Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding

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PRECLUSION CONCERNS AS AN ADDITIONAL FACTOR
WHEN STAYING A FEDERAL SUIT IN DEFERENCE
TO A CONCURRENT STATE PROCEEDING

INTRODUCTION

The Supreme Court has defined the abstention doctrines\(^1\) as narrow exceptions to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."\(^2\) In *Colorado River Water Conservation District v. United States*,\(^3\) the Court dismissed a case that was also the subject of parallel state court proceedings.\(^4\) Although the Court in that case identified congressional authority warranting the decision not to exercise its jurisdiction,\(^5\) lower federal courts have dismissed and

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5. *See Colorado River*, 424 U.S. at 819. The Court stated that of the factors counseling for the dismissal "the most important" was the congressional policy evident in the McCarran Amendment, ch. 651, Title II, § 208(a), 66 Stat. 560, 560 (codified at 43 U.S.C. § 666 (1982)). *See Colorado River*, 424 U.S. at 819; accord Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983) (Court in *Colorado River* recognized Congress' judgment that disputes were intended to be adjudicated in state court); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 673 (1977) (Brennan, J., dissenting in 4-1-4 decision) (without federal congressional policy comparable to that identified in *Colorado River*, stay is inappropriate). *See infra* notes 36-37 and accompanying text for a discussion of the McCarran Amendment.
stayed cases without such authority.\(^6\)

Using the doctrine in the absence of legislative approval raises difficult questions concerning both the principle of separation of powers and the plaintiff's right to a federal forum.\(^7\) This Note examines the conflict be-

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6. See, e.g., Microsoft Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 537-38 (7th Cir. 1982) (wasteful duplicative effort and no peculiarly federal interest favoring exercise of jurisdiction); Dinizik v. Hanson Galleries, 553 F. Supp. 547, 549 (S.D. Tex. 1982) (mem.) (unique factors favoring retention could not be identified); Klingenber v. Bobbin Publications, Inc., 530 F. Supp. 173, 174 (D.D.C. 1982) (no compulsion to exercise jurisdiction if state court proceeding is more expeditious); Bagley v. Florida First Nat'l Bank, 508 F. Supp. 11, 12-13 (M.D. Fla. 1980) (avoidance of wasteful litigation); see also McKnight v. Blanchard, 667 F.2d 477, 479 (5th Cir. 1982) (court has discretion to stay proceedings in interest of controlling docket but may not do so indefinitely); Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976) (court has power to stay case to avoid wasteful duplicative litigation but power not to be exercised unless cases similar); Thompson v. Kerr, 555 F. Supp. 1090, 1098-99 (S.D. Ohio 1982) (same). But see Roberts & Schaefer Co. v. Lake Coal Co., No. 83-5551, slip op. at 4 (6th Cir. Nov. 20, 1984) (insufficient showing to warrant departure from rule obliging federal court to exercise authority. 6

Some courts have distinguished between a dismissal of jurisdiction and a mere stay. See Augustin v. Mughal, 521 F.2d 1215, 1217 (8th Cir. 1975); Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 821 (9th Cir. 1975). However, this distinction is artificial. When a federal court grants a stay the expectation is that the state court will resolve the entire controversy and that the plaintiff will be barred from returning to federal court by res judicata principles. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983); C. Wright, supra note 1, § 52, at 317-18. Thus, the effect of a stay and a dismissal is the same: a plaintiff is unable to litigate federal claims in a federal forum. See infra notes 76-78 and accompanying text.


The Supreme Court has been aware of the implications of separation of powers principles on the exercise of federal jurisdiction in contexts other than abstention. See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (federal court must carefully consider whether it should imply a cause of action and exercise jurisdiction in order to provide remedy consistent with congressional purpose); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (separation of powers requires nonexercise of jurisdiction when exercise would infringe executive branch's foreign affairs powers); Baker v. Carr, 369 U.S.
between Colorado River abstention and congressional enactment of jurisdictional statutes, and recommends that courts consider res judicata principles when determining the propriety of a stay.

I. DENIAL OF FEDERAL JURISDICTION IN DEFERENCE TO PENDING STATE PROCEEDINGS

Although the federal courts have acknowledged an obligation to hear cases,\(^8\) they have also recognized the power to abstain\(^9\) in "exceptional


9. There are three traditional abstention doctrines permitting federal courts to decline or postpone the exercise of their jurisdiction in deference to anticipated or pending state proceedings. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-14 (1976).

