provision); Overhill Corp. v. City of Grand Junction, 186 F. Supp. 69 (D.Colo. 1960) (authority of city to adopt and enforce a zoning ordinance under state law or general law).

64. *See e.g.*, C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983); Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975); Muskegon Theatres v. City of Muskegon, 507 F2d. 199 (6th Cir. 1974); Fralin and Waldron, Inc. v. City of Martinsville, Virginia, 493 F.2d 481 (4th Cir. 1974); Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978); Dome Condominium Ass'n v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977); Stallworth v. City of Monroeville, 426 F. Supp. 236 (S.D. Ala. 1976); Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).

65. *See, e.g.*, Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982); Town of Springfield v. State of Vermont Envtl. Bd., 521 F. Supp. 243 (D.Vt. 1981); Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980); Hotel Coamo Springs v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976).

66. *See, e.g.*, Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983); Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971), *aff'd*, 469 F.2d 956 (1st Cir. 1972).

67. *See, e.g.*, Fralin and Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979); Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980), *aff'd* 698 F.2d 368 (9th Cir. 1982); Lodestar Co. v. County of Mono, 639 F. Supp. 1439 (E.D. Cal. 1986).

2. Burford Abstention.—In *Burford v. Sun Oil Co.*,[68] the plaintiff sought to enjoin the enforcement of an order by the Texas Railroad Commission for the drilling of certain wells. The Supreme Court held that deference to the state court was warranted because the state had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, and the exercise of federal court jurisdiction would have an impermissibly disruptive effect on state policy for the management of those fields.[69] Under *Burford* abstention, the federal court does not retain jurisdiction pending resolution of the state court issues, but rather dismisses the case entirely.[70]

Unlike *Pullman* abstention, the judicial policy underlying *Burford* abstention is not premised upon a concern for the consequences of erroneously deciding an unclear state law issue en route to the federal questions. Rather, it is concerned with the "disruptive effect" that federal court intervention could have upon a coherent state system of regulation, the integrity of which transcends the merits of the particular case in question. Writing for the majority in *Colorado River Water Conservation District v. United States*,[71] Justice Brennan explained this judicial policy consideration as follows:

> Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . . . In some cases, however, the state question itself need not be determinative of state policy. It is enough that 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.[72]

Examples of section 1983 land use cases in which the federal courts have relied solely upon *Burford* as a basis for abstention are few. More often, as discussed below, the courts intertwine *Burford*-type considerations with *Pullman* abstention in reaching a decision to abstain, or they may explicitly base their decision on both doc-

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68. 319 U.S. 315 (1943).

69. *Id.* at 317-18. *See also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Alabama Public Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951).

70. *See* Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978); Stallworth v. City of Monroeville, 426 F. Supp. 236 (S.D. Ala. 1976).

71. 424 U.S. 800 (1976).

72. *Id.* at 814.

trines.[73] The reason for the limited number of land use cases in which *Burford* abstention alone has been applied is that zoning and other land use controls are generally not subject to a single source of state judicial or administrative control.[74] However, as discussed below, because of the complexity of land use controls in some jurisdictions, some courts are beginning to find land use cases appropriate for dismissal on the grounds of both *Pullman* and *Burford* abstention.

One substantive area of land use in which *Burford* abstention has been held appropriate is the area involving challenges to eminent domain actions. This substantive area is usually the subject of a state statutory scheme. Because eminent domain is "intimately involved with state perogative," the Supreme Court has cautioned against interference by the federal courts.[75]

3. Younger Abstention.—This abstention doctrine, recognized in the 1971 *Younger* decision,[76] states that a federal court should not intervene by injunctive or declaratory relief in a pending state law enforcement proceeding. *Younger* itself involved a pending state criminal prosecution. Since the 1971 decision, the court has broadened the scope of *Younger* abstention to include certain types of civil cases. The principal difference between *Younger* abstention and *Pullman* and *Burford* abstentions is that the focus of *Younger* is upon the existence of a parallel state proceeding. The controlling principle for *Younger* abstention is whether the federal case involves an effort to enjoin a state judicial proceeding.[77] Under *Younger* abstention, unlike *Pullman* abstention, the case is dismissed rather

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73. *See infra*, notes 338-346 and accompanying text.

74. Heritage Farms v. Solesbury Township, 671 F.2d 743 (3d Cir. 1982); Isthmus Landowners Ass'n v. State of Cal., 601 F.2d 1087 (9th Cir. 1979). *See infra* notes 124-33 and accompanying text. Zoning and related forms of land use controls are an exercise of the police power which is vested in the states. However, very few state legislatures exercise the power of zoning themselves. Instead, by means of state enabling legislation or constitutional provisions, the states have delegated their authority to zone and impose other land use controls to local governments. To date, a few states (notably Florida, Hawaii, New Jersey, California, Oregon, Kentucky, Nebraska and Vermont) have adopted comprehensive planning legislation which requires local governments to link their implementation programs to local comprehensive plans. However, such legislative schemes generally do not provide for state administrative control of local land use planning and regulation programs. *See generally*, D. HAGMAN AND JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (2d ed. 1986).

75. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959). *See also*, Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981).

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

77. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

than stayed.[78]

Section 1983 land use cases in which the federal courts have applied *Younger* abstention are limited to those few instances in which there has been a pending state proceeding involving essentially the same issues as are presented in the federal court proceeding.[79]

C. *Intersection of the Ripeness and Abstention Doctrines*

The ripeness and abstention doctrines are similar in that they both provide ground rules for the exercise of federal court jurisdiction. However, the distinction between these two doctrines is important: the former governs whether a federal court may, under article III of the Constitution, exercise subject matter jurisdiction, while the latter is a judge-made rule by which the court in its discretion, determines whether the court should exercise subject matter jurisdiction in a particular case. Judicial recognition of this distinction has obvious procedural consequences. Ripeness determines whether the court has the power to exercise subject matter jurisdiction. If a matter is determined not to be ripe for adjudication, then there is no need to reach the question of abstention. In the wake of the Supreme Court's recent land use decisions involving ripeness[80] and the taking issue,[81] the combined exclusionary impact of the ripeness doctrine and the abstention doctrine (particularly the *Pullman* abstention doctrine) is becoming apparent. Indeed, the two doctrines intersect at a logical point of concern to a federal court: at the second prong of the ripeness doctrine (*i.e.*, whether the plaintiff has sought "just" compensation through available state procedures), and the "unsettled question

78. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 816 (1976).

79. *See e.g.*, Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981); Central Avenue News v. City of Minot, North Dakota, 651 F.2d 565 (8th Cir. 1981) (pending state court proceeding to enforce zoning and licensing ordinances).

80. *See* discussion of ripeness cases *supra*.

81. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that a Pennsylvania law which required mining companies to retain 50 percent of their coal in the ground to prevent subsidence did not effect a taking of property because the regulation served a valid public safety purpose); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that where the application of a regulation deprives the landowner of all or virtually all beneficial use of the property, mere invalidation of the regulation is not a constitutionally sufficient remedy; compensation must be paid for both permanent and temporary regulatory takings); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that a requirement that landowners grant a public access easement across their property as a condition of building permit approval amounted to a permanent physical invasion and therefore constituted a taking for which compensation was required, and holding further that the purpose of the condition, namely, to protect coastal vistas and ensure public access to the beach did not "substantially advance" a "legitimate state interest.").

of state law" consideration of *Pullman* abstention. This is because the availability of an adequate state remedy for inverse condemnation (an issue of ripeness) can itself become the unsettled question of state law which may warrant abstention by the federal court.

This convergence of these two aspects is illustrated in the recent case of *Northern Virginia Law School v. City of Alexandria*,[82] involving a section 1983 taking claim brought by the law school for the city's refusal to rezone school property from residential to commercial. The district court dismissed the complaint on both ripeness and abstention grounds stating:

> Virginia law . . . provides an inverse condemnation remedy . . . The fact that no Virginia state court has yet decided whether the statutory remedy may be used to redress regulatory takings, as opposed to physical invasions of property, does not preclude the application of the *Williamson* rule to this case. [footnote omitted] Under *Williamson*, the plaintiff bears the burden of demonstrating that the state procedure is inadequate or unavailable. [Citations omitted] The plaintiff here has not met that burden. . . .
>
> The second ground for dismissal—abstention—is closely related to the ripeness issue. *Central to both is the existence of a dispositive state remedy or issue.* . . . [T]he existence of the dispositive and novel issue under Virginia law concerning the meaning of [the state inverse condemnation provision] is a factor that should be given substantial weight in determining whether abstention is appropriate. . . . The Court finds that the principles of both [*Pullman* and *Burford*] cases militate in favor of abstention here.[83]

This convergence of the two doctrines can be expected to appear increasingly in the federal courts' analyses of taking claims in land use cases. The implication of this doctrinal convergence for property owners is that the threshold jurisdictional determination of ripeness will trigger and often reinforce the reasoning of a federal court which believes that it should abstain in land use disputes.

II. Trends Among the Federal Circuits in Applying the Ripeness and Abstention Doctrines to Land Use Cases

A. *An Overview*

In the period since the Supreme Court's decisions on ripeness in *Hamilton Bank* and *MacDonald*, the lower federal courts generally

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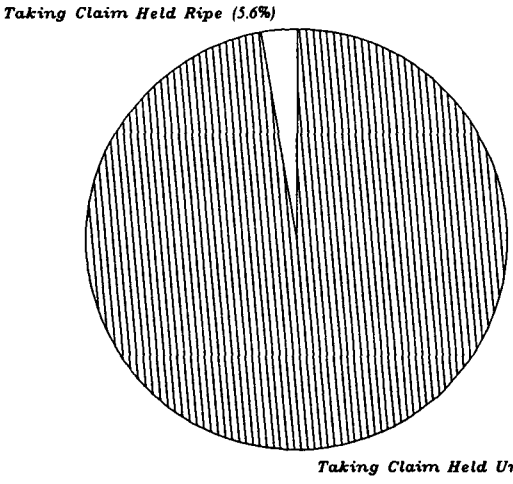
82. 680 F. Supp. 222 (E.D. Va. 1988).
83. *Id.* at 224-25 (emphasis added).

have attempted to refine the ripeness doctrine, particularly the "finality" requirement. The Ninth and Tenth Circuits have been the most active in attempting to apply the ripeness doctrine to landowners' suits, rendering a combined total of 18 ripeness decisions,[84] almost all involving section 1983 claims.[85] Of the remaining circuits, the First, Seventh, and Eighth have been the most active, rendering a total of 10 decisions.[86] A total of 36 ripeness decisions concerning land use have been rendered by the federal district courts since 1983.[87] Of these, plaintiffs have suffered dismissal in approximately 94 percent of the decisions.[88] (Figure 1) Of the cases ordering dismissal, 26 percent have been on based on the finality requirement of the ripeness doctrine;[89] 56 percent have been based upon the plaintiff's failure to utilize available state procedures to seek "just" compensation,[90] and 18 percent of the dismissals were based on both prongs of the ripeness doctrine.[91] (Figure 2)

Figure 1

Federal Court Ripeness Decisions

*All Land Use Cases, 1983–1988**



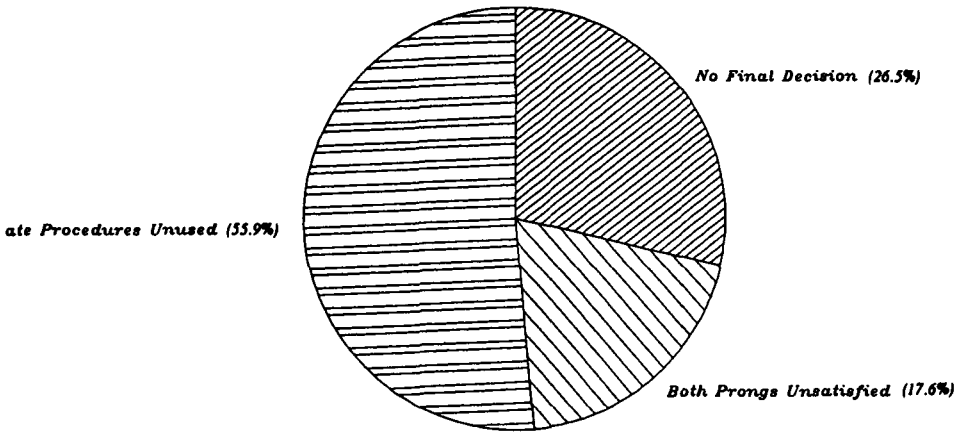
84. *See* appendix at 137-40, figures 1 and 2.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* appendix, at 137-42.
90. *Id.*
91. *See Id.*

* For a listing of specific cases, see appendix at 137.

Figure 2

Reasons for Ripeness Dismissal

*All Land Use Cases, 1983–1988**



In the area of abstention, a review of section 1983 federal court land use actions since 1974 reveals that the courts have chosen to abstain under one or more of the abstention doctrines in close to fifty percent of the cases. (Figure 3)[92] The percentage is about the same for land use cases that involve allegations of constitutional violations. (Figure 4).[93]

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* For a listing of specific cases, see appendix at 140.

92. *See* appendix at 143.

93. *See* appendix at 146. Because, judicial pronouncements notwithstanding, the federal courts appear to apply the principles of abstention to land use cases without particular regard to whether a case is brought as a § 1983 action, the summary of abstention trends within the circuits (presented in Part III B below) has been broadened to include land use cases generally.

Figure 3

Federal Court Abstention Decisions

*All § 1983 Land Use Cases, 1972–1988**

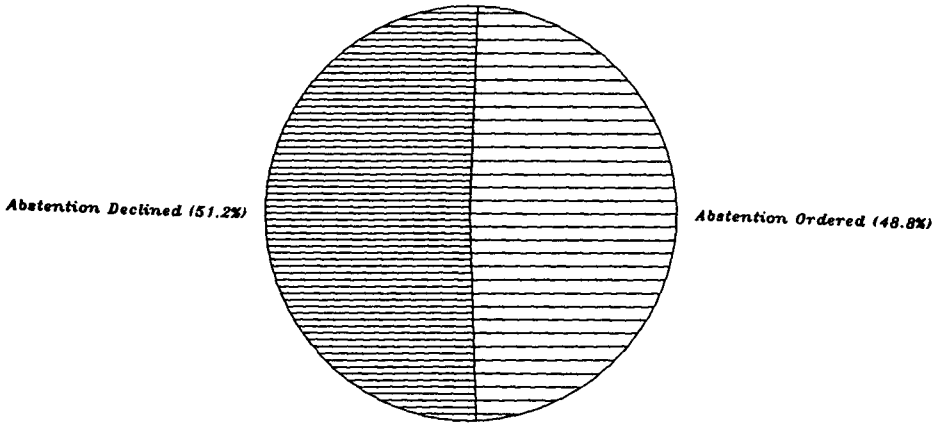
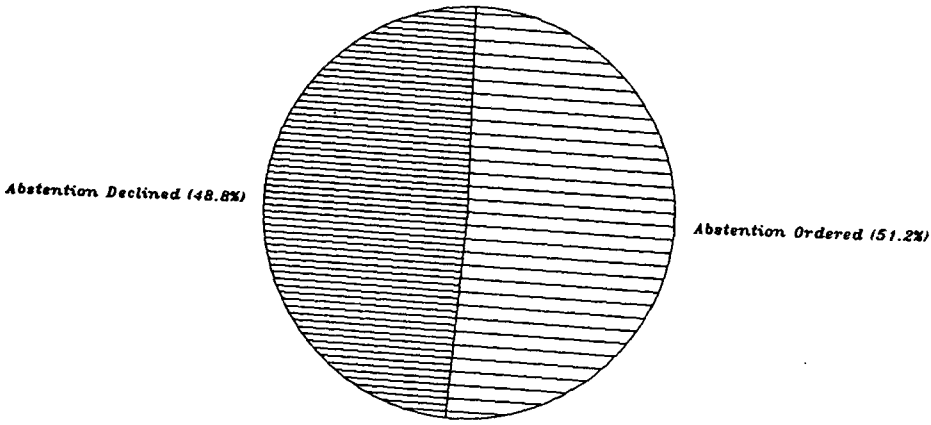


Figure 4

Federal Court Abstention Decisions

*All Land Use Cases, 1972–1988***



* For a listing of specific cases, *see* Appendix at 143.
** For a listing of specific cases, *see* Appendix at 146.

As noted above, the ripeness doctrine has two prongs that correspond to the two questions raised by a takings claim: (1) whether the local government's decision is sufficiently "final" so that a court can decide whether the regulation has gone so far that it is a taking; (2) whether the landowner sought and was denied "just" compensation for the regulatory taking through available state inverse condemnation procedures. It is the second prong of the ripeness doctrine upon which most property owners' takings claims have become impaled.