The first category, identified as Pullman abstention, applies "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959); see Harrison v. NAACP, 360 U.S. 167, 176-77 (1959); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 228-29 (1957); City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 171-72 (1942); Railroad Comm’n v. Pullman Co., 312 U.S. 496, 498 (1941). See generally L. Tribe, American Constitutional Law § 3-40, at 150-52 (1978) (discussing Pullman doctrine); C. Wright I, supra note 1, § 52, at 303-07 (same); Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974) (same); Redish I, supra note 7, at 95-96 (same). The parties are ordered to resolve the state law issues in state court only if the state statute is capable of two constructions—one which renders the law unconstitutional and the other which renders it constitutional. Accordingly, abstention is inappropriate if the meaning of the state law is settled. Colorado River, 424 U.S. at 315-17; see, e.g., Lindsey v. Normet, 405 U.S. 56, 64-69 (1972); City of Chicago v. Atchison T. & S.F. Ry., 357 U.S. 77, 84 (1958); C. Wright I, supra note 1, § 52, at 304; Note, Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River, 44 U. Chi. L. Rev. 641, 649 (1977) [hereinafter cited as The Impact of Colorado River].

Pullman abstention does not result in the abdication of jurisdiction; it merely delays the exercise of that jurisdiction. The plaintiff is not required to submit his federal claims to the state court, but may instead reserve these contentions until returning to the federal court following the state adjudication. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-17 (1964); see American Trial Lawyers Ass’n v. New Jersey Sup. Ct., 409 U.S. 467, 469 (1973) (per curiam); Harrison v. NAACP, 360 U.S. 167, 177 (1959); Government & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364, 366 (1957). But see Harris County Comm’rs v. Moore, 420 U.S. 77, 88-89 & n.14 (1975) (dismissal of federal claims without prejudice is appropriate when state court will refuse to hear only state law claims while plaintiff reserves federal claims); Romero v. Caldwell, 455 F.2d 1163, 1167 (5th Cir. 1972) (same). The doctrine, however, is not without its detractors. It is thought to cause undue delay in the enforcement of federal rights, see J. Nowak, supra note 2, at 102; C. Wright I, supra note 1, § 52, at 305-06; Field, supra, at 1130, to employ state courts as advisors or research assistants to the federal courts, see United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 859, 863 (Tex. 1965); C. Wright I, supra note 1, § 52, at 307, and to waste judicial effort in determining whether the state statute is sufficiently ambiguous to abstain, see Redish I, supra note 7, at 95.

A second abstention doctrine, recognized in Burford v. Sun Oil Co., 319 U.S. 315
(1943), requires a federal court to dismiss a case involving an area of traditional state power when the exercise of federal jurisdiction would have a disruptive effect on “state efforts to establish a coherent policy with respect to a matter of substantial public concern.” Colorado River, 424 U.S. at 814; see Burford, 319 U.S. at 326-27; see, e.g., Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam) (water rights); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959) (eminent domain condemnation proceedings); Alabama Pub. Serv. Comm’n v. Southern Ry., 341 U.S. 341, 344 (1951) (infrastate railroad regulation); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233 (1st Cir. 1979) (auto insurance rates). To invoke the doctrine state law must be unsettled and the matter must bear on a substantial state policy. See Colorado River, 424 U.S. at 815. Compare Louisiana Power, 360 U.S. at 29-30 (abstention permitted when issues involving state’s eminent domain powers were unsettled) with County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 187 (1959) (abstention not permitted when issues involving state’s eminent domain powers were well settled).

The third abstention doctrine was first utilized in Younger v. Harris, 401 U.S. 37 (1971), and prohibits a federal court from enjoining ongoing state criminal proceedings even when federal constitutional claims are alleged. See id. at 46-47; Colorado River, 424 U.S. at 816. The Younger Court ruled that although federal courts should not hesitate to vindicate federal rights, they should do so in ways that will not interfere with legitimate state activities. See 401 U.S. at 44. These principles also apply to state civil proceedings when the state is a party to the proceeding and the matter is closely related to a criminal statute. See, e.g., Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (civil attachment brought by the state); Judice v. Vail, 430 U.S. 327, 333-35 (1977) (judicial contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (state’s interest in nuisance litigation is as great as in criminal proceeding). For a general discussion of the Younger abstention doctrine see generally J. Nowak, supra note 2, at 106-09; C. Wright I, supra note 1, § 52A.