1. Failure to Utilize Available State Compensation Procedures.—Before even reaching the "finality" question, most lower federal courts have found it a simple matter to dismiss takings claims, because the property owner failed to seek "just" compensation through available state procedures.[94] Even when the state law remedy for seeking "just" compensation is unclear or undeveloped, the courts have generally been unsympathetic and ordered dismissal despite the injustice or hardship caused by such retroactive decisions.[95] The Ninth Circuit noted in *Austin* that the justification for such retroactive dismissals is that lack of ripeness means that the court is without jurisdiction to hear the claim and, therefore, such a jurisdictional ruling, by definition, cannot be prospective only.[96]

2. The Finality Requirement.—The "finality" requirement has been the most troublesome for the lower federal courts to apply. Some judges have openly admitted their difficulty in determining "when enough is enough" under this requirement.[97] None of the judicial pronouncements on finality provide any reliable method for determining when an application is truly "meaningful" and *re*application is not necessary for a takings claim or any other claim to be ripe for consideration. Defining the reapplication requirement of the finality rule for a takings claim may not be possible beyond the partic-

94. *See* Boothe v. Manatee County, 812 F.2d 1372 (11th Cir. 1987); Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985); Jackson Court Condominiums v. City of New Orleans, 665 F. Supp. 1235 (E.D.La. 1987); Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

95. Austin v. City and County of Honolulu, 840 F.2d 678 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 136 (1988); Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987), *aff'd*, 847 F.2d 486 (8th Cir. 1988); Mitchell v. Mills County, 673 F. Supp. 332 (S.D. Iowa 1987); Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).

96. 840 F.2d at 682.

97. *See, e.g.*, Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926, 941 n.18 (D. Hawaii 1986); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

ular facts of each case. However, in a few recent decisions the federal courts have applied the *MacDonald* reapplication requirement more cautiously, underscoring the differences between takings claims and other claims such as substantive due process, procedural due process and equal protection.

The Supreme Court's language in *MacDonald* suggested that the ripeness doctrine applies not only to takings claims, but also to substantive due process, equal protection and procedural due process claims that may accompany the takings claim:

> Whether the inquiry asks if the regulation has "gone too far," or whether it seeks to determine if proferred compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.
>
> *Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.*[98]

Most of the lower federal courts have focused upon the second sentence and, where they have found the taking claim to be unripe, have dismissed substantive due process, equal protection and procedural due process claims as equally unripe.[99]

A "procedural" due process claim raises the question of whether the local government followed constitutionally mandated procedures as to notice and opportunity to be heard in making a regulatory decision. The few federal court decisions that have sought to apply the ripeness doctrine to procedural due process claims have concluded that the final decision requirement applies.[100] These courts reason that it is impossible to evaluate the adequacy of challenged procedures before a plaintiff has availed himself of those procedures.[101] This reasoning is correct under the principles of the ripeness doctrine except in those cases where a plaintiff can demonstrate that the "futility" exception applies. However, the reapplication requirement should never apply. In assessing a procedural due process claim, the

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98. 477 U.S. at 350-351 (emphasis added).

99. *See* Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 775 (1988); Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988); Ochoa Realty v. Faria, 815 F.2d 812 (lst Cir. 1987); Barancik v. Marin County, No. 85-3848, slip op. at 5-6 (N.D. Cal. Mar. 25, 1987); Golemis v. Kirby, 632 F. Supp. 159 (D.R.I. 1985).

100. *See*, Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988); Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 775 (1988).

101. *See, e.g., Kinzli*, 818 F.2d 1449.

courts should examine a local government's specific actions during a particular application process, not the "nature and intensity" of the landowner's development proposal.

B. *The Circuits*

In the following analysis of the application of the ripeness and abstention doctrines within each circuit, the ripeness doctrine is addressed first, as it is the threshold jurisdictional question which should be addressed first by a federal court in order to determine if it has the power to proceed to the merits of a claim.[102]

1. First Circuit.[103]—The ripeness decisions in the First Circuit have all been decided upon the second prong of the ripeness doctrine, namely, the failure of the plaintiff to have sought and been denied "just" compensation for the alleged regulatory taking through available state inverse condemnation procedures.[104] Even when the state law remedy for seeking just compensation is unclear or undeveloped, the Court of Appeals for the First Circuit has been unsympathetic and ordered dismissal. Dismissal has been ordered despite the apparent injustice or hardship caused by such retroactive decisions.[105] The ripeness decisions within this circuit have not distinguished regulatory takings claims from substantive due process claims. For example, in *Golemis*, the plaintiff did not seek damages but limited his claim to declaratory and injunctive relief under a substantive due process theory. In the view of the court, the plaintiff's distinction between remedies was a "periphrastic strawman" —irrelevant to the ripeness question, since "ripeness concerns apply to the prosecution of actions per se, not to a party's choice of remedy."[106]

Where *Pullman* abstention has been applied in land use cases

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102. Unfortunately, not all courts have sought to address ripeness as a preliminary jurisdictional question, which, if answered in the negative, prevents the court from proceeding to the merits. *See* Barancik v. Marin County, No. 85-3848 slip op. (N.D. Cal. Mar. 25, 1987), *aff'd*, Barancik v. Marin County, No. 87-1982 (9th Cir. June 30, 1988), *opinion amended* (April 19, 1989), rehearing denied (June 6, 1989). *See infra* note 99 and accompanying text.

103. The First Circuit includes the states of Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico.

104. *See*, Ochoa Realty Corp. v. Faria, 815 F.2d 812 (lst Cir. 1987); Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (lst Cir. 1987); Golemis v. Kirby, 632 F. Supp. 159 (D.R.I. 1985).

105. *See, e.g.*, Culebras Enter. Corp, 813 F.2d 506 (lst Cir. 1987) (where plaintiff's land was frozen from the years 1975-1984).

106. Golemis, 632 F. Supp. at 164 (paraphrasing Steffel v. Thompson, 415 U.S. 452 (1974)).

by the federal courts within the First Circuit, the courts have been consistent in defining *Pullman* as requiring state court resolution of an unsettled issue of state law that could obviate the need for a decision on the federal claim. In applying the doctrine, the courts have primarily analyzed whether the challenged statute or ordinance is facially ambiguous. If the statute is not ambiguous, they have not abstained.[107]

The First Circuit courts have consistently held that *Burford* abstention should apply only where federal adjudication would disrupt a complex, coherent and comprehensive regulatory system.[108] Despite the readiness of courts in the First Circuit to find lack of subject matter jurisdiction on ripeness grounds, there does not appear to be a significant inclination on the part of the First Circuit to abstain from deciding land use cases absent some unresolved issue of state law, such as the construction of a state enabling statute or the constitutionality of development moratoria.[109] Between 1972 and 1988 courts in the First Circuit ordered abstention in approximately 43 percent of all land use cases, and in 40 percent of the land use cases brought under section 1983.[110]

2. Second Circuit.[111] To date, only one district court in the Second Circuit has applied the ripeness doctrine to a case involving land use, a case in which plaintiff's building permit was revoked for their failure to apply for a certificate of no harassment.[112] That failure, ruled the court, foreclosed the plaintiffs from alleging that the revocation of their permit constitute a final determination sufficient to satisfy the finality requirement of the ripeness doctrine.[113]

The courts of the Second Circuit have decided more land use cases on abstention grounds. The principal abstention doctrine used in the Second Circuit in deciding land use cases has been the *Pullman* doctrine. *Pullman* abstention has been defined within the circuit

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107. *See* Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980); Hotel Coamo Springs v. Hernadez Colon, 426 F. Supp. 664 (D.P.R. 1976). *But cf.*, Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972).

108. *See* Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993, 997 (1st Cir. 1983); Steel Hill Dev., Inc. v. Town of Sanborton, 335 F. Supp. 947, 952 (D.N.H. 1971), *aff'd on other grounds*, 469 F.2d 956 (1st Cir. 1972).

109. *See* Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972). *See also* Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984).

110. *See* appendix at 148-49 and 152, respectively.

111. The Second Circuit includes the states of Connecticut, New York and Vermont.

112. Weissman v. Fruchtman, 700 F. Supp. 746 (S.D.N.Y. 1988).

113. *Id.* at 753-54.

as a doctrine requiring state court resolution of a state law issue in order to obviate the need to decide federal constitutional questions.[114] The federal courts in the Second Circuit have declined to abstain where construction of the statute at issue or the state enabling legislation is not ambiguous.[115] The courts have also refused to abstain where the construction of the ordinance in question would not resolve the federal constitutional issues.[116]

Burford abstention was considered but not applied in *Lerner v. Town of Islip*,[117] In the view of the Court, the zoning in the state had no single source of state, judicial or administrative control.[118] The court in *Lerner* also expressed the view that while some federal courts choose to abstain from zoning cases, "most federal courts decide zoning disputes . . . without referring to the abstention doctrine."[119] Between 1972 and 1988, the courts in the Second Circuit ordered abstention in 50 percent of all land use cases, and in 50 percent of the land use cases brought under section 1983.[120]

3. Third Circuit.[121]—The Third Circuit, to date, has addressed the ripeness issue as applied to land use in only one published decision, *Pace Resources, Inc. v. Shrewsbury Township*,[122] involving a claim for monetary relief after a state court had invalidated as illegal spot zoning the township's rezoning of 37 of plaintiff's 146 acres from industrial to agricultural use and ordered the township to approve or deny the plaintiff's previously submitted plans on the basis of the ordinance in effect prior to the rezoning. Because the plaintiff's taking claim was based upon other aspects of the new ordinance, but it had never applied for development approval under the new ordinance, the court had little difficulty finding that the claim was premature under *Agins v. Tiburon*.[123]

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114. *See* Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974); Lerner v. Town of Islip, 272 F. Supp. 664 (E.D.N.Y. 1967).

115. *See* Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974); Town of Springfield v. State of Vermont Envtl. Bd., 521 F. Supp. 243 (D.Vt. 1981).

116. *See* Hill Constr. Co. v. Connecticut, 366 F. Supp. 737 (D. Conn. 1973).

117. 272 F. Supp. 664, 667 (E.D.N.Y. 1967).

118. *Id.* at 665.

119. *Id.* at 666.

120. *See* appendix at 152 and 156, respectively.

121. The Third Circuit includes the states of Pennsylvania, New Jersey and Delaware.

122. 808 F.2d 1023 (3d Cir. 1987). *See also*, Doerinkel v. Hillsborough Township, No. 86-1823 (D.N.J. May 25, 1988) (Westlaw, DCT database; 1988 WL 54662) (taking claim held unripe for failure to utilize state inverse condemnation procedures).

123. *Id.* at 1029.

There are more cases on abstention within the Third Circuit. However, these cases reveal little consistency in their outcomes. The cases define the *Pullman* doctrine as one requiring abstention where an unsettled question of state law could be resolved that would either moot the federal constitutional question or change the light within which it would be viewed.[124]

In both *Heritage Farms*[125] and *Sixth Camden*,[126] the courts held that *Burford* abstention applies where a case touches on difficult and important state policy questions. However, in neither case did the court decide to abstain. In *Sixth Camden*, the court found no questions of state law before it.[127] In *Heritage Farms*, the court decided that the lack of uniform statewide land use policy demonstrated that there was no threat of disrupting state policy.[128]

In *Amico*, the court held that *Burford* abstention applied to cases "where the subject matter of the action is also highly complex and unique."[129] However, this court refused to abstain on *Burford* grounds because the zoning ordinance in question was, in its view, simple and raised narrow issues.[130]

The inconsistency in the Third Circuit may be due to the fact that the cases, to date, have involved more than straight-forward land use issues. For example, the *Heritage Farms* case involved fraud and conspiracy under § 1983.[131] In *Sixth Camden* and *Hovsons*, there were parallel pending state court actions. In *Bodor v. East Coventry Township*,[132] the court refused to abstain because the town was charging prohibitively high filing fees, which made the administrative remedies at the local level unavailable to the plaintiff. Between 1972 and 1988 the courts in the Third Circuit ordered abstention in 27 percent of all land use cases, and in 22 percent of land

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124. *See* Heritage Farms, Inc. v. Solesbury Township, 671 F.2d 743 (3d Cir. 1982); Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982); Hovsons, Inc. v. Secretary of the Interior, 519 F. Supp. 434 (D.N.J. 1981); Sixth Camden Corp. v. Evesham Township, Burlington County, 420 F. Supp. 709 (D.N.J. 1976); Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).

125. 671 F.2d 743, 746 (3d Cir. 1982).

126. 420 F. Supp. 709, 720 (D.N.J. 1976).

127. 420 F. Supp. at 720.

128. 671 F.2d at 746.

129. 553 F. Supp. at 744 (citing Sante Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 842 (9th Cir. 1979)).

130. *Id.* at 744.

131. 671 F.2d at 748.

132. 325 F. Supp. 1102 (E.D. Pa. 1971)

use cases brought under section 1983.[133]

4. Fourth Circuit.[134] Two land use regulatory cases have been dismissed on ripeness grounds in the Fourth Circuit: *Northern Virginia Law School v. City of Alexandria*,[135] and *Wintercreek Apartments v. City of St. Peters*.[136] In *Northern Virginia Law School*, discussed previously,[137] the school's taking claim was based on a denial of their request to have property rezoned from residential to commercial use. The court dismissed the claim for lack of ripeness because the school had failed to utilize the inverse condemnation remedy provided under Virginia law.[138]

Failure to utilize the available inverse condemnation remedy was also a ground for dismissal in the *Wintercreek Apartments* case.[139] However, in that case the plaintiffs had also failed to revise their development proposal to comply with the requirements of an amendment to the city's zoning ordinance, which was adopted prior to the approval of the plaintiff's proposal. When the city refused to give further consideration to the development plans, the plaintiffs sued, alleging that the amended ordinance effected a taking of their property. Citing *Hamilton Bank*, the *Wintercreek* court reasoned that the plaintiffs had failed to satisfy their finality requirement of the ripeness doctrine because they had not sought a variance which was available under the zoning ordinance.[140]

Similar to the Ninth Circuit, discussed below, there is a strong judicial preference in the Fourth Circuit to abstain in land use cases. The two principal cases which reflect the abstention reasoning within

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133. *See* appendix at 152 and 157, respectively.

134. The Fourth Circuit includes the states of North Carolina; South Carolina; Virginia and West Virginia.

135. 680 F. Supp. 222 (E.D. Va. 1988).

136. 682 F. Supp. 989 (E.D. Mo. 1988). A third case, HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985), involved a claim that a quick-take condemnation procedure was used by the Virginia Department of Housing & Transportation (VDH & T) to acquire property for the private use of another corporation; the court held that until the fee simple interest in the plaintiff's property had been granted by the state court, the defeasible fee interest in the property under the quick-take statute was not a "final" taking under the rule of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). The court went further and held that *Hamilton Bank* was also applicable to the private versus public use issue under the fifth amendment's taking clause. *Id.* at 669. Therefore, until the state court resolved that issue through the available condemnation procedure, the matter was not ripe for adjudication. *Id.*

137. *See supra* notes 82-83 and accompanying text.

138. 680 F. Supp. at 224-25.

139. 682 F. Supp. at 993.

140. *Id.* at 991-93.

the Fourth Circuit are *Fralin and Waldorn, Inc. v. City of Martinsville*[141] and *Kent Island Joint Venture v. Smith*.[142] These cases reflect a judicial tendency to apply the combined reasoning of the *Burford* and the *Pullman* doctrines to reach the decision to abstain. In neither of these cases did the court require that the state law be uncertain or unsettled. The courts in these cases have characterized land use policy as a particularly sensitive local matter. They defer to the state courts' extensive "expertise and experience"[143] with land use matters to determine whether local land use activities are reasonable and otherwise valid under state law and the federal Constitution.[144]

One of the Fourth Circuit's land use decisions that reflect this combined *Pullman-Burford* approach to abstention is *Meredith v. Talbot County*.[145] The case involved a developer's attempt to have development restrictions on a portion of its subdivision waived after the developer had agreed to the restrictions in order to ensure approval before the imposition of a moratorium. The request was denied by the County's Board of Appeals and the developer filed an action in the federal district court seeking compensatory damages for an alleged "taking" of its property. The district court ruled that abstention was required under both the *Pullman* and *Burford* doctrines. The Court of Appeals affirmed, explaining that *Pullman* abstention was proper because the county's decision to impose the development restrictions was based upon a new state environmental protection law for the Chesapeake Bay area which had not yet been interpreted by the Maryland courts.[146] In also upholding abstention under the *Burford* doctrine, the court concluded that "[t]he procedures, programs, statutes, regulations, planning boards and officials involved in the subdivision approval process" were sufficient to "qualify zoning in Talbot County, Maryland as being governed by a complex state regulatory scheme."[147] Between 1972 and 1988, the courts in the Fourth Circuit ordered abstention in 60 percent of all land use cases, and in 40 percent of land use cases brought under

141. 370 F. Supp. 185 (W.D. Va. 1973). *aff'd*, 493 F.2d 481 (4th Cir. 1974).

142. 452 F. Supp. 455 (D. Md. 1978).

143. *Fralin and Waldon*, 370 F. Supp. at 191; *Kent Island*, 452 F. Supp. at 463.

144. *But see* Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978).

145. 828 F.2d 228 (4th Cir. 1987).

146. *Id.* at 232.

147. *Id.*

section 1983.[148]

5. Fifth and Eleventh Circuits.[149] The newly formed Eleventh Circuit has addressed the ripeness issue with the most frequency.[150] It has also further refined the "finality" requirement of the doctrine. However, only three of these cases have involved regulatory taking claims.[151] The Fifth Circuit, while yielding only one ripeness decision to date,[152] has been consistent with courts of the Eleventh Circuit, when analyzing claims for ripeness, in distinguishing between types of claims. For example, in *Carroll v. City of Prattville*[153] the district court reviewed inverse condemnation and substantive due process claims arising out of the city's alleged refusal to rezone the plaintiff's property. The court dismissed the taking claim under the first prong of the ripeness doctrine, namely, plaintiff's failure to utilize Alabama's post-taking remedy for an inverse condemnation action.[154] However, the district court in *Carroll* did not conclude that the prematurity of the taking claim caused the substantive due process claim to be unripe as well. Rather, it considered the claim separately, and denied the city's motion to dismiss for failure to state a claim.[155]

Similarly, in *Jackson Court Condominiums*,[156] which involved a

148. *See* appendix at 153 and 157-58, respecitively.

149. The Fifth Circuit includes the states of Louisiana, Mississippi and Texas. The Eleventh Circuit includes the states of Alabama, Florida and Georgia. The Eleventh Circuit was formed in 1980.

150. Boothe v. Manatee County, 812 F.2d 1372, *reh'g denied*, 818 F.2d 871 (11th Cir. 1987); Anthony v. Franklin County, 799 F.2d 681, reh'g denied, 804 F.2d 681 (11th Cir. 1986); East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n, 662 F. Supp. 1465 (M.D. Ga. 1987).

151. Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987); Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987); Bernstein v. Holland, 657 F. Supp. 233 (M.D. Ga. 1987).

152. Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235 (E.D. La. 1987).

153. 653 F. Supp. 933 (M.D. Ala. 1987).

154. *Id.* at 942. The court also considered the defendant's request that it abstain, but only as to plaintiff's remaining substantive due process claim. It declined to abstain on *Pullman* abstention grounds, noting that the plaintiff was not challenging the authority of the city to zone newly annexed property, but only its exercise of that authority under the substantive due process clause, and therefore there was no unsettled question of state law, the disposition of which would avoid the constitutional issue. *See Id.* at 939-40.

155. *Id.* at 944. *But cf.*, Bernstein v. Holland, 657 F. Supp. 233 (M.D. Ga. 1987) (both taking and substantive due process claims dismissed as premature where plaintiff challenged passage of amendment to zoning ordinance before seeking "variance" from the terms of the ordinance).

156. 665 F. Supp. 1235 (E.D. La. 1987).

challenge on taking, substantive due process and equal protection grounds to an ordinance prohibiting time sharing condominium projects, the District Court for the Eastern District of Alabama dismissed the taking claim on ripeness grounds only.[157]

In contrast to most of the other circuits, the Eleventh Circuit has articulated at least one standard for determining when the "futility" exception to the finality requirement has been satisfied. In *Corn v. City of Lauderdale Lakes*,[158] the challenged ordinances imposed a complete moratorium on the development of the plaintiff's property. "Finality," said the court, "is manifested by a showing that there is no beneficial use to which the property may be put, as determined, for instance, by the request and denial of a variance. . . ."[159] The court held that any request for a variance "would plainly have been futile" because of the moratorium.[160]

One district court in the Eleventh Circuit has applied the reasoning in *Hamilton Bank* to extend the second requirement of the ripeness doctrine—utilizing available state procedures—to procedural due process claims. In *East-Bibb Twiggs Neighborhood Association v. Macon-Bibb Planning & Zoning Commission*,[161] the plaintiffs filed a suit under 42 U.S.C. § 1983 alleging that the county planning & zoning commission's granting of a conditional use permit to the defendant to operate a sanitary land fill in the plaintiffs' neighborhood constituted a denial of procedural due process under the applicable zoning regulations. Because the ordinance provided that any procedural requirements that were not followed by the commission were reviewable in state court, the court held that before the plaintiffs' claim was "ripe" for adjudication in a federal court, the plaintiffs must demonstrate that the "the procedural safeguards set up by the zoning regulations themselves are futile or inadequate as a matter of law."[162]

With respect to the application of the abstention doctrine, there appears to be a tendency within the old Fifth Circuit to abstain automatically from land use cases. The courts of the circuit have de-

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157. *Id.* at 1242, 1250-54. The court also dismissed the other two claims, not because they were unripe, but because each failed to state a claim.

158. 816 F.2d 1514 (11th Cir. 1987).

159. *Id.* at 1516.

160. *Id.* This test is similar to that expressed in *dictum* by the Ninth Circuit. Norco Constr., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986). *See infra* notes 212, 213 and accompanying text.

161. 662 F. Supp. 1465 (M.D. Ga. 1987).

162. *Id.* at 1467.

fined *Pullman* as requiring abstention where a state court could resolve an uncertain question of the state law so as to avoid federal adjudication of a constitutional question.[163] The courts were confronted by state statutes that were subject to interpretation and had yet to be construed by state courts. *Dome* involved Florida's condominium laws, which the court found to be exceptionally important to the state's growth management efforts.[164] In *P.C. Utilities*, Florida's sewage treatment facility permitting laws were at issue, and the court noted that "even the attorney general is unsure" of the interpretation of those laws.[165] These state law circumstances under Florida Law led the courts to abstain in both cases. The courts in this circuit have viewed land use questions as being fundamentally of local concern and therefore outside the competence and supervisory power of the federal courts.

Nasser v. City of Homewood[166] is one of the recent land use decisions that has come from the newly formed Eleventh Circuit. *Nasser* contrasts with the trend of the old Fifth Circuit cases. The court in *Nasser* refused to abstain under *Pullman* abstention because there was no unsettled issue of state law.[167] It also refused to apply *Burford* abstention because the state had provided no single forum for resolving land use disputes and there was no state interest in uniformity that would be disrupted by federal review of zoning ordinances.[168] It appears that *Nasser* will serve as the standard for future abstention decisions in the Eleventh Circuit.[169] Between 1972 and 1988 the courts in the Fifth and Eleventh Circuits ordered abstention in 75 percent of all land use cases, but in none of the land use cases brought under section 1983.[170]

6. Sixth Circuit.[171]—The Sixth Circuit, to date, has addressed the ripeness issue in only one decision, *Four Seasons Apartment v.*

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163. *See* Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Dome Condominium Ass'n v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977); P.C. Util. Corp. v. Division of Health of Dept. of Health & Rehabilitative Services, 339 F. Supp. 916 (S.D. Fla. 1972), *aff'd without opinion*, 472 F.2d 1406 (5th Cir. 1973).

164. 442 F. Supp. at 446-47.

165. 339 F. Supp. at 919.

166. 671 F.2d 432 (11th Cir. 1982).

167. *Id.* at 439.

168. *Id.* at 440.

169. *See* Carroll v. City of Prattville, 653 F. Supp. 933, 940 (M.D. Ala. 1987).

170. *See* appendix at 152 and 156, respectively.

171. The Sixth Circuit includes the states of Kentucky, Michigan, Ohio and Tennessee.

City of Mayfield Heights.[172] The case involved the rescission of an apartment building permit by the city three years after it was issued because of sewage and drainage problems that had developed in the project area. The developers sued under section 1983, seeking a writ of mandamus, declaratory relief and damages for a taking, and alleging a procedural due process violation because the rescission was done without calling a hearing in advance of the notice of rescission. The court dismissed the taking claim as premature under *Williamson* because the plaintiffs had not availed themselves of state procedures to test their right to just compensation.[173] The court, however, did not apply the ripeness test to the procedural due process claim, finding instead that because there was no established state or local policy or procedure governing local building permits, the plaintiffs did not present a valid constitutional claim.[174] The Sixth Circuit decision is one of a handful of ripeness cases involving procedural due process claims in which the courts have addressed the adequacy of such claims separately, without discussing the applicability of the ripeness doctrine to procedural due process.[175]

No one single case in the Sixth Circuit that provides the controlling principles of abstention in land use cases. The cases refer to *Pullman* abstention as abstention where the federal constitutional issues may be mooted or modified by state court interpretation of state law.[176] The decisions in these cases appear to be based more upon a mixture of policies underlying abstention rather than upon specific precedent within the circuit. Between 1972 and 1988, the courts in the Sixth Circuit ordered abstention in 80 percent of all land use cases, and in all land use cases brought under section 1983.[177]

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172. 775 F.2d 150 (6th Cir. 1985).

173. *Id.* at 152.

174. *Id.*

175. *See* Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Jacobs v. City of Minneapolis, No. 4-87-397 (D. Minn. Aug. 4, 1987) (unpublished decision available on WESTLAW, DCT database); Mitchell v. Mills County, 673 F. Supp. 332 (S.D. Iowa 1987), *aff'd*, 847 F.2d 486 (8th Cir. 1988). In those cases in which the federal courts have discussed the applicability of the ripeness doctrine to procedural due process claims, the courts have concluded that the final decision requirement of the doctrine does apply because it is impossible to evaluate the adequacy of challenged procedures before a plaintiff has availed herself of those procedures. *See* Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988); Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified on other grounds*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).

176. *See* Muskegan Theatres v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974); Danish News Co. v. City of Ann Arbor, 517 F. Supp. 86 (E.D. Mich. 1981), *aff'd without opinion*, 751 F.2d 384 (6th Cir. 1984).

177. *See* appendix at 152 and 156, respectively.

7. Seventh Circuit.[178]—The Seventh Circuit appears to have followed the lead of the Ninth Circuit on the ripeness issue, particularly with respect to that circuit's analytical approach to the finality requirement. *Unity Ventures v. County of Lake*,[179] the first antitrust case to result in an actual award of damages by a federal jury (treble damages of $28.5 million), was appealed to the Seventh Circuit following the trial court's granting of the defendants' motion for JNOV. The case involved the alleged conspiracy of the county and certain municipalities to deny sewer service to the property in order to block the plaintiff's development. However, because the plaintiff developer had never in fact made a formal application for a sewer connection, the Seventh Circuit, citing the Ninth Circuit's decision in *Herrington v. County of Sonoma*,[180] dismissed the complaint as premature.[181] In all of their other ripeness decisions, the courts in the Seventh Circuit have dismissed the plaintiffs' taking claims for failure to utilize available state procedures to seek just compensation.[182]

In one of the two circuit court abstention decisions involving land use, *Ahrensfeld v. Stephens*,[183] the court defined two circumstances where "principles of equity, comity and federalism" call for abstention: (1) where there are pending state court proceedings in which the federal claims before the federal court can be promptly adjudicated and (2) where a state court could construe the state statute being attacked in federal court so as to avoid or modify the constitutional questions.[184] The *Ahrensfeld* court abstained because related state proceedings were still pending, and because the state supreme court had not yet issued a dispositive interpretation of the state's eminent domain statutes.[185] The court also cited *Hill v. City of El Paso*[186] for the proposition that the application of zoning ordi-

178. The Seventh Circuit includes the states of Illinois, Indiana and Wisconsin.

179. 841 F.2d 770 (7th Cir. 1988).

180. 834 F.2d 1488 (9th Cir. 1987).

181. 841 F.2d at 774, 775.

182. *See* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988); Manor Healthcare Corp. v. Guzzo, No. 88C 2547 (N.D. Ill. Nov. 14, 1988) (Westlaw, DCT database; 1988 WL 123932); Muscarello v. Village of Hampshire, 644 F. Supp. 1016 (N.D. Ill. 1986); Beachy v. Board of Aviation Comm'rs, 699 F. Supp. 742 (S.D. Ind. 1988)..

183. 528 F.2d 193 (7th Cir. 1975). *See also* American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

184. 528 F.2d at 197.

185. *Id.* at 198-99.

186. 437 F.2d 352, 357 (5th Cir. 1971).

nances is "distinctly a feature of local government . . . outside the general supervisory power of federal courts."[187] By contrast, in *Rasmussen v. City Lake Forest*,[188] the federal district court applied a *Burford*-type analysis but refused to abstain because state law "[did] not appear to coordinate the zoning ordinances of municipalities toward any particular state objectives."[189] Between 1972 and 1988, the courts in the Seventh Circuit ordered abstention in 20 percent of all land use cases and in 50 percent of the land use cases brought under section 1983, also ordered abstention.[190]

8. Eighth Circuit.[191]—The ripeness decisions within the Eighth Circuit[192] are noteworthy in that, in contrast to the decisions in other circuits, the district and circuit court decisions appear to recognize, at least implicitly, if not explicitly, that the fate of a plaintiff's substantive due process, equal protection and procedural due process claims under ripeness analysis is not necessarily the same as that of a plaintiff's taking claim which is subjected to ripeness analysis. In *Littlefield*, the Eighth Circuit held that the plaintiffs' claims were premature both because they had not obtained a final decision and because they had failed to pursue just compensation remedies through available state procedures.[193] However, because the district court had treated the plaintiffs' substantive due process claim alleging arbitrary and capricious action as part of the procedural due process and taking claims and genuine issues of material fact existed, the court held that the plaintiffs had properly stated a claim and remanded to the case to the district court to address the substantive due process claim.[194] The Eighth Circuit also reviewed the procedural due process claim separately on its merits without applying the ripeness doctrine.[195] In other ripeness decisions within the Eighth Circuit, the courts have addressed the plaintiffs'

187. 528 F.2d at 198 n.7.

188. 404 F. Supp. 148 (N.D. Ill. 1975).

189. *Id.* at 154.

190. *See* appendix at 151 and 155, respectively.

191. The Eighth Circuit includes the states of Arkansas, Iowa, Minnesota, Missouri, North Dakota, South Dakota, and Nebraska.

192. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Mitchell v. Mills County, 673 F. Supp. 332 (S.D. Iowa 1987); Jacobs v. City of Minneapolis, No. 4-87-397 (D. Minn. Aug. 4, 1987) (unpublished opinion on WESTLAW, DCT database); JBK, Inc. v. City of Kansas City, 641 F. Supp. 893 (W.D. Mo. 1986).

193. 785 F.2d at 609.

194. *Id.* at 599, 603-10.

195. *Id.* at 603.

non-taking claims apart from the ripeness analysis and, while the courts have often dismissed them for failure to state a claim, they have not lumped them together and dismissed them as one with the taking claim on ripeness grounds.[196]

In addition to declining to apply ripeness as broadly as some other circuits, the Eighth Circuit has also generally declined to abstain in land use cases, although no particular case stands out as a leading case. In *United States v. City of Black Jack*,[197] the court simply stated that it saw "no sound reason upon which to justify denying the plaintiff a federal forum."[198] In *Jim Young Development Corp. v. State Highway Commission*,[199] the court declined to abstain on *Pullman* grounds because the state law had not provided an adequate remedy for the plaintiff's just compensation claim.[200] Both the *Marjak*[201] and *People Tags*[202] cases, in which the courts also declined to abstain, involved first amendment claims, to which courts historically have been reluctant to apply abstention.[203] Between 1972 and 1988, the courts in the Eighth Circuit ordered abstention in 63 percent of all land use cases, but ordered abstention in all of the land use cases brought under section 1983.[204]

9. Ninth Circuit.[205]—The Court of Appeals for the Ninth Circuit has had many opportunities to refine the finality requirement of the ripeness doctrine. However, its decisions have not yet yielded any predictable approach for plaintiff property owners. In *Kinzli v. City of Santa Cruz*,[206] the Ninth Circuit established a disarmingly simple

196. *See* Mitchell v. Mills County, 673 F. Supp. 332 (S.D. Iowa 1987), *aff'd*, 847 F.2d 486 (8th Cir. 1988); Jacobs v. City of Minneapolis, No. 4-87-397 (D.Minn. Aug. 4, 1987) (WESTLAW DCT database); JBK, Inc. v. City of Kansas City, 641 F. Supp. 893 (W.D. Mo. 1986).

197. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

198. *Id.* at 1184.

199. 56 F.R.D. 38 (W.D. Mo. 1971).

200. For cases in which the courts have abstained on the bases of *Pullman* and other abstention principles, *see* Central Avenue News, Inc. v. City of Minot, 651 F.2d 565 (8th Cir. 1981); Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984); Home Builders Ass'n of Greater Kansas City v. City of Kansas City, 379 F. Supp. 1316 (W.D. Mo. 1974).

201. Marjak, Inc. v. Cowling, 626 F. Supp. 522 (W.D. Ark. 1985).

202. People Tags Inc. v. Jackson County Legislature, 636 F. Supp. 1345 (W.D. Mo. 1986).

203. *See* Holt v. City of Maumelle, 647 F. Supp. 1529, 1531 (E.D. Ark. 1986) (distinguishing Marjak Inc. v. Cowling).

204. *See* appendix at 151 and 155-56, respectively.