The Supreme Court has stated that the difficulty of ascertaining state law is not a sufficient ground for a court to decline to exercise its jurisdiction. See Meredith v. Winter Haven, 320 U.S. 228, 234-35 (1943). Subsequent decisions of the Court, however, have cast doubt on this proposition, and the difficulty of ascertaining state law has been considered another ground for abstention. See C. Wright I, supra note 1, § 52, at 308-09, 312 (comparing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), where dismissal was not permitted because state law was settled, with Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), where dismissal was ordered because state law was unsettled). The Court has affirmed the Meredith rule, see McNeese v. Board of Educ., 373 U.S. 668, 673 n.5 (1963), but has endorsed a certification procedure which can be used to obtain a judgment from a state’s highest court on an unsettled state issue, see Lehman Brothers v. Schein, 416 U.S. 386, 389-90, 392 (1974), and has stated in dictum that “unclear issues are commonly split off and referred to state courts,” see Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 920 (1984).

In addition to the abstention doctrines, the Supreme Court has recognized several other limited exceptions to the general rule that a federal court must exercise its properly invoked jurisdiction. The doctrine of forum non conveniens permits dismissal of an action to a more convenient forum or when public policy demands the dismissal. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257-61 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947). Typically the alternative forum is a federal court, and dismissal of one action does not impinge on the plaintiff’s right of access to a federal forum. It is possible, however, that the only alternative forum might be a state court. The change of venue statute, 28 U.S.C. § 1404(a) (1982), has eliminated this problem, see C. Wright I, supra note 1, § 52, at 315 n. 62, as has the reluctance of courts to invoke the doctrine when a plaintiff would be relegated to a state court, see Burns v. Adam, 114 F. Supp. 355, 356 (E.D. Pa. 1953); The Impact of Colorado River, supra, at 647-48. How this doctrine affects a court’s obligation to exercise jurisdiction is beyond the scope of this Note.

When a state court has already taken jurisdiction of a res, a federal court must decline the exercise of jurisdiction. Princess Lida v. Thompson, 305 U.S. 456, 466 (1939). Jurisdiction of the property is said to vest the state court with exclusive jurisdiction to deter-
The federal judiciary has been too eager to overlook this obligation, however, and frequently declines to exercise jurisdiction when a similar proceeding is pending in state court. A federal court may also decline the exercise of its jurisdiction to hear a declaratory judgment when a similar state suit is pending. Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494-95 (1942). The dismissal in Brillhart, however, was based on the Court's discretionary power to exercise the equitable jurisdiction granted in the Declaratory Judgment Act. See Will v. Calvert Fire Ins. Co., 437 U.S. 655, 670-72 (1978) (Brennan, J., dissenting); 28 U.S.C. § 2201 (1982).

Finally, a federal court can stay an action where the same issues are present in another action pending in another federal court. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 181, 184 (1952); Exxon Corp. v. United States Dep't of Energy, 594 F. Supp. 84, 89-90 (D. Del. 1984).

The prudential standing doctrine is another example of an instance in which a federal court may decline the exercise of its properly invoked jurisdiction. C. Wright 1, supra note 1, § 13, at 70-74. However, it is beyond the scope of this Note to discuss the manner in which that doctrine affects a court's obligation to exercise its jurisdiction.

A. Declining the Exercise of Jurisdiction

The duty to exercise jurisdiction is implicated when a plaintiff is forced to litigate his claims in state court because a federal court has invoked one of the abstention doctrines. Under section 1738 of the Judicial Code, federal courts must give state court judgments the same preclusive effect that those judgments receive in the courts of the state from which they emanate. Indeed, not only are federal issues actually litigated in a state case barred in a subsequent federal action, but issues which could have been raised but were not are also precluded.