205. The Ninth Circuit includes the states of Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, and Washington.

206. 818 F.2d 1449, 1454 *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108

formula for determining when a decision is in fact "final." Relying upon *Williamson County Regional Planning Commission v. Hamilton Bank*,[207] the Ninth Circuit held that a final decision requires two occurrences: (1) a rejected development plan; and (2) a denial of a variance.[208] However, the difficulty is not in applying this set formula, but in applying the "futility" exception to this rule. In *Kinzli*, the Ninth Circuit took as its starting point for determining futility the Supreme Court's statement in *MacDonald, Sommer & Frates v. County of Yolo*[209] that a plaintiff property owner must have submitted a "meaningful application" to satisfy the "futility" exception to the ripeness doctrine.[210] The Court in *MacDonald* coupled this statement with the observation that of course "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[211] *Kinzli* then identified disparate tests for futility which the Ninth Circuit had articulated at various times.

In *Norco Construction, Inc v. King County*,[212] for example, the court suggested in *dictum* that the futility exception may apply if it is "clear beyond peradventure that excessive delay in such a final determination [would cause] the present destruction of the property's beneficial use."[213] *Kinzli* also noted that in *American Savings & Loan Association v. County of Marin*,[214] it had suggested that futility might be satisfied where the planning authority had rejected a sufficient number of prior applications.[215] The Ninth Circuit in *American Savings* did not attempt to determine the precise point at which submission is futile but did suggest that the submission and rejection of two plans was enough for ripeness in *Penn Cent. Transp. Co. v. New York City*.[216] Ultimately, the court in *Kinzli* was not required to consider the futility exception because the plaintiffs had abandoned their application early on and thus did not satisfy the

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S.Ct. 775 (1988).

207. 473 U.S. 172 (1985).

208. *Kinzli* at 1454. The Seventh Circuit has also adopted this approach. *See*, Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988).

209. 477 U.S. 340 (1986).

210. 818 F.2d at 1455.

211. 477 U.S. at 353 n.9.

212. 801 F.2d 1143 (9th Cir. 1986).

213. *Id.* at 1145.

214. 653 F.2d 364 (9th Cir. 1981).

215. 818 F.2d at 1454.

216. 438 U.S. 104 (1978).

requirement of a "meaningful" application.[217]

After the *Kinzli* case, the Ninth Circuit decided *Herrington v. Sonoma County*,[218] where the plaintiffs had initially alleged an unconstitutional taking but then abandoned their takings claim at trial. The court held that the reapplication requirement of the ripeness doctrine was irrelevant to plaintiffs' substantive due process and equal protection claims. The Court, in summary, reasoned that there are three important distinctions between substantive due process and equal protection claims, and a takings claim: First, although both taking claims and substantive due process claims involve a determination of whether the contested action was a reasonable and proper exercise of police power, the test for reasonableness under the takings clause is less deferential to the local government's decision making authority than the test for reasonableness under substantive due process.[219] Second, a government's regulatory action may be a legitimate exercise of the police power and still constitute a taking. Proof that a regulatory decision "goes too far" does not require a showing that the decision is arbitrary or irrational.[220] Third, unlike a damages award from a taking claim for inverse condemnation, a damages award, if appropriate under a substantive due process claim, does not necessarily cover the period of time during which the property owner was denied use of the property.[221]

Substantive due process and equal protection claims challenge the rationality of a regulatory decision and do not require proof that *all* use of a landowner's land has been denied. The *Herrington* court reasoned that the plaintiff's claims did not require speculation as to what forms of less intensive development might have been permitted by the local government.[222] To date, only a few federal courts in the other circuits have declined to apply the reapplication requirement to substantive due process and equal protection claims.[223]

Unfortunately, after making this credible attempt to address the scope and relevance of the reapplication requirement to non-taking

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217. *See also* Lake Nacimiento Ranch Co. v. San Luis Obispo County, 830 F.2d 977, 980 (9th Cir. 1987) (informal application did not constitute a "meaningful application" for purposes of the futility exception).

218. 834 F.2d 1488 (9th Cir. 1987).

219. *Id.* at 1498 n.7.

220. *Id.*

221. *Id.*

222. *Id.* at 1498, 1499.

223. *See* Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987); Oberndorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

claims, the Herrington court, upon petition for rehearing, retreated from the position it had articulated. In an amended opinion, the panel eliminated the analysis summarized above and in its stead substituted the statement: "Our decisions in this area have also clarified that we will apply the same ripeness standards to equal protection and substantive due process claims."[224] The court's amended opinion leaves uncertain the relevance of the reapplication requirement of the finality doctrine in cases involving substantive due process and equal protection claims only.

This doctrinal uncertainty within the Ninth Circuit was compounded seven days after the Herrington panel issued its amended opinion, when another panel, citing to the rationale of the original Herrington decision, emphasized that there is a different finality rule for substantive due process claims. In *Bateson v. Geisse*,[225] the Ninth Circuit panel affirmed the district court's determination that the reapplication requirement is not relevant to a substantive due process claim, stating: "A substantive due process claim does not require proof that all use of the property has been denied, *Herrington v. County of Sonoma*, 834 F.2d 1488, 1498 (9th Cir. 1988), but rather that the interference with property rights was irrational or arbitrary. Usuray v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed 2d 752 (1976)."[226]

Although the decisions of different Ninth Circuit panels have left the scope of the reapplication requirement under the finality doctrine unclarified, the Ninth Circuit, in *Hoehne v. County of San Benito*,[227] did give some further meaning to the "futility" exception to that requirement. In *Hoehne*, the court, for the first time, gave weight to evidence indicating that the local government's negative attitude towards the plaintiffs' development proposal would have made reapplication an " 'idle and futile act' "[228] The county board of supervisors, concluded the court, had "sent a clear and, we believe, final signal announcing their views as to the acceptable use of the property . . . and [that] the supervisors had amended the General Plan in a manner clearly and unambiguously adverse to the applica-

224. Herrington v. County of Sonoma, 857 F.2d 567, 569, (9th Cir. 1988).

225. 857 F.2d 1300 (9th Cir. 1988).

226. *Id.* at 1303.

227. 870 F.2d 529 (9th Cir. 1989).

228. *Id.* at 535, quoting Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987).

tion of the landowners."[229] The court's analysis suggests that the futility exception to the reapplication requirement can be satisfied where the facts demonstrate that a local government, by its acts, gives "the strongest possible, if not irrefutable, indication that [it] is opposed" to the landowner's proposal.[230]

In contrast to the approach of the other circuits to *Pullman* abstention,[231] the Ninth Circuit has developed a three-part test. As articulated in *Canton v. Spokane School Dist. #81*,[232] the three elements are: (1) the complaint must touch a sensitive area of social policy into which the Federal Courts should not enter unless there is no alternative to adjudication; (2) a definitive ruling on the State issues by a State Court could obviate the need for constitutional adjudication by the Federal Court; and (3) the proper resolution of potentially determinative State law issue is uncertain.[233]

Regarding the first prong of the *Canton* test for *Pullman* abstention, the Ninth Circuit has held that "land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention."[234] The fact that the action involving land use planning is based on 42 U.S.C. §1983 and alleges civil rights violations does not alter the court's perception that land use cases involve a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.[235]

With respect to the second and third elements of the *Canton* test of *Pullman* abstention, the Ninth Circuit has emphasized that "it is crucial that the uncertainty in the state law be such that construction of it by the state courts might obviate, or at least delimit, decision of the federal (constitutional) question."[236] In practice, the federal courts within the Ninth Circuit have not tended to delve very deeply into how and why particular state law may be uncertain or how it would, in fact, obviate or alter the federal constitutional ques-

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229. *Id.*

230. *Id.* See also Barancik v. Marin County, No. 87-1982 (9th Cir. June 30, 1988), opinion amended (April 19, 1989) reh'g denied (June 6, 1989).

231. *See infra* note 342 and accompanying text.

232. 498 F.2d 840 (9th Cir. 1974).

233. *Id.* at 845. Recently, a federal district court in the Fourth Circuit applied the *Canton* formula in deciding a motion to abstain. *See* Northern Virginia Law School v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

234. Kollsman v. City of Los Angeles, 565 F. Supp. (C.D. Cal. 1983), *vacated* 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

235. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983); Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976).

236. Canton v. Spokane School Dist. #81, 498 F.2d 840, 845 (9th Cir. 1976).

tion. The result has been that in a significant percentage of the cases, the federal courts within the Ninth Circuit have abstained from deciding land use questions.[237] In the few land use cases in which the Ninth Circuit courts have declined to abstain, either the state law was determined to be absolutely clear,[238] or the case concerned allegations of malicious conduct on the part of the local government officials.[239] Between 1972 and 1988, the courts in the Ninth Circuit ordered abstention in 57 percent of all land use cases, and in 55 percent of land use cases brought under section 1983.[240]

10. Tenth Circuit.[241]—Of the ripeness decisions within the Tenth Circuit,[242] the *Oberndorf* and *Landmark Land Company of Oklahoma* cases are noteworthy for the distinctions which the courts made in their application of the ripeness doctrine to non-taking claims. In *Oberndorf*, the court declined to dismiss on grounds of ripeness a civil rights claim alleging that a city-approved urban renewal plan constituted a fifth amendment taking and a violation of plaintiffs' substantive due process and equal protection rights under the fourteenth amendment.[243] It was of critical importance that the plaintiffs in this case did not seek a just compensation remedy, but rather sought damages under section 1983 for defendants' alleged interference with their property rights through a series of invalid and fraudulent actions taken in bad faith under color of state law.[244] For this reason, the court noted, if the plaintiffs were forced to execute their state law remedy they "would be playing right into the scheme

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237. *See e.g.*, Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); Kollsman v. City of Los Angeles, *supra*; C-Y Dev. Co. v. City of Redlands, 737 F.2d 830 (9th Cir. 1984), *cert. denied* 105 S.Ct. 1179 (1985); Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979); Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978); Newport Invs. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977); Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976).

238. Midkiff v. Tom., 702 F.2d 788 (9th Cir. 1981).

239. Lodestar Co. v. County of Mono, 639 F. Supp. 1439 (E.D. Cal. 1986); Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

240. *See* appendix at 150-51, 54.

241. The Tenth Circuit includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

242. Landmark Land Co. v. Buchanan, Nos. 85-2458, 85-2538 (10th Cir. Nov. 30, 1988) (Westlaw, DCT database; 1988 WL 126469); Amwest Investments v. City of Aurora, 701 F. Supp. 1508 (D. Colo. 1988). Oberndorf v. City and County of Denver, 653 F. Supp. 304 (D. Colo. 1986); Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).

243. *Oberndorf*, 653 F. Supp. at 311.

244. 653 F. Supp. at 308.

defendants [had] allegedly constructed."[245] The court therefore reasoned that "[t]here are no further steps available to plaintiffs which might relieve them of the burdens created by the Urban Renewal Plan."[246] It is this perception of futility which appears, in part, to have guided the court in its pronouncement on ripeness, and refusal to dismiss the taking claim. However, in explaining its denial of defendants' motion to dismiss, the court also provided the rationale for why the substantive due process and procedural due process claims were not rendered premature:

> Plaintiffs repeat their argument that they are *not* asserting their property has been taken without the payment of just compensation. As a result, a condemnation proceeding will not provide adequate relief. Further, there is a *present* injury as a proximate result of defendants' conduct, irrespective of the fact that a condemnation proceeding has not yet been instituted. . . .
>
> My statements in *Upah* [*v. Thorton Development Authority*] concerning ripeness of these claims, are applicable to this action. Accordingly, defendants' motion with regard to this argument is denied:
>
> > Defendants' equation of a taking with a condemnation ignores cases which have, for example, stated that unreasonable government regulation may constitute a taking in some instances [citations omitted]. Plaintiff has alleged such unreasonable government regulation in this case. Additionally, defendants have neglected plaintiff's claims for *due process violations which have already occurred*. . . . In the present case, . . . plaintiff's allegations do not rest on the outcome of the condemnation action. Rather plaintiff has asserted *claims based on actions which defendants have allegedly already taken and which purportedly violate plaintiff's rights*. Accordingly, defendants' motion to dismiss for lack of jurisdiction, on the ground that plaintiff's claims are not ripe is denied.[247]

In *Landmark Land Company of Oklahoma*, although the court held that Landmark's substantive due process equal protection claims must "follow the takings claim out the courthouse door because each centrally involved the issue of deprivation."[248] it declined

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245. *Id.*

246. *Id.*

247. *Id.* at 311 (*quoting* Upah v. Thornton Dev. Auth., 632 F. Supp. 1279, 1281 (D. Colo. 1987)) (emphasis added).

248. Landmark Land Co. v. Buchanan, at 12-13 of 21 (Westlaw, Allfeds).

to dismiss the procedural due process claim. Citing the Eighth Circuit's decision in *Littlefield v. City of Afton*,[249] the court reasoned that even though the city's refusal to issue permits "[did] not dictate the permitted level of development with sufficient finality," the city could not withhold the permits without affording Landmark Land due process. Hence, the procedural due process claim could not be dismissed as unripe.[250]

There have been three land use abstention decisions in the Tenth Circuit: *City of Moore v. Atchison, Topeka & Santa Fe Railway Co.*,[251] *Overhill Corporation v. City of Grand Junction*,[252] and *Oberndorf v. City of Denver*, discussed above with reference to ripeness.[253] In *Oberndorf*, the court, with brief discussion, denied the defendants' motion to abstain under the *Pullman* doctrine, seemingly because the state constitutional issues were unambiguous as to the civil rights claim and nonexistent as to the antitrust claims.[254] The earlier cases, *City of Moore* and *Overhill* address *Pullman* doctrine more fully. However, each case defines the *Pullman* doctrine somewhat differently. *City of Moore* defined the *Pullman* doctrine as requiring abstention where a state court's resolution of an unsettled question of state law might avoid or modify the federal constitutional issue. There, the court refused to abstain where there were no unsettled state law issues and the constitutional claim would not be affected by an interpretation of state law.[255] However, in *Overhill*, the court defined *Pullman* as requiring abstention where a federal court would be adjudicating the constitutionality of ambiguous state enactment before the state courts had an opportunity to interpret them. The *Overhill* court abstained because it was not clear that the ordinance was valid under the state constitution enabling legislation.[256]

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249. 785 F.2d 596, 599-603 (8th Cir. 1986).

250. *Landmark Land*, at 15.

251. 699 F.2d 507 (10th Cir. 1983).

252. 186 F. Supp. 69 (D. Colo. 1960).

253. In a fourth case, American Booksellers Ass'n v. Schiff, 649 F. Supp. 1009 (N.D.M. 1986), involving a challenge to a state statute prohibiting retail display of sexually oriented material harmful to minors, the court devoted a lengthy footnote to a discussion of both *Pullman* and *Younger* abstention. After concluding the *Younger* abstention was inapplicable to the case before it, the court then declined to reach the question of whether *Pullman* abstention was appropriate because it decided to dismiss the case for lack of jurisdiction. *See id.* at 1013 n.5.

254. 653 F. Supp. at 312.

255. 699 F.2d at 510.

256. 186 F. Supp at 73. Because the *Overhill* case was decided in 1960, it is not included in the statistical analysis presented in Figures 5 and 6, *infra*.

In sum, of the three land use cases in the Tenth Circuit in which the court decided the abstention question, only one case, *Overhill*, a non-section 1983 case, resulted in abstention.

11. D.C. Circuit.[257]—Only one case involving land use has been decided on abstention grounds. In *Silverman v. Barry*,[258] the Circuit Court defined the *Pullman* doctrine as applicable where an unsettled question of local law whose resolution might avoid or modify a decision on the constitutional question is present. The court defined *Burford* abstention as involving difficult questions of local law bearing on substantially important policy problems. Under the facts of the case, the court declined to abstain because the ordinance at issue was clear. With respect to *Burford*, the court stated that abstention should not be based solely on sensitivity and the notion of localism since federal courts "routinely decide local matters of great sensitivity."[259]

C. *The Implications*

The circuit by circuit summary analysis indicates that there are significant differences among the federal circuits, not only in their analytical approaches to the ripeness and abstention doctrines, but also in the frequency and scope of their application of the two doctrines in land use cases, particularly as to actions brought under 42 U.S.C. § 1983. The ripeness doctrine, as the latest of the two doctrines to be applied in the context of land use, is still evolving. As summarized above in figure number 2, however, there is more uniformity among the circuits in their application of this doctrine. This is primarily because so many plaintiffs with takings claims had not utilized available state procedures at the time of the Supreme Court's pronouncements on ripeness in 1985 and 1986.[260] Because of the retroactive subject matter jurisdictional bar created by the Supreme Court's ripeness rule, most lower federal courts dismissed cases without having to reach the more troublesome part of ripeness, namely, whether the plaintiff had obtained a "final" decision. Virtually all of these dismissed complaints were brought under 42 U.S.C. § 1983.[261]

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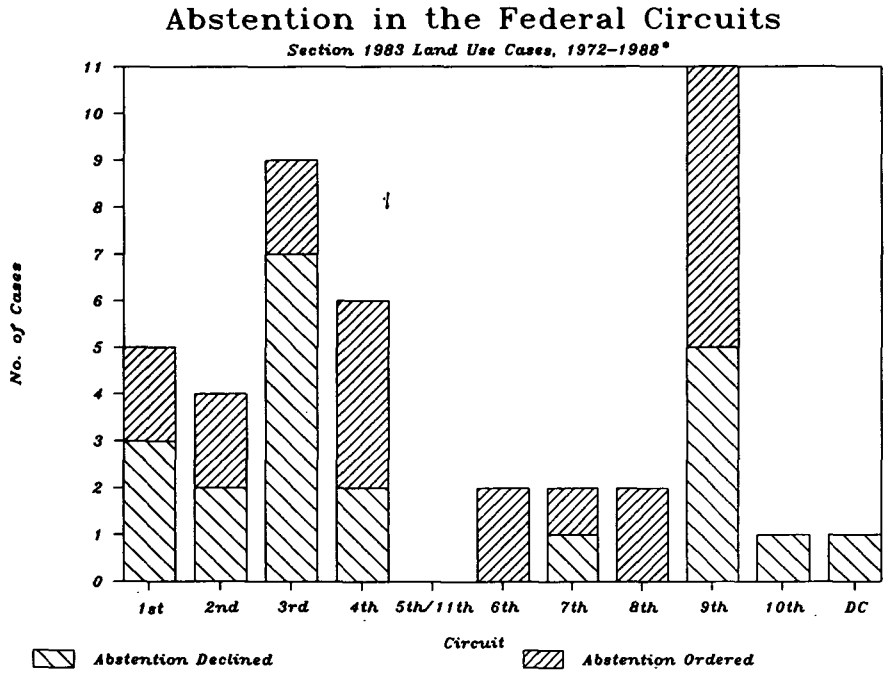
257. The D.C. Circuit has jurisdiction over the District of Columbia solely.
258. 727 F.2d 1121 (D.C. Cir. 1984).
259. *Id.* at 1124 n.4.
260. *See* appendix at 140.
261. *See* appendix at 137.

It is the abstention doctrine, however, which reveals the greatest discrepancy among the circuits. Figure 5 below presents a comparison of the circuits' section 1983 decisions involving the abstention issue. It indicates that except for the First, Third and Tenth Circuits and the D.C. Circuit, the federal courts have abstained in 50 percent or more of the land use cases brought under section 1983.

Figure 5



This outcome, contrary to the Supreme Court's admonition that abstention is a narrow exception to the general rule,[262] indicates that the exception has become the rule at least 50 percent of the time. Indeed, as illustrated in Figure 6 below, when the analysis of the abstention issue is broadened to include all land use cases, the fre-

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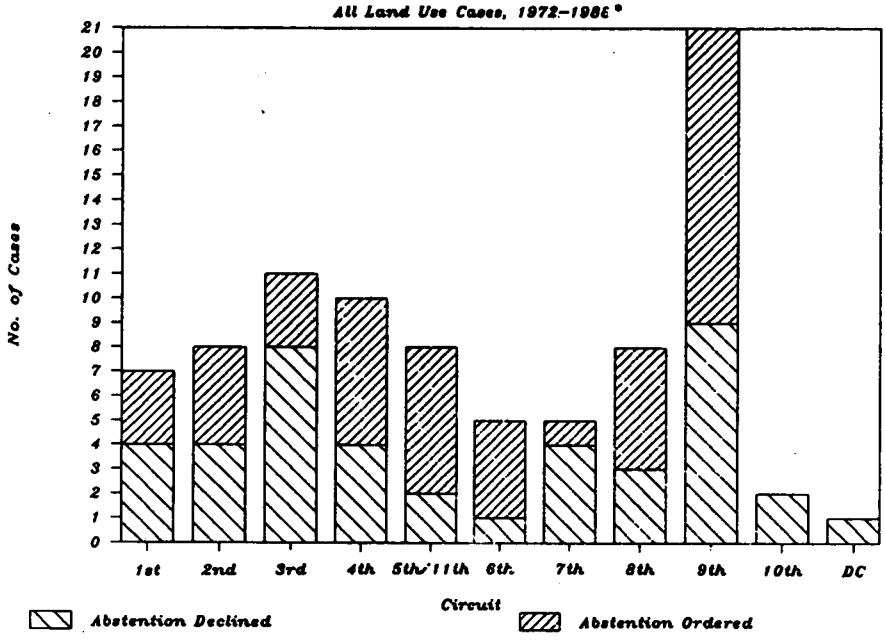
* For a listing of cases, see appendix at 152.

262. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

quency of court-ordered abstention within most of the circuits increases.[263]

Figure 6

Abstention in the Federal Circuits



The explanation most frequently given for this state of affairs in federal civil rights litigation involving land use is that the federal courts are reluctant to second-guess the decisions of local legislative and administrative bodies, particularly in an area that is traditionally of local concern and to which state courts are more accustomed than the federal courts. However, the conclusion that federal court deference to state courts in land use matters is warranted by virtue of the state courts' greater familiarity with local conditions is not supported in fact nor theory.[264] Such an explanation for federal court

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* For a listing of specific cases, see appendix at 156.

263. *See* appendix at 152 and 156, respectively.

264. The United States Code of Judiciary and Judicial Procedure provides that every federal district court judge must be a resident of the state in which he or she sits. *See* 28

deference does not comport with the proper rationale for *Pullman* abstention, which rests upon the existence of an unsettled question of general state law. Nor does it conform to *Burford* abstention, which was premised upon a complex, coherent and comprehensive state regulatory scheme. Despite the lack of comprehensive regulatory schemes of land use control in most state jurisdictions,[265] and, in many instances, the absence of any unsettled question of general state law, the federal courts nevertheless have invoked the rationales of these two abstention doctrines and ordered abstention in 50 percent of the cases presented.[266] In the process, the courts, particularly those within the Fourth and Ninth Circuits, have ignored and distorted the original tests for these types of abstention.[267] This misuse of abstention reflects a disregard for the fundamental purpose of 42 U.S.C. § 1983 and jeopardizes the future use of section 1983 by property owners as an avenue of relief for deprivations of constitutional rights.

III. Pitfalls for Property Owners

The developments in the federal caselaw on ripeness and abstention have not been salutary for property owners who seek redress of violations of their constitutional rights in federal court. The following analysis outlines some of the principal problem areas for property owners under the ripeness and abstention doctrines, and assesses the validity of various judicial positions that have created these problems.

A. *Ripeness*

As it has evolved to date, the ripeness doctrine presents significant obstacles and pitfalls for property owners that arise in the development approval process and upon judicial review.

U.S.C. § 134(b). Moreover, if, for example, an injunction was to be granted as one of the remedies in the federal adjudication, it is established procedure in the federal courts to allow subsequent state determinations to override any continuing injunction. A federal court can subject its equitable decree to reopening if the state court later reaches an inconsistent construction of an underlying question of state law. *See, e.g.*, Lee v. Bickell, 292 U.S. 415, 425-26 (1934); Glenn v. Field Packing Co., 290 U.S. 177 (1933).

265. The states of Florida, Hawaii, and Oregon have state comprehensive planning acts. California also has enacted various statutes governing aspects of land use, particularly in the area of environmental legislation. However, the regulations of even these states do not exhibit the comprehensiveness and coherency contemplated by the Court in *Burford*.

266. *See* appendix at 152 and 156, respectively.

267. *See infra*, notes 292-335 and accompanying text.

1. Obstacles During the Development Approval Process.—Because of the finality requirement, a landowner must have the financial staying power, not only to submit various proposals for "lesser" intensities than the use originally proposed, but also to submit proposals for whatever other uses could conceivably be permitted on the site under the local zoning ordinance. The ripeness doctrine also invites local governments to create more complicated and time-consuming review and approval processes. Finally, the doctrine is an open invitation for some local government officials to do mischief. Unscrupulous officials can easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed.

If the local government repeatedly turns down what the landowner believes are meaningful applications for development, the landowner may have no alternative but to challenge the government's position in court. However, even before the landowner challenges the denial of development approval as a taking of property, he must first satisfy the second prong of the ripeness doctrine and seek "just" compensation through available state procedures.

2. Pitfalls Upon Judicial Review.—If the federal courts are to apply the finality requirement reasonably, they must find an appropriate method for determining a local government's position on the proper nature and intensity of development—the critical basis for determining whether or not a particular project may be developed (*i.e.*, whether or not the project conforms to zoning and planning standards). Attempting to extract legislative intent from a pattern of applications and denials for certain projects is imprecise and unsound. The court should consider only the most relevant primary sources, including site feasibility studies, statements by officials before and during the application process, and declarations of local land use policies and regulations.

Properly applied, the ripeness doctrine should be used by the court to determine if a land use claim has matured sufficiently to warrant a decision on the merits. Ripeness determinations are based on the article III mandate of the Constitution that there be an actual "case or controversy" and on judicial policy considerations.[268] It is inappropriate for a court to adjudicate the merits of such a claim by trial or by means of summary judgment if it determines that a claim

268. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3532 (2d ed. 1984).

is premature. Such an exercise of jurisdiction is beyond the power of the court under article III. If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.[269]

Unfortunately, some lower federal courts have granted a motion for summary judgment in conjunction with a dismissal on grounds of ripeness.[270] Such a ruling works an injustice upon a plaintiff by causing his or her claim to be merged or barred for purposes of *res judicata*.[271] Some other courts, however, have concluded that it is inappropriate to reach the merits of a claim once it has been determined to be unripe for judicial review.[272]

3. Implication for Future Taking Claims.—Because the ripeness doctrine poses such a formidable obstacle to taking claims, it can be expected that landowners will no longer include a takings claim in their federal court complaints. Instead, if the facts permit, they will base their cases on such other constitutional grounds as substantive due process, procedural due process, and equal protection. If a plaintiff landowner attempts to join these separate constitutional claims with a takings claim, the majority of the federal court decisions indicate that, even where an admittedly "final" decision on an application has been made, a federal court will likely dismiss the entire complaint if the landowner has failed to seek approval of a lesser intensity of use or an alternative use.[273] If a landowner is caught in the middle, having filed his or her complaint during the period of the Supreme Court's ripeness decisions in *Hamilton Bank* and *MacDonald*, he or she may be well advised to abandon the takings claim before trial, or, if necessary, on appeal.[274]

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269. *See* C. WRIGHT, A. MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §§ 2712, 2713 (2d ed. 1984).

270. Barancik v. Marin County, No. 85-3848 slip op. (N.D. Cal. Mar. 25 1987), *aff'd*, Barancik v. Marin County, No. 87-1982 (9th Cir. 1988).

271. WRIGHT, MILLER & KANE, *supra* note 255, § 2712.

272. *Cf.* Littlefield v. City of Afton, 785 F.2d 596, 599 (8th Cir. 1986); Union Pacific R.R. v. Idaho, 654 F. Supp. 1236, 1244, *modified*, 663 F. Supp. 75, 77 (D. Idaho 1987); Bernstein v. Holland, 657 F. Supp. 233, 235 (M.D. Ga. 1987).

273. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

274. Two cases to succeed in this approach to date are Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987) (taking claim abandoned at trial). Barancik v. Marin County, No. 87-1982 (June 30, 1988) *opinion amended* April 19, 1989 (taking claim abandoned on appeal of district court order granting summary judgment). *See generally*, Mandelker and Blaesser, "Applying the Ripeness Doctrine in Federal Land Use Litigation," 11 Zoning & Plan. L. Rep. 49 (July-Aug. 1988).

B. *Abstention*

The doctrine of abstention was established by the Supreme Court in *Railroad Commission of Texas v. Pullman Co.*[275] as a very narrow exception to the general obligation of the federal judiciary to hear and decide cases properly brought before it. Chief Justice John Marshall expressed this proposition in *dictum* in *Cohens v. Virginia*,[276] stating:

> The Judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution.[277]

Since *Pullman*, the Supreme Court has continued to emphasize that abstention is justified only in "narrowly limited special circumstances."[278] Otherwise, the federal courts have an obligation to exercise their vested jurisdiction. *Pullman* abstention is appropriate only where a question of general state law is uncertain and abstention will serve to avoid a potentially erroneous construction of the state law by the federal court.[279] In light of the outcomes on the abstention issue in federal land use cases, as summarized above, it is difficult to escape the conclusion that the federal courts have lost sight of this fundamental obligation, particularly in land use cases brought under 42 U.S.C. § 1983.

1. The Exception Restated.—In *Gibson v. Berryhill*,[280] the Supreme Court stated: "[W]hen confronted with issues of Constitutional dimension which *implicate or depend upon unsettled questions of state law*, a federal court ought to abstain and stay its proceedings until *those state law questions* are definitively resolved."[281] In *United States v. Livingston*,[282] the Court observed:

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275. 312 U.S. 496 (1941).

276. 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.).

277. *Id.* at 404.

278. Zwickler v. Koota, 389 U.S. 241, 248 (1967). *See also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972).

279. *See* Harmon v. Forssenius 380 U.S. 528, 534 (1965).

280. 411 U.S. 564 (1973).

281. *Id.* at 574 (emphasis added).

282. 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd sub nom.* 364 U.S. 281 (1960).

> Regard for the interest and sovereignty of the state and the reluctance needlessly to adjudicate Constitutional issues may require federal district court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws *requiring construction.*[283]

If there are no unsettled questions of state law, then abstention is improper. Even where a particular issue has not been addressed by the state courts, abstention is improper if the resolution of the state law question is certain from other decisions or sources.[284] Nor is abstention justified where resolution of a federal question may result in the overturning of state policy.[285] Simply put, abstention is "the exception, not the rule."[286]

In order for *Pullman* abstention to be appropriate: (1) the state law in question must be unclear; and (2) the state law must be subject to an interpretation that will avoid the federal Constitutional question.[287] A federal court, to invoke abstention, must identify with particularity the issues that are critical to the outcome of the federal litigation and involve questions of state law that are *actually unclear.*[288] In *Hawaii Housing Authority v. Midkiff*,[289] the Supreme Court rejected the suggestion that *Pullman* abstention can be founded on an abstract suspicion of uncertainty or on a theoretical possibility that state court adjudication could obviate the need to reach a federal question:

> In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler v. Koota*, 389 U.S. 241, 251, and n. 14 (1967).[290]

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283. *Id.* at 12 (emphasis added). *See also* Harris County Comm'rs Court v. Moore, 420 U.S. 77, 80-87 (1975); Zwickler v. Koota, 389 U.S. 241 (1967).

284. Harman v. Forssenius, 380 U.S. 528, 534-35 (1965); Meredith v. Winterhaven, 320 U.S. 228, 236-37 (1943).

285. Zablocki v. Redhail, 434 U.S. 374, 379-80 n.5 (1978).

286. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

287. Zwickler v. Koota, 389 U.S. 241, 251 n.14 (1967).

288. *See* Harman v. Forssensius, 380 U.S. at 534; Kollsman v. City of Los Angeles, 737 F.2d 830, 839 (1984) (Reinhardt, J., dissenting).

289. 467 U.S. 229 (1984).

290. *Id.* at 237.

Furthermore, the Court in *Midkiff* explained that the concern in *Pullman* to avoid "needless friction with state policies" was founded upon the *Pullman* Court's specific identification of an *unsettled* question of general state law that was susceptible of a limiting construction:

> In *Railroad Comm'n v. Pullman Co., supra*, this Court held that *federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.* By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies. . . ." *Id.* 312 U.S., at 500, 61 S.Ct., at 645. However, *federal courts need not abstain on Pullman grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" the federal constitutional question.*[291]

Despite these clear precedents, in at least one federal circuit, the Ninth, and, more recently, the Fourth, the decisions have begun to approach a *per se* rule of abstention, authorizing abstention whenever the subject matter of the action is zoning or land use.[292] Additionally, these two circuits have begun to combine *Pullman* and *Burford*-type analysis in ordering abstention. Such rules of decision distort the principles upon which the *Pullman* and *Burford* abstention doctrines were based. As applied in section 1983 land use cases, these judicial positions arguably conflict with the legislative purpose of Congress.

2. The Emerging *Per Se* Rule of Abstention in Land Use Cases in the Ninth and Fourth Circuits.—The abstention decisions in land use cases in the Ninth Circuit, and increasingly the Fourth Circuit, display an assumption that an unsettled question of state law exists in virtually every zoning or land use case. The judicial analyses in these two circuits reveal a consistent equation of the unresolved question of the *application* of state law to a particular set of circumstances with an unsettled question of state law principle of general application. The courts in these circuits appear to view the inevitable *ad hoc* nature of zoning and land use disputes, revolving around what are sometimes described as *post hoc* rationalizations,[293]

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291. *Id.* at 236 (emphasis added).

292. *See infra* notes 294-326 and appendix at 162.