Application of this res judicata principle in the abstention context substantially limits a litigant's right to federal court adjudication of his en-
tire civil action.\textsuperscript{16} Therefore, abstention has been permitted only in the exceptional circumstances in which Congress has expressly relaxed the obligation to exercise jurisdiction\textsuperscript{17} or when a recognized public policy capable of supporting an implication of such congressional authority can be identified.\textsuperscript{18} The Court has stated that abstention can be justified

\begin{itemize}
\item \textsuperscript{16} See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10, 28 (1983); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 414-15 & n.5 (1964); Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1183-84 (11th Cir. 1981); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 397 (5th Cir. 1981); C. Wright II, supra note 1, § 4247 at 517-19; The Impact of Colorado River, supra note 9, at 641 & n.1.

In \textit{Burford} abstention it is clear that the entire case is left for state court adjudication with no possibility for a return to federal court, see Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 348-49 (1951); Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943); C. Wright II, supra note 1, § 4245, at 490-91; see also England, 375 U.S. at 415 & n.5 (relegating a plaintiff to state court is objectionable in \textit{Pullman} abstention but not in \textit{Burford} abstention), except through Supreme Court review of a decision from the state's highest court, see 28 U.S.C. § 1257 (1982). In \textit{Younger} abstention the state criminal proceedings will effectively bar any relitigation of federal constitutional claims in a subsequent federal action for civil damages. See Allen v. McCurry, 449 U.S. 90, 95-96 (1980).

In \textit{Pullman} abstention the fact that the adjudication of state law issues might preclude subsequent litigation of federal issues in a federal forum led the Court in \textit{England} to develop a procedure whereby a plaintiff is permitted to reserve the federal claims. See \textit{375 U.S. at 421-22 (1964)}; NAACP v. Button, 371 U.S. 415, 427-28 (1963).

\item \textsuperscript{17} Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976); see Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 & n.22 (1983) (Court identified a jurisdictional statute giving express congressional authority for expeditious federal adjudication); Redish I, supra note 7, at 78, 81 (courts should not decline jurisdiction absent statutory authority). Congress, in the interest of federalism, has dictated federal court abstention in certain cases. See, e.g., The Tax Injunction Act, 28 U.S.C. § 1341 (1982); The Johnson Act, 28 U.S.C. § 1342 (1982); 28 U.S.C. § 2254(b) (1982); The Anti-Injunction Act, 28 U.S.C. § 2283 (1982); The Three-Judge Court Act, 28 U.S.C. § 2284 (1982). These acts constitute express legislative limits on the exercise of federal judicial power. There is little reason to suspect that Congress intended additional limits to be self-imposed by the judiciary. Arguably, however, if Congress was unhappy with the abstention doctrines it could revoke them. The failure to do so, combined with the re-enactment of the relevant jurisdictional legislation may reveal an implicit congressional acceptance and ratification of the judge-made abstention doctrines. See Redish I, supra note 7, at 81 (posing this argument only to attack it). For an excellent criticism of the argument, see \textit{id.} at 80-84 (Congress has not deferred to judicial discretion in this area; theory condones through legislative inertia what is initially a judicial usurpation of legislative authority; Congress is too busy to have to change the law every time it disagrees with an incorrect judicial interpretation of a statute).

\item \textsuperscript{18} See \textit{Younger v. Harris}, 401 U.S. 37, 43 (1971) (inferring power to dismiss case from congressional history of permitting state courts to try state cases free from federal interference); Burford v. Sun Oil Co., 319 U.S. 315, 332-33 (1943) (implying that court should temper exercise of its equitable powers before Congress imposed rigorous restrictions on those powers to further federal harmony) (quoting Railroad Comm'n v. \textit{Pullman Co.}, 312 U.S. 496, 501 (1941)). Professor Redish argues that it is conceivable but highly unlikely that Congress would impliedly delegate to the judiciary the authority to modify a jurisdictional grant when necessary to avoid friction within the federal system. See Redish I, supra note 7, at 78, 80. It has also been suggested that the power of the federal courts to fill in the interstices of a statutory act empower it to modify the jurisdictional grants when Congress can be said not to have intended otherwise. See \textit{Gulf Oil Corp. v. Gilbert}, 330 U.S. 501, 515 (1947) (Black, J., dissenting). The Court has made a considerable effort to identify recognizable public policies supporting abstention in order to justify
"only in the exceptional circumstances where the order . . . would clearly serve an important countervailing interest."19 The abstention cases have confined these "important countervailing interest[s]" to the recognized policies of federalism, comity and proper constitutional adjudication.20 Because congressional authority for the decision not to exercise jurisdiction can be inferred from these policies, the principle of separation of powers and the right of a plaintiff to a federal forum have not been compromised.21

A federal court should not, however, abstain solely because an in per-

an implication of congressional authority for the procedure. See Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). See infra note 20 and accompanying text.