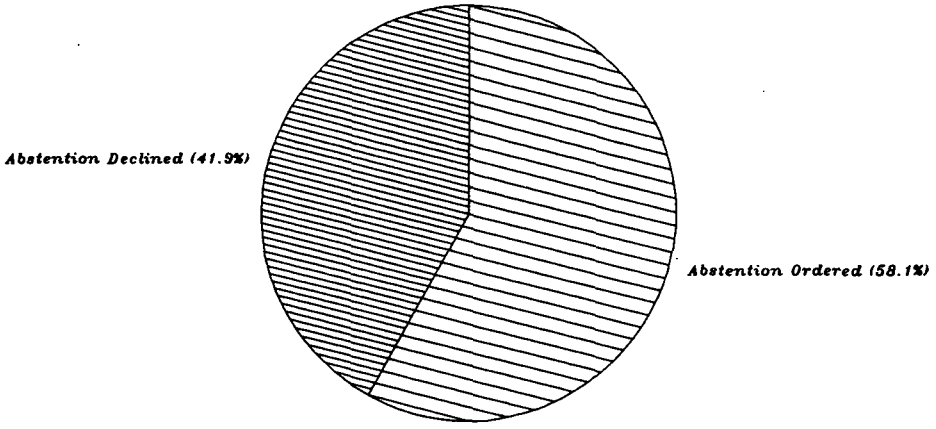
293. The term "post hoc rationalization" refers to supportive evidence and theories which are presented or developed to justify a public action after it has taken place. One court

as meaning that there is an unsettled question of state law in every such case and that therefore abstention is appropriate in every such case. This approach, extends the abstention doctrine far beyond the narrow exception established in *Pullman* and effectively holds, as a matter of law, that the doubt created by the application of settled state law principles to a particular set of circumstances is a sufficient unsettled question of state law to override the Congressional mandate of 42 U.S.C. § 1983. Not surprisingly, the two circuits combined have order abstention in a high percentage of cases. (Figure 7)[294]

Figure 7

9th & 4th Circuit Abstention Decisions

*All Land Use Cases, 1972–1988**



In *Pearl Investment v. City and County of San Francisco*,[295] the

has described this phenomenon in the land use context as "after-the-fact" justifiacations. *See* City of Boca Raton v. Boca Villas Corp., 371 So.2d 154, 155 (Fla. 4th D.C.A. 1979).

* For a listing of specific cases, see appendix at 162.

294. *See* appendix, at 162.

295. 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Ninth Circuit acknowledged that there were *no* unsettled questions of state law:

> Resolution of an issue of state law might be uncertain because the particular statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court. *We do not find those factors to be present in this case. Here there is much force to Pearl's contention that the district court could have ascertained the established standards applied by the California courts in reviewing zoning decisions and accordingly should have applied those standards without deferring to state adjudication.*[296]

Notwithstanding the Court's conclusion, the Court affirmed the district court's abstention because "[w]e do not write on a clean slate. . . ."[297] The court explained that it was constrained to sustain abstention because of the Ninth Circuit's prior decisions holding[298] that abstention was appropriate in land use cases because "the resolution of state law questions is doubtful in virtually every case involving land use or zoning issues."[299] However, it is submitted that this reasoning conflicts with the Supreme Court's directive in *Pullman* and its progeny that the unsettled question of state law for which a federal court should defer to state court consideration must involve an uncertain proposition of *general law*, not merely the uncertainty inherent in the application of a general legal principle to a particular set of circumstances.

The plaintiff in *Pearl Investment* presented a claim of deprivation of its federal due process rights under San Francisco Municipal Code Section 26, a discretionary review provision that twice before had been upheld by the California Supreme Court as satisfying the constitutional requirements for the delegation of discretionary power under state law.[300] Unlike the circumstance supporting abstention in *Railroad Commission of Texas v. Pullman Co.*,[301] the plaintiff did not challenge the City's "authority" under state law to impose discretionary review to its permit application. Rather, it challenged on

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296. 774 F.2d at 1465 (emphasis added).

297. *Id.*

298. *See* Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979); Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).

299. *Pearl Investment*, 774 F.2d at 1465 (quoting the district court decision).

300. *See* City of San Francisco v. Superior Court, 53 Cal. 2d 236, 347 P.2d 294, 305 (1959); Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 311, 144 P.2d 4 (1943).

301. 312 U.S. 496 (1941).

federal constitutional grounds the result of the application of a legal principle, twice-decided by the California Supreme Court, to a particular set of circumstances. Nevertheless, the federal court abstained.

Within the Fourth Circuit, the emerging per se rule of abstention appears to be guided by an extreme judicial deference to state courts in the area of land use policy—a *Burford*-type concern—and the view that the "sensitive" nature of local land use issues necessarily gives rise to unsettled questions of state law. In *Kent Island Joint Venture v. Smith*,[302] the court articulated this view in the following terms:

> Land use regulation by zoning is 'distinctly a feature of local government' which is 'outside the general supervisory power of federal courts.' [citation omitted]. A land use decision 'clearly involves matters entirely within the realm of the state and local governments with which they are singularly familiar, and there are few local issues more sensitive.' [citation omitted].
>
> . . .
>
> This Court is satisfied that plaintiff must challenge these land use decisions of Queen Anne's County officials in the state courts of Maryland. The dispute here is strictly a local matter as to which federal intervention is both unwise and unwarranted. The reasonableness of zoning and other land use classifications is a question of state law, the resolution of which could avoid or modify related federal constitutional issues.[303]

The emerging *per se* rule of abstention in the Ninth Circuit and Fourth Circuit creates an incongruous situation when considered in the context of *res judicata*. The doctrine of *res judicata* (a doctrine of judicial repose) precludes the parties or those in privity with them from relitigating issues that were or could have been raised in a prior action.[304] Under the related doctrine of collateral estoppel, a prior decision in which a court has decided an issue of fact or law necessary to the judgment in that action will preclude relitigation of the same issue in a suit based on a different cause of action but involving

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302. 452 F. Supp. 455 (D. Md. 1978).

303. *Id.* at 462-63. See also Fralin & Waldron, Inc., v. City of Martinsville, 370 F. Supp. 185, 191 (W. D. Va. 1973), aff'd, 493 F.2d 481 (4th Cir. 1974); Caleb Stowe Assocs. v. Albermarle County, 724 F.2d 1079, 1080 (4th Cir. 1984): Meredith v. Talbot County, 828 F.2d 228, 232 (4th Cir. 1987); Ad Soil Services, Inc. v. Board of County Comm'rs, 596 F. Supp. 1139, 1142 (D. Md. 1984); Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222, 226 (E.D. Va. 1988).

304. Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

a party to the first action.[305] In the decisions of *Allen v. McCurry*,[306] and *Migra v. Warren City School Dist. Bd. of Education*,[307] the U.S. Supreme Court held that these doctrines of preclusion are applicable to actions brought under 42 U.S.C. § 1983. In the *Allen* case, this Court noted that, contrary to the dissenting view of Justice Blackmun,[308] its decision did not constitute an abandonment of the principle established in *England v. Louisiana State Board of Medical Examiners*[309] that under *Pullman* abstention a plaintiff who is remitted to state court is not precluded from litigating his federal constitutional issues later in federal court.[310]

It is submitted, however, that the Supreme Court's decisions in *England* and in *Allen* never contemplated the impossible circumstance in which the emerging abstention rule in these two circuits places plaintiffs in land use cases brought under 1983. The assumption underlying the *England* principle is that there is an actual unsettled question of general state law which may be referred to the state court for adjudication without a determination of the federal Constitutional claims. Because land use cases inevitably involve mixed questions of fact and law, the effect of the abstention rule where, in fact, there are no unsettled questions of general state law is to compel federal plaintiffs, without their consent, to submit their federal constitutional claims to a state court determination. If state court litigation depends upon the resolution of mixed questions of fact and law, then a plaintiff will be barred from relitigation under the doctrine of *res judicata* and will thereby be deprived of the federal forum that Congress deemed appropriate in 1871.[311] On the other hand, if *res judicata* is not preclusive, then the abstention rule established by the Ninth Circuit would allow a plaintiff two bites at the "land use" apple, a perversion of the principles of comity and judicial efficiency on which the *Pullman* decision was based.

The decisions of the Supreme Court are emphatic in stating that each abstention decision is a matter of discretion which must be approached on a case-by-case basis, and not as a matter of the appli-

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305. Montana v. United States, 440 U.S. 147, 153 (1979).

306. 449 U.S. 90, 104 (1980).

307. 465 U.S. 75 (1984).

308. Allen v. McCurry, 449 U.S. 90, 112 (1980) (Blackmun, J., dissenting).

309. 375 U.S. 411 (1964). *See supra* note 55 and accompanying text.

310. *See* 449 U.S. 90, 101 n.17.

311. Propper v. Clark, 337 U.S. at 472, 491-492 (1949). *See* Key v. Wise, 629 F.2d 1049 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103 (1981) (Brennan, J., dissenting). *See also* Hernandez v. City of Lafayette, 699 F.2d 734 (5th Cir. 1983).

cation of a general rule.[312] Abstention is proper only in narrowly limited "special circumstances."[313] While many of the federal courts, have paid lip service to this admonition, their decisions, in fact, reflect the application of a general rule of abstention in all land use or zoning cases.

Of the two circuits, the Ninth Circuit's position is the most extreme. Other federal court of appeals decisions in which abstention has been considered in a land use context have not followed the Ninth Circuit's form of abstention analysis.[314] In fact, over the past fifteen years, the only court of appeals decision brought under 42 U.S.C. § 1983 involving land use or zoning in which abstention has been ordered, was based on the fact that there existed a pending state court proceeding with which the federal court did not wish to interfere.[315] That decision relied in essence upon the Supreme Court's decision in *Huffman v. Pursue, Ltd.*,[316] extending the principle of abstention articulated in *Younger v. Harris*,[317] to state-initiated civil proceedings. In all other circuit court section 1983 cases involving land use over the last fifteen years, the federal courts of appeal have declined to abstain.[318]

The Ninth Circuit, and most recently district courts in the

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312. Baggett v. Bullitt, 377 U.S. 360, 375 (1964).

313. 337 U.S. at 492.

314. *See* Silverman v. Barry, 727 F.2d 1121, 1123-34 n.4 (D.C. Cir. 1984); Urbanizadora Versalles v. Rivera Rios, 701 F.2d 993, 998 (1st Cir. 1983); City of Moore v. Atchison, Topeka & Santa Fe Ry., 699 F.2d 507, 510 (10th Cir. 1983); Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746-747 (3rd Cir. 1982), *cert. denied*, 456 U.S. 990 (1982); Ahrensfeld v. Stephens, 528 F.2d 193, 197 (7th Cir. 1975); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974); Boraas v. Village of Belle Terre, 476 F.2d 806, 811-12 (2nd Cir. 1973) *rev'd on other grounds*, 416 U.S. 1 (1974). *But see* Nasser v. City of Homewood, 671 F.2d 432, 439-440 (11th Cir. 1982); Fralin v. Waldron, Inc. v. City of Martinsville, 493 F.2d 481, 483 (4th Cir. 1974); Muskegon Theatres v. City of Muskegon, 507 F.2d 199, 204 (6th Cir. 1974); Hill v. City of El Paso, 437 F.2d 352, 357 (5th Cir. 1971).

315. *See* Central Avenue News v. City of Minot, 651 F.2d 565, 567 (8th Cir. 1981). *See also* Forest Hills Util. Co. v. City of Heath, Ohio, 539 F.2d 592, 596 (6th Cir. 1976); Ahrensfeld v. Stephens, 528 F.2d 198, 200 (7th Cir. 1975); Hill v. City of El Paso, 437 F.2d 352, 356, 357 (5th Cir. 1971). *But see* Culebras Enterprises v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) (action held premature on ripeness grounds, but abstention mentioned as additional ground for awaiting state court determination).

316. 420 U.S. 592 (1975).

317. 401 U.S. 37 (1971).

318. *See* Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 148 (1987); Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984); Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983); Heritage Farms v. Solesbury Township, 671 F.2d 743 (3d Cir. 1982), *cert. denied*, 456 U.S. 990 (1982); *See also* Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on grounds other than abstention*, 416 U.S. 1 (1974).

Fourth Circuit, have equated the existence of an "array" of state and local land use laws and regulations in the State of California with the existence of unsettled questions of state law.[319] Speaking of the denial of a building permit, the California Federal District Court in *Sederquist v. City of Tiburon*,[320] stated:

> Whether a city has abused its discretion by refusing to issue a building permit is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws and regulations applicable to the area in question. We do not claim to ability to predict whether a state court would decide that the city here abused its discretion. . . .[321]

Speaking of a refusal to rezone, the Virginia Federal District Court stated:

> [I]t is unclear under Virginia law whether the City Council abused its discretion in refusing to rezone plaintiff's property, whether this refusal effected a taking of the property and whether plaintiff has a remedy for the alleged taking under the state's inverse condemnation procedure. See Sederquist v. City of Tiburon, 590 F.2d 278, 282-83 (9th Cir. 1978). . . .[322]

The foregoing language quoted above from the *Sederquist* case, the same language quoted by the Ninth Circuit in its decision in *Pearl Investment*,[323] and also relied upon by the Virginia District Court, arguably is no more than a presumption of uncertain state law based upon the existence of a complex but not unfathomable array of land use laws and regulations in the State of California. Such a judicial statement as quoted above should not substitute for the precise analysis the Supreme Court has required in determining whether there are, in fact, specific unsettled questions of general state law which could be decided by a state court so as to avoid the federal constitutional questions raised.[324] In the abstention decisions

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319. *See* Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092, 1094-95 (9th Cir. 1976). *See also* Northern Virginia Law School v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

320. 590 F.2d 278 (9th Cir. 1978).

321. *Id.* at 282-83.

322. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222, 226 (E.D. Va. 1988).

323. 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

324. The source of the Ninth Circuit's rigid abstention rule may be found in that Circuit's elevation of certain of Justice Frankfurter's language in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), to a formal test, thereby creating a third prong to the Supreme Court's established two-prong test for applying the *Pullman* abstention doctrine.

rendered by the Ninth Circuit involving land use or zoning since *Rancho Palos Verdes* and *Sederquist*, the Ninth Circuit has repeatedly invoked the axiom that the array of state and local land use regulations at once makes "land use," by definition, a sensitive area of social policy which inherently involves unsettled questions of state law.[325]

No decision of the Supreme Court has articulated the general rule applied by the Ninth Circuit and the Fourth Circuit, in which uncertainty is found imbedded in every land use or zoning decision merely because the federal court must examine a complex array of statutes and ordinances in order to resolve the mixed questions of law and fact before it. Rather, as the Supreme Court has said: "[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."[326]

3. The Separation of Powers Issue.—Article I of the Constitution of the United States provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, . . ."[327] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

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Before reaching the questions of whether a federal complaint involves (i) an unsettled question of general state law that is (ii) subject to an interpretation that will avoid the federal Constitutional question, the Ninth Circuit first determines whether 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." Canton v. Spokane School Dist. #81, 498 F.2d 840, 845 (9th Cir. 1974) (quoting *Pullman* at 498). Justice Frankfurter's statement in *Pullman* was made in the context of racial discrimination. In its decisions subsequent to *Pullman*, the Supreme Court has not reiterated Justice Frankfurter's reference to sensitive constitutional issues nor made it a criterion for abstention. *See* Zwickler v. Koota, 389 U.S. 241, 248-49 (1967); Harrison v. NAACP, 360 U.S. 167, 177 (1959); Chicago v. Fieldcrest Dairies, 316 U.S. 168, 173 (1942).

As applied by the Ninth Circuit, this "social sensitivity" prong of its so-called Canton test for *Pullman* abstention has so outweighed the Ninth Circuit's analysis under the principal abstention criteria established by the Supreme Court that the Circuit's decisions have effectively equated "sensitive area of social policy" with unsettled questions of state law.

325. *See* Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); Bank of America National Trust and Savings Ass'n v. Summerland County Water Dist., 767 F.2d 544, 546 (9th Cir. 1985); C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 377, 380 (9th Cir. 1983); Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380, 1385 (9th Cir. 1981); Isthmus Landowners Ass'n v. California, 601 F.2d 1087, 1091 (9th Cir. 1979); Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 841 (9th Cir. 1979); Newport Invs. v. City of Laguna Beach, 564 F.2d 893, 894 (9th Cir. 1977).

326. Lehman Bros. v. Schein, 416 U.S. 386, 390 (1974).

327. U.S. CONST. art. I, § 1.

establish."[328] The Supreme Court has construed this division of powers under the Constitution as meaning that "the federal lawmaking power is vested in the legislative, not the judicial, branch of government . . ."[329] In the celebrated "snail darter" case, *TVA v. Hill*,[330] the Supreme Court underscored the importance of the separation of powers principle as a direct restraint upon judicial law making:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally— and emphatically— the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. *Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.*[331]

The Civil Rights Act of 1871 reflects these ordering of priorities by Congress. Indeed, it constitutes a restructuring of the relationship between the state and federal courts[332] so as to ensure the effective enforcement of Constitutional rights. It reflects a legislative social policy judgment that the federal courts cannot disregard on any grounds other than unconstitutionality.[333]

The Ninth and Fourth Circuits' pursuit of what approaches a *per se* rule of abstention in all cases involving land use or zoning because of their stated uncertainty in deciding questions of fact in light of "the many local and statewide land use laws" constitutes a weighing of social and political policies—a function that the Constitution has assigned to the legislative branch under the separation of powers principle. Where a federal court, as in *Pearl Investment*,[334] acknowledges in its opinion that the pertinent state law issues are *not* uncertain yet nevertheless, invokes *Pullman* abstention, its decision constitutes an improper judicial incursion into a substantive area where Congress has already spoken, undermining the enforce-

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328. U.S. CONST. art. III, § 1.

329. Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981).

330. 437 U.S. 153 (1978).

331. *Id.* at 194 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803) (emphasis added).

332. *See* CONG. GLOBE, 42nd Cong., 1st Sess., 149 (comments of Rep. Garfield).

333. TVA v. Hill, 437 U.S. 153, 194 (1978).

334. Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985).

ment of the Civil Rights Act. As such, it violates the principle of separation-of-powers between the legislative and judicial branches.[335]

4. The Merger of Pullman and Burford Abstention Doctrines.--In part, because of the increasing complexity of state land use regulatory schemes, some federal courts, particularly those in the Fourth and Ninth Circuits, have applied a form of abstention analysis that appears to equate the complexity of a regulatory scheme with the "uncertain state law" requirement of *Pullman* abstention. Although these decisions are not always explicit in identifying the *Burford*-type concern for disrupting a perceived interlocking scheme of local and state regulations, it is apparent that the *Burford*-type considerations are also present. For example, in *Rancho Palos Verdes Corporation v. City of Laguna Beach*,[336] the Ninth Circuit upheld the lower court's abstention on *Pullman* grounds and even stated that *Burford* abstention was inappropriate.[337] But the court's reasoning nevertheless contains strands of *Burford* abstention analysis:

> The complaint involves land use planning . . . . [T]he state has enacted a web of statutes, . . . California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space in response to the state's announced policy . . . may unwittingly have resulted in a seizure of property rights that they did not intend and cannot afford. Federal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex problems.[338]

Similarly, in *Kent Island Joint Venture v. Smith*,[339] the court stated more explicitly:

> The appropriateness of combining the principles of *Pullman* and *Burford* has been recognized in varying degrees by those

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335. The unfounded abstention ordered by federal courts will also effect a delay or forever foreclose the exercise of federal jurisdiction, a result that Congress never contemplated in enacting the Civil Rights Act of 1871. The Supreme Court has previously condemned such unnecessary delay that results from the application of the abstention doctrine. *See* Meredith v. Winter Haven, 320 U.S. 228, 237 (1943). *See also* C. WRIGHT, LAW OF FEDERAL COURTS, § 52 at 305 (1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 3-40 at 151 (1978).

336. 547 F.2d 1092 (9th Cir. 1976)

337. *Id.* at 1096.

338. *Id.* at 1094-95. *See also* C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).

339. 452 F. Supp. 455 (D. Md. 1978).

courts ordering abstention in cases challenging state land use policy.

. . .

[S]tate land use policy is a sensitive matter subject to comprehensive local regulation. For a federal court to exercise its jurisdiction in areas of important state domestic policy creates an "unseemly conflict between two sovereignties, [and] the unnecessary impairment of state functions . . . ." Martin v. Creasy, 360 U.S. 219, 224, 79 S.Ct. 1034, 1037 3 L.Ed.2d 1186 (1959). Accordingly, *Burford*-type abstention is also appropriate here.[340]

Recent decisions in the Fourth Circuit indicate that the courts of that circuit now regard land use planning as an area not only of unique local concern but one subject to a state-wide regulatory scheme sufficient to support *Burford* abstention. In *Northern Virginia Law School v. City of Alexandria*,[341] the district court reasoned, using the Ninth Circuit's *Canton* test, that the three requirements of that test had been met:[342]

First, it is indisputable that land use planning is a sensitive area of state policy. *See Kollsman*, 737 F.2d 830, 833; *Fralin & Waldron*, 493 F.2d 481, 483; *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 461 (D. Md. 1978). Moreover, a state court ruling on the issues presented by plaintiff's Complaint could moot the federal constitutional issue or present it in a different posture. . . . Finally, it is uncertain under Virginia law whether the City Council abused its discretion in refusing to rezone plaintiff's property, whether this refusal effected a taking of the property and whether plaintiff has a remedy for the alleged taking under the state's inverse condemnation procedure. *See Sederquist v. City of Tiburon*, 590 F.2d 278, 282-83 (9th cir. 1978) (whether state court would order compensation for a regulatory taking and whether city abused its discretion in refusing to issue a building permit are uncertain questions of state law).

[A]bstention is also warranted under the reasoning of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). There, the Supreme Court admonished federal courts to defer to state courts where federal intervention would needlessly disrupt a state's administration of purely local affairs. *Id.* at 333-34, 63 S.Ct. at 1107-1108; *see also Kent Island*, 452 F. Supp. 455, 461. Land use planning, as previously noted, is an area of uniquely

340. *Id.* at 462-63.

341. 680 F. Supp. 222 (E.D. Va. 1988).

342. *See supra* notes 231-240 and accompanying text.

local concern and, in Virginia, is the subject of an extensive regulatory scheme. *See* VA. CODE §§ 15.1-427 to -503.2.[343]

The court also found *Pullman* abstention appropriate, equating the questions of whether the city council in that case abused its discretion in refusing to rezone plaintiff's property, whether the refusal effected a taking and whether the plaintiff had a remedy for the alleged taking under the state's inverse condemnation procedure with the unsettled question of state law standard under *Pullman*.[344]

The importation of *Burford* abstention into federal court analysis of land use cases arguably is improper in light of the less than comprehensive and coherent regulatory systems which characterize land use control in most states. From a planning standpoint, regulation in accordance with state, regional and local comprehensive plans is desirable. However, until such a system of land use controls is achieved, and a procedure is tailored to address appeals from decisions made under that system, the conceptual basis for the application of *Burford* abstention is more fiction than reality and is therefore inappropriate.

The procedural danger of this evolving merger of the *Pullman* and *Burford* abstention doctrines for property owner claims is that the proper procedural course of action under *Burford* is dismissal, rather than the staying of the action. Where the federal courts have the option to stay the action or dismiss, it is likely that they will more often dismiss the action for reasons of judicial economy and convenience.

CONCLUSION

The increasing use of the ripeness and abstention doctrines by the federal courts to dismiss constitutional claims brought by property owners under both 42 U.S.C. § 1983 and the fourteenth and fifth amendments generally, is a phenomenon which has resulted in the virtual exclusion of property owners' claims from the federal courthouse. Such a result was never intended by the Congress when it enacted the Civil Rights Act of 1871. The uncertain state of the law with respect to the ripeness doctrine in land use disputes— particularly the application of the finality requirement—reflects the fail-

343. *Id.* at 226. *See also* Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987) (Subdivision approved process held to be governed by a complex regulatory scheme sufficient to justify *Burford* abstention.

344. *Id.*

ure of the Supreme Court to understand the practical realities of land use control and to give meaningful guidance to the lower federal courts. The perversion, in some circuits, and the misapplication in others, of the abstention doctrine in land use cases, also calls for correction and guidance from the Supreme Court.

APPENDIX

Figure 1

Federal Court Land Use Ripeness Decisions 1983-1988

(36 cases examined)

Regulatory Taking Claim Held Unripe
(34 cases)

1st Circuit:

*1. Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987).
*2. Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).
*3. Golemis v. Kirby, 632 F. Supp. 159 (D.R.I. 1985).

2nd Circuit:

4. Weissman v. Fruchtman, 700 F. Supp. 746 (S.D.N.Y. 1988).

3rd Circuit:

*5. Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906.
6. Elsa Doerinkel v. Hillsborough Township, No. 86-1823 (D.N.J. May 25, 1988) (WESTLAW, DCT database; 1988 WL 54662).

4th Circuit:

*7. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).
*8. Wintercreek Apartments v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988).

5th Circuit:

*9. Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235 (E.D.La. 1987).

6th Circuit:

*10. Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985).

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* Denotes claim brought under 42 U.S.C. § 1983.

7th Circuit:

*11. Muscarello v. Village of Hampshire, 644 F. Supp. 1016 (N.D. Ill. 1986).
*12. Beachy v. Board of Aviation Comm'rs, 699 F. Supp. 742 (S.D. Ind. 1988).
*13. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).
*14. Manor Healthcare Corp. v. Guzzo, No. 88 C 2547 (N.D. Ill. Nov. 14, 1988) (WESTLAW, DCT database; 1988 WL 123932).

8th Circuit:

*15. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986).
*16. JBK, Inc. v. City of Kansas City, 641 F. Supp. 893 (W.D. Mo. 1986).
*17. Jacobs v. City of Minneapolis, No. 4-87-397 (D. Minn. Aug. 4, 1987) (WESTLAW, DCT database; 1987 WL 14716).

9th Circuit:

*18. Norco Construction, Inc., v. King County, 801 F.2d 1143 (9th Cir. 1986).
*19. Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 988 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).
*20. Cassettari v. County of Nevada, 824 F.2d 735 (9th Cir. 1987).
*21. Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 79 (1988).
*22. Lai v. City of Honolulu, 841 F.2d 301 (9th Cir. 1988).
23. Austin v. City of Honolulu, 840 F.2d 678 (9th Cir. 1988).
*24. Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 134 (1988).
*25. Kaiser Dev. Co. v. City of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).
26. Union Pacific R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987).
27. Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal 1988).

28. Stephans v. Tahoe Regional Planning Agency, 697 F. Supp. 1149 (D. Nev. 1988).
*29. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).

10th Circuit:

*30. Landmark Land Co. v. Buchanan, Nos. 85-2458, 85-2538 (10th Cir. Nov. 30, 1988) (WESTLAW, DCT database; 1988 WL 126469).
*31. Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).
*32. Amwest Investments, Ltd. v. City of Aurora, 701 F. Supp. 1508 (D. Colo. 1988).
*33. Bernstein v. Holland, 657 F. Supp. 233 (M.D. Ga. 1987).
*34. Carrol v. City of Prattville, 653 F. Supp. 933 (N.D. Ala. 1987).

Regulatory Taking Claim Held Ripe
(2 cases)

9th Circuit:

*1. Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983).

11th Circuit:

*2. Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987).

Figure 2

Reasons For Dismissal In Federal Court
Land Use Ripeness Decisions 1983-1988

(35 cases examined)

No Final Decision

(9 cases)

2nd Circuit:

1. Weissman v. Fruchtman, 700 F. Supp. 746 (S.D.N.Y. 1988).

3rd Circuit:

2. Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987).

9th Circuit:

3. Norco Constr., Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986).
4. Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 79 (1988).
5. Lai v. City of Honolulu, 841 F.2d 301 (9th Cir. 1988).
6. Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 134 (1988).
7. Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988).
8. Stephens v. Tahoe Regional Planning Agency, 697 F. Supp. 1149 (D. Nev. 1988).

10th Circuit:

9. Landmark Land Co. v. Buchanan, Nos. 85-2458, 85-2538 (10th Cir. Nov. 30, 1988) (WESTLAW, DCT database;).

State Compensation Procedures Unused

(19 cases)

1st Circuit:

1. Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987).
2. Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).

3. Golemis v. Kirby, 632 F. Supp. 159 (D.R.I. 1985).

3rd Circuit:

4. Elsa Doerinkel v. Hillsborough Township, No. 86-1823 (D.N.J. May 25, 1988) (WESTLAW, DCT database; 1988 WL 54662).

4th Circuit:

5. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

5th Circuit:

6. Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235 (E.D. La. 1987).

6th Circuit:

7. Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985).

7th Circuit:

8. Muscarello v. Village of Hampshire, 644 F. Supp. 1016 (N.D. Ill. 1986).
9. Beachy v. Board of Aviation Comm'rs, 699 F. Supp. 742 (S.D. Ind. 1988).
10. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).
11. Manor Healthcare Corp. v. Guzzo, No. 88 C 2547 (N.D. Ill. Nov. 14, 1988) (WESTLAW, DCT database; 1988 WL 123932).

8th Circuit:

12. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986).
13. JBK, Inc. v. City of Kansas City, 641 F. Supp. 893 (W.D. Mo. 1986).
14. Jacobs v. City of Minneapolis, No. 4-87-397 (D. Minn. Aug. 4, 1987) (WESTLAW, DCT database; 1987 WL 14716).

9th Circuit:

15. Cassettari v. Nevada County, 824 F.2d 735 (9th Cir. 1987).
16. Austin v. City of Honolulu, 840 F.2d 678 (9th Cir. 1988).

17. Union Pacific R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987).
18. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988).

11th Circuit:

19. Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987).

Both Prongs of Ripeness Doctrine Unsatisfied
(6 cases)

4th Circuit:

1. Wintercreek Apartments v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988).

9th Circuit:

2. Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).
3. Kaiser Dev. Co. v. City of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).

10th Circuit:

4. Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).
5. Amwest Investments, Ltd. v. City of Aurora, 701 F. Supp. 1508 (D. Colo. 1988).

11th Circuit:

6. Bernstein v. Holland, 657 F. Supp. 233 (M.D. Ga. 1987).

Figure 3

Federal Court § 1983 Abstention Decisions 1972-1988

(43 cases examined)

Abstention Declined

(22 cases)

1st Circuit:

1. Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983).
2. Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971).
3. Hotel Coamo Springs, Inc. v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976).

2nd Circuit:

4. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974) (on grounds other than abstention).
5. Waltentas v. Lipper, 636 F. Supp. 331 (S.D.N.Y. 1986).

3rd Circuit:

6. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982).
7. Sullivan v. City of Pittsburgh, 811 F.2d 171 (3rd Cir.), *cert. denied*, 108 S. Ct. 148 (1987).
8. Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976).
9. Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982).
10. Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985).
11. Van Meter v. Township of Maplewood, 696 F. Supp. 1024 (D.N.J. 1988).
12. Epstein v. Township of Whitehall, 693 F. Supp. 309 (E.D. Pa. 1988).

4th Circuit:

13. Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).

14. Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980).

7th Circuit:

15. Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded without opinion*, 510 F.2d 976 (7th Cir. 1975).

9th Circuit:

16. Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974)
17. Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985).
18. McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).
19. M.J. Brock & Sons v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).
20. Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

10th Circuit:

21. Oberndorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

D.C Circuit:

22. Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984), *cert. denied*, 109 S. Ct. 394 (1988).

Abstention Ordered

(21 cases)

1st Circuit:

1. Culebras Enters. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).
2. Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984).

2nd Circuit:

3. Northeast Mines, Inc. v. Town of Smithtown, 584 F. Supp. 112 (E.D.N.Y. 1984).
4. Rattner v. Board of Trustees, 611 F. Supp. 648 (S.D.N.Y. 1985).

3rd Circuit:

5. Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).
6. Glen-Gery Corp. v. Lower Heidelberg Township, 608 F. Supp. 1002 (E.D. Pa. 1985).

4th Circuit:

7. Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).
8. Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987).
9. Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).
10. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

6th Circuit:

11. Forest Hills Utility Co. v. City of Heath, 539 F.2d 592 (6th Cir. 1976).
12. Danish News Co. v. City of Ann Arbor, 517 F. Supp. 86 (E.D. Mich. 1981), *aff'd without opinion*, 751 F.2d. 384 (6th Cir. 1984).

7th Circuit:

13. Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).

8th Circuit:

14. Central Ave. News, Inc. v. City of Minot, 651 F.2d 565 (8th Cir. 1981).
15. Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984).

9th Circuit:

16. Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976)
17. Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977).
18. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).
19. Pearl Inv. Co. v City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).
20. World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).
21. Beck v. California, 479 F. Supp. 392 (C.D. Cal. 1979).

Figure 4

All Federal Court Land Use Abstention Decisions 1972-1988

(86 cases examined)

Abstention Declined

(42 cases)

1st Circuit:

1. Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983).
2. Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971).
3. Hotel Coamo Springs, Inc. v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976).
4. Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980).

2nd Circuit:

5. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974) (on grounds other than abstention).
6. Hill Constr. Co. v. Connecticut, 366 F. Supp. 737 (D. Conn. 1973).
7. Town of Springfield, v. Vermont Envtl. Bd., 521 F. Supp. 243 (D. Vt. 1981).
8. Waltentas v. Lipper, 636 F. Supp. 331 (S.D.N.Y. 1986).

3rd Circuit:

9. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3d Cir. 1982), *cert. denied*, 456 U.S. 990 (1982).
10. Izzo v. Borough of River Edge, 843 F.2d 765 (3rd Cir. 1988).
11. Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976).
12. Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982).
13. Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985).

14. Sullivan v. City of Pittsburgh, 617 F. Supp. 1488, *corrected*, 620 F. Supp. 935 (W.D. Pa. 1985), *aff'd*, 811 F.2d 171 (3d Cir.), *cert. denied*, 108 S.Ct. 148 (1987).
15. Van Meter v. Township of Maplewood, 696 F. Supp. 1024 (D.N.J. 1988).
16. Epstein v. Township of Whitehall, 693 F. Supp. 309 (E.D. Pa. 1988).