20. Both Burford and Younger abstention are supported by federalist principles. In Burford abstention it is thought appropriate, in a dual judicial system, to defer to sensitive, complex and independent state administrative programs and policies of substantial public import. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976); Bezanson, Abstention: The Supreme Court and Allocation of Judicial Power, 27 Vand. L. Rev. 1107, 1123 (1974); Note, Abstention: An Exercise in Federalism, 108 U. Pa. L. Rev. 226, 230 (1976). In Younger abstention it is considered important to leave state courts free to perform their separate functions, especially when the state attempts to enforce its own penal statutes. See Judicice v. Vail, 430 U.S. 327, 332-33 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01 (1975); Younger v. Harris, 401 U.S. 37, 44 (1971). The Younger abstention doctrine is also said to be justified as an exercise of the court's equitable powers. Because the federal plaintiff could raise his claims in the state proceeding there is an adequate remedy at law and no need for the federal court to exercise its equitable powers. See Judicice, 430 U.S. at 336-37; Younger, 401 U.S. at 43-44.

Pullman abstention is supported by two recognized policies. First, it is thought best to avoid unnecessary constitutional adjudication. See Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 511 (1972) (citing Harman v. Forssenius, 380 U.S. 528, 534 (1965)); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941). Second, it is thought to be appropriate to respect the independence of state governments and to avoid hasty interpretations of unsettled state law. Pullman, 312 U.S. at 500.

A recent Supreme Court decision may have an interesting impact on the abstention doctrines that are based on federalist principles. In Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985), the Court stated: "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . [T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." Id. at 1018. The Court argued that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." Id. at 1020. The argument is equally forceful with respect to Congress' power to enact jurisdictional statutes. The principal limit on that power is state participation in the federal system. Accordingly, the judiciary should not concern itself with creating federalism doctrines which "invit[e] an unelected federal judiciary to make decisions about which state policies it favors and which . . . it dislikes." Id. at 1015. It is not the role of the judiciary to invoke federalist concepts to modify congressional enactments; Congress is the appropriate forum for consideration of these principles. Indeed, Congress has demonstrated its ability to accommodate state interests through the enactment of statutes preventing the federal judiciary from unnecessarily intruding on the jurisdiction of the state courts. See supra note 17 and accompanying text.

21. See infra notes 60-70 and accompanying text.
sonam action has been filed in state court. Ordinary there is no express congressional authority permitting abstention in such a case and there are no identifiable public policies capable of supporting an implication of such congressional authority. Nevertheless, lower federal courts, seeking to exercise greater control over their dockets, have cast doubt on this proposition. Finding a pattern of authority running through recognized doctrines permitting dismissals, these courts have held that the mere pendency of a similar state proceeding is sufficient to invoke abstention. The inefficiency of duplicative litigation was regarded as sufficiently exceptional to warrant dismissal of the federal action.


23. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (dismissal permitted because case presented rare instance in which express congressional authorization was found). The policies underlying Younger and Burford abstention, see supra note 20, are ordinarily not present in a case.

24. See, e.g., Weiner v. Shearson, Hamill & Co., 521 F.2d 817, 819-21 (9th Cir. 1975); PPG Indus. v. Continental Oil Co., 478 F.2d 674, 679-81 (5th Cir. 1973); Reichman v. Pittsburgh Nat'l Bank, 465 F.2d 16, 18 (3d Cir. 1972); Weber v. Consumers Digest, Inc., 440 F.2d 729, 732 (7th Cir. 1971); Amdur v. Lizzlies, 372 F.2d 103, 106-08 (4th Cir. 1967); Leer Siegler, Inc. v. Adkins, 330 F.2d 595, 601-02 (9th Cir. 1964); Chronicle Publishing Co. v. NBC, 294 F.2d 744, 749 (9th Cir. 1961); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14, 15 (2d Cir. 1951); id. at 16 (Clark, J., dissenting); Mottolese v. Kaufman, 176 F.2d 301, 302-03 (2d Cir. 1949); see also Thompson v. Boyle, 417 F.2d 1041, 1042 (5th Cir. 1969) (court states that it is not adhering to stay procedure developed in other circuits, yet it affirms stay), cert. denied, 397 U.S. 972 (1970).

25. These courts combined a variety of doctrines to justify the finding that they possess the discretion to dismiss a case in deference to parallel proceedings. In addition to the abstention doctrines, these courts relied on forum non conveniens, the declaratory judgment principle, the rule that the first court to control a res exercises jurisdiction to the exclusion of all others, and the rule that one federal court will defer to a similar action in another federal court. The aggregate of these rules was interpreted as suggesting that the obligation to exercise jurisdiction was no longer absolute. See, e.g., Weiner v. Shearson, Hamill & Co., 521 F.2d 817, 819-21 (9th Cir. 1975) (abstention, declaratory judgment rule, forum non conveniens doctrine); PPG Indus. v. Continental Oil Co., 478 F.2d 674, 679-81 (5th Cir. 1983) (abstention, res exception, declaratory judgment rule); Aetna State Bank v. Altheimer, 430 F.2d 750, 756 (7th Cir. 1970) (court congestion justifies abstention), overruled, Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), rev'd, 437 U.S. 655 (1978); Amdur v. Lizzlies, 372 F.2d 103, 106 (4th Cir. 1967) (same) (quoting Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936)); Mottolese v. Kaufman, 176 F.2d 301, 302-03 (2d Cir. 1949) (abstention, declaratory judgment rule, forum non conveniens doctrine and doctrine that a federal court should defer to similar action in another federal court relied upon to justify a stay).

B. Colorado River Abstention and the Obligation to Exercise Jurisdiction

The Supreme Court in Colorado River addressed the propriety of this conclusion. The United States government filed suit in federal court seeking a declaration of its rights and those of certain Indian tribes to waters in the State of Colorado. The Colorado Water Conservation District intervened in the federal action as a defendant and filed a motion to dismiss the suit in deference to an ongoing state suit in which the United States had been joined as a defendant. The district court granted the motion to dismiss the federal suit on abstention grounds. On appeal the Tenth Circuit reversed, holding that the United States was not prevented from litigating its water rights as a plaintiff in a federal forum by any of the traditional abstention doctrines.

The Supreme Court reversed. It ruled that although none of the established abstention doctrines supported the dismissal, it was nonetheless proper. Noting the general rule that the mere pendency of an in personam action in state court was no bar to a federal suit, the Court found congressional authority in a statute—the McCarran Amendment—that counselled for deference to comprehensive state procedures for the adjudication of water rights. The Court noted that "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" also supported the dismissal. In addition, the Court stated that "[i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent

28. Id. at 803, 805.
29. Id. at 806. The United States had been served in the state proceeding pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1982), which provides:
   Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law . . . and the United States is a necessary party to such suit.
30. Colorado River, 424 U.S. at 806 (district court opinion was oral).
33. See Colorado River, 424 U.S. at 806.
34. See id. at 817, 819-21.
35. See id. at 817.
jurisdiction, a federal court may . . . consider such factors as" which court first assumed jurisdiction over property, the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums.39

Lower federal courts have relied on this language as an affirmation of the entrenched practice of staying federal actions merely because of the pendency of a similar suit in state court.40 It can be argued, however,
that the Court rejected that procedure and has reaffirmed the rule that only exceptional circumstances support a refusal to exercise jurisdiction.

These courts have ignored the presence of the McCarran Amendment and its effect on the analytical framework in which *Colorado River* was decided. It was this amendment that provided the necessary congressional authorization to relax the otherwise unflagging obligation to exercise federal jurisdiction. The Court, by acting in accordance with a legislative directive, remained faithful to the exceptional circumstances requirement and thus to the judiciary’s role within the constitutional scheme of government.

Similarly, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court relied on a federal statute, this time to deny a stay of a federal proceeding in deference to a state court case. In *Moses H. Cone*, a hospital and its contractor had agreed to arbitrate disputes arising during the performance of a contract. After completion of performance, however, the hospital sued in state court for a declaration that the contractor did not have a right to arbitration. The contractor immediately sued in federal court to compel arbitration