4th Circuit:

17. Timmons v. Andrews, 538 F.2d 584 (4th Cir. 1976).
18. Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978).
19. Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).
20. Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980).

6th Circuit:

21. Bannum, Inc. v. City of Memphis, 666 F. Supp. 1091 (W.D. Tenn. 1986).

7th Circuit:

22. E & E Hauling, Inc. v. Forest Preserve Dist., 821 F.2d 433 (7th Cir. 1987).
23. Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded without opinion*, 510 F.2d 976 (7th Cir. 1975).
24. Rasmussen v. City of Lake Forest, 404 F. Supp. 148 (N.D. Ill. 1975).
25. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

8th Circuit:

26. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).
27. Marjak, Inc. v. Cowling, 626 F. Supp. 522 (W.D. Ark, 1985).
28. People Tags, Inc. v. Jackson County Legislature, 636 F. Supp. 1345 (W.D. Mo. 1986).

9th Circuit:

29. Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974).
30. Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380 (9th Cir. 1981).
31. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd on other grounds sub nom.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
32. Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983).
33. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 475 U.S. 41 (1986).
34. Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985).
35. McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 408 U.S. 906 (1987).
36. M.J. Brock & Sons v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).
37. Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

10th Circuit:

38. City of Moore v. Atchison, T. & S. Ry. Co., 699 F.2d 507 (10th Cir. 1983).
39. Oberdorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

11th Circuit:

40. Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982).
41. Bayside Enters. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978).

D.C. Circuit:

42. Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984), *cert. denied*, 109 S. Ct. 394 (1988).

Abstention Ordered

(44 cases)

1st Circuit:

1. Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972).

2. Culebras Enters. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).
3. Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984).

2nd Circuit:

4. Wigginess, Inc. v. Fruchtman, 482 F. Supp. 681 (S.D.N.Y. 1979), *aff'd with directions without opinion*, 628 F.2d 1346 (2d Cir.), *cert. denied*, 449 U.S. 842 (1980).
5. Northeast Mines, Inc. v. Town of Smithtown, 584 F. Supp. 112 (E.D.N.Y. 1984).
6. Rattner v. Board of Trustees, 611 F. Supp. 648 (S.D.N.Y. 1985).
7. Onondaga Landfill Sys., Inc. v. Williams, 624 F. Supp. 25 (N.D.N.Y. 1985).

3rd Circuit:

8. Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).
9. Hovsons, Inc. v. Secretary of the Interior, 519 F. Supp. 434 (D.N.J. 1981), *aff'd*, 711 F.2d 1208 (3d Cir. 1983).
10. Glen-Gery Corp. v. Lower Heidelberg Township, 608 F. Supp. 1002 (E.D. Pa. 1985).

4th Circuit:

11. Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).
12. Caleb Stowe Assocs. v. Albemarle County, 724 F.2d 1079 (4th Cir. 1984).
13. Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987).
14. Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).
15. Ad Soil Services, Inc. v. Board of County Comm'rs, 596 F. Supp. 1139 (D. Md. 1984).
16. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

5th Circuit:

17. P. C. Utils. Corp. v. Division of Health of Dep't of Health & Rehabilitative Servs., 339 F. Supp. 916 (S.D. Fla. 1972), *aff'd without opinion*, 472 F.2d 1406 (5th Cir. 1973).

6th Circuit:

18. Muskegon Theaters, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974).
19. Forest Hills Utility Co. v. City of Heath, 539 F.2d 592 (6th Cir. 1976).
20. Danish News Co. v. City of Ann Arbor, 517 F. Supp. 86 (E.D. Mich. 1981), *aff'd without opinion*, 751 F.2d. 384 (6th Cir. 1984).
21. J.V. Peters and Co. v. Hazardous Waste Facility Approval Bd., 596 F. Supp. 1556 (S.D. Ohio 1984).

7th Circuit:

22. Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).

8th Circuit:

23. Central Ave. News, Inc. v. City of Minot, 651 F.2d 565 (8th Cir. 1981).
24. Bob's Home Serv., Inc. v. Warren County, 755 F.2d 625 (8th Cir. 1985).
25. Home Builders Ass'n v. City of Kansas City, 379 F. Supp. 1316 (W.D. Mo. 1974).
26. Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984).
27. Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986).

9th Circuit:

28. Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976).
29. Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977)
30. Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).
31. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir 1979).
32. Isthmus Landowners Ass'n v. California, 601 F.2d 1087 (9th Cir. 1979).
33. Beck v. California, 479 F. Supp. 392 (C.D. Cal. 1979).
34. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).

35. Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).
36. Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).
37. World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).
38. Southwest Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986).
39. Rooke v. City of Scotts Valley, 664 F. Supp. 1342 (N.D. Cal. 1987).

11th Circuit:

40. Fields v. Rockdale County, 785 F.2d 1558 (11th Cir. 1986).
41. Stallworth v. City of Monroeville, 426 F. Supp. 236 (S.D.Ala. 1976).
42. Dome Condominium Ass'n v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977).
43. East Naples Water Sys., Inc. v. Board of County Comm'rs, 627 F. Supp. 1065 (S.D. Fla. 1986).
44. A.B.T. Corp. v. City of Ft. Lauderdale, 664 F. Supp. 488 (S.D. Fla.), *aff'd*, 835 F.2d 1439 (11th Cir. 1987).

Figure 5

Section 1983 Land Use Absention Decisions By Federal Circuit

1972-1988

1st Circuit:

Abstention Declined

1. Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983).
2. Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971).
3. Hotel Coamo Springs, Inc. v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976).

Abstention Ordered

4. Culebras Enters. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).
5. Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984).

2nd Circuit:

Abstention Declined

1. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974) (on grounds other than abstention).
2. Waltentas v. Lipper, 636 F. Supp. 331 (S.D.N.Y. 1986).

Abstention Ordered

3. Northeast Mines, Inc. v. Town of Smithtown, 584 F. Supp. 112 (E.D.N.Y. 1984).
4. Rattner v. Board of Trustees, 611 F. Supp. 648 (S.D.N.Y. 1985).

3rd Circuit:

Abstention Declined

1. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982).
2. Sullivan v. City of Pittsburgh, 811 F.2d 171 (3rd Cir. 1987), *cert. denied*, 108 S.Ct. 148 (1987).

3. Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976).
4. Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982).
5. Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985).
6. Van Meter v. Township of Maplewood, 696 F. Supp. 1024 (D.N.J. 1988).
7. Epstein v. Township of Whitehall, 693 F. Supp. 309 (E.D. Pa. 1988).

Abstention Ordered

8. Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).
9. Glen-Gery Corp. v. Lower Heidelberg Township, 608 F. Supp. 1002 (E.D. Pa. 1985).

4th Circuit:

Abstention Declined

1. Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).
2. Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980).

Abstention Ordered

3. Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).
4. Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987).
5. Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).
6. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

5th Circuit:

Abstention Declined

None

Abstention Ordered

None

6th Circuit:

Abstention Declined

None

Abstention Ordered

1. Forest Hills Util. Co. v. City of Heath, 539 F.2d 592 (6th Cir. 1976).
2. Danish News Co. v. City of Ann Arbor, 517 F. Supp. 86 (E.D. Mich. 1981), *aff'd without opinion*, 751 F.2d. 384 (6th Cir. 1984).

7th Circuit:

Abstention Declined

1. Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded without opinion*, 510 F.2d 976 (7th Cir. 1975).

Abstention Ordered

2. Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).

8th Circuit:

Abstention Declined

None

Abstention Ordered

1. Central Ave. News, Inc. v. City of Minot, 651 F.2d 565 (8th Cir. 1981).
2. Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984).

9th Circuit:

Abstention Declined

1. Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974)
2. Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985).
3. McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 408 U.S. 906 (1987).
4. M.J. Brock & Sons v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).

5. Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

Abstention Ordered

6. Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976).
7. Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977).
8. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).
9. Pearl Inv. Co. v City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).
10. World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).
11. Beck v. California, 479 F. Supp. 392 (C.D. Cal. 1979).

10th Circuit:

Abstention Declined

1. Oberndorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

Abstention Ordered

None

D.C. Circuit:

Abstention Declined

1. Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984), *cert. denied*, 109 S. Ct. 394 (1988).

Abstention Ordered

None

Figure 6

All Land Use Abstention Decisions By Federal Circuit 1972-1988

1st Circuit:

Abstention Declined

1. Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983).
2. Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D.N.H. 1971).
3. Hotel Coamo Springs, Inc. v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976).
4. Chan v. Town of Brookline, 484 F. Supp. 1283 (D. Mass. 1980).

Abstention Ordered

5. Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972).
6. Culebras Enters. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987).
7. Coombs v. Town of Ogunquit, 578 F. Supp. 1321 (D. Me. 1984).

2nd Circuit:

Abstention Declined

1. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974) (on grounds other than abstention).
2. Lerner v. Town of Islip, 272 F. Supp. 664 (E.D.N.Y. 1967).
3. Hill Constr. Co. v. Connecticut, 366 F. Supp. 737 (D. Conn. 1973).
4. Town of Springfield v. Vermont Envtl. Bd., 521 F. Supp. 243 (D. Vt. 1981).
5. Waltentas v. Lipper, 636 F. Supp. 331 (S.D.N.Y. 1986).

Abstention Ordered

6. Wigginess, Inc. v. Fruchtman, 482 F. Supp. 681 (S.D.N.Y. 1979), *aff'd with directions without opinion*, 628 F.2d 1346 (2d Cir.), *cert. denied*, 449 U.S. 842 (1980).
7. Northeast Mines, Inc. v. Town of Smithtown, 584 F. Supp. 112 (E.D.N.Y. 1984).

8. Rattner v. Board of Trustees, 611 F. Supp. 648 (S.D.N.Y. 1985).
9. Onondaga Landfill Sys., Inc. v. Williams, 624 F. Supp. 25 (N.D.N.Y. 1985).

3rd Circuit:

Abstention Declined

1. Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982).
2. Izzo v. Borough of River Edge, 843 F.2d 765 (3rd Cir. 1988).
3. Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976).
4. Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982).
5. Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985).
6. Sullivan v. City of Pittsburgh, 617 F. Supp. 1488, *corrected*, 620 F. Supp. 935 (W.D. Pa. 1985), *aff'd*, 811 F.2d 171 (3d cir. 1987), *cert. denied*, 108 S.Ct. 148 (1987).
7. Van Meter v. Township of Maplewood, 696 F. Supp. 1024 (D.N.J. 1988).
8. Epstein v. Township of Whitehall, 693 F. Supp. 309 (E.D. Pa. 1988).

Abstention Ordered

9. Salvati v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973).
10. Hovsons, Inc. v. Secretary of the Interior, 519 F. Supp. 434 (D.N.J. 1981), *aff'd*, 711 F.2d 1208 (3d Cir. 1983).
11. Glen-Gery Corp. v. Lower Heidelberg Township, 608 F. Supp. 1002 (E.D. Pa. 1985).

4th Circuit:

Abstention Declined

1. Timmons v. Andrews, 538 F.2d 584 (4th Cir. 1976).
2. Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978).
3. Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).

4. Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980).

Abstention Ordered

5. Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).
6. Caleb Stowe Assocs. v. Albemarle County, 724 F.2d 1079 (4th Cir. 1984).
7. Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987).
8. Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).
9. Ad Soil Services, Inc. v. Board of County Comm'rs, 596 F. Supp. 1139 (D. Md. 1984).
10. Northern Virginia Law School, Inc., Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).

5th Circuit:

Abstention Declined

None

Abstention Ordered

1. P.C. Utils. Corp. v. Division of Health of Dep't of Health & Rehabilitative Servs., 339 F. Supp. 916 (S.D. Fla. 1972), *aff'd without opinion*, 472 F.2d 1406 (5th Cir. 1973).

6th Circuit:

Abstention Declined

1. Bannum, Inc. v. City of Memphis, 666 F. Supp. 1091 (W.D. Tenn. 1986).

Abstention Ordered

2. Muskegon Theaters, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974).
3. Forest Hills Util. Co. v. City of Heath, 539 F.2d 592 (6th Cir. 1976).
4. Danish News Co. v. City of Ann Arbor, 517 F. Supp. 86 (E.D. Mich. 1981), *aff'd* without opinion, 751 F.2d. 384 (6th Cir. 1984).
5. J.V. Peters and Co. v. Hazardous Waste Facility Approval Bd., 596 F. Supp. 1556 (S.D. Ohio 1984).

7th Circuit:

Abstention Declined

1. E & E Hauling, Inc. v. Forest Preserve Dist., 821 F.2d 433 (7th Cir. 1987).
2. Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded without opinion*, 510 F.2d 976 (7th Cir. 1975).
3. Rasmussen v. City of Lake Forest, Illinois, 404 F. Supp. 148 (N.D. Ill. 1975).
4. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd* without opinion, 475 U.S. 1001 (1986).

Abstention Ordered

1. Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).

8th Circuit:

Abstention Declined

1. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).
2. Marjak, Inc. v. Cowling, 626 F. Supp. 522 (W.D. Ark, 1985).
3. People Tags, Inc. v. Jackson County Legislature, 636 F. Supp. 1345 (W.D. Mo. 1986).

Abstention Ordered

4. Central Ave. News, Inc. v. City of Minot, 651 F.2d 565 (8th Cir. 1981).
5. Bob's Home Serv., Inc. v. Warren County, 755 F.2d 625 (8th Cir. 1985).
6. Home Builders Ass'n v. City of Kansas City, 379 F. Supp. 1316 (W.D. Mo. 1974).
7. Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984).
8. Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986).

9th Circuit:

Abstention Declined

1. Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir.

2. Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380 (9th Cir. 1981)
3. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd on other grounds sub nom.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
4. Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983).
5. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 475 U.S. 1132 (1986).
6. Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985).
7. McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 408 U.S. 906 (1987).
8. M.J. Brock & Sons v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).
9. Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

Abstention Ordered

10. Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976).
11. Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977).
12. Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).
13. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir 1979).
14. Isthmus Landowners Ass'n v. California 601 F.2d 1087 (9th Cir. 1979).
15. Beck v. California, 479 F. Supp. 392 (C.D. Cal 1979).
16. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).
17. Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).
18. Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).
19. World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).

20. Southwest Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986).
21. Rooke v. City of Scotts Valley, 664 F. Supp. 1342 (N.D. Cal. 1987).

10th Circuit:

Abstention Declined

1. City of Moore v. Atchison, T. & S. Ry. Co., 699 F.2d 507 (10th Cir. 1983).
2. Oberndorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

Abstention Ordered

None

11th Circuit:

Abstention Declined

1. Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982).
2. Bayside Enters. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978).

Abstention Ordered

3. Fields v. Rockdale County, 785 F.2d 1558 (11th Cir. 1986).
4. Stallworth v. City of Monroeville, 426 F. Supp. 236 (S.D. Ala. 1976).
5. Dome Condominium Ass'n v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977).
6. East Naples Water Sys., Inc. v. Board of County Comm'rs, 627 F. Supp. 1065 (S.D. Fla. 1986).
7. A.B.T. Corp., v. City of Ft. Lauderdale, 664 F. Supp. 488 (S.D. Fla.), *aff'd*, A.B.T. Corp. v. Ft. Lauderdale, 835 F.2d 1439 (11th Cir. 1987).

Figure 7

Ninth And Fourth Circuit Land Use Abstention Decisions
1972-1988

Abstention Declined

(13 cases)

9th Circuit:

1. Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974).
2. Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380 (9th Cir. 1981).
3. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd on other grounds sub nom.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
4. 1Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983).
5. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 475 U.S. 41 (1986).
6. Adultworld Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985).
7. McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 408 U.S. 906 (1987).
8. M.J. Brock & Sons v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).
9. Blodgett v. County of Santa Cruz, 502 F. Supp. 204 (N.D. Cal. 1980).

4th Circuit:

10. Timmons v. Andrews, 538 F.2d 584 (4th Cir. 1976).
11. Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978).
12. Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).
13. Chertkof v. Mayor of Baltimore, 497 F. Supp. 1252 (D. Md. 1980).

Abstention Ordered

(18 cases)

9th Circuit:

1. Rancho Palos Verdes Corp. v. City of Laguna Beach, 547

2. Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977).
3. Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).
4. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979).
5. Isthmus Landowners Ass'n v. California 601 F.2d 1087 (9th Cir. 1979).
6. Beck v. California, 479 F. Supp 392 (C.D. Cal. 1979).
7. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983).
8. Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).
9. Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).
10. World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).
11. Southwest Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986).
12. Rooke v. City of Scotts Valley, 664 F. Supp. 1342 (N.D. Cal. 1987).

4th Circuit:

13. Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).
14. Caleb Stowe Assocs. v. Albemarle County, 724 F.2d 1079 (4th Cir. 1984).
15. Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987).
16. Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).
17. Ad Soil Servs., Inc. v. Board of County Comm'rs, 596 F. Supp. 1139 (D. Md. 1984).
18. Northern Virginia Law School, Inc. v. City of Alexandria, 680 F. Supp. 222 (E.D. Va. 1988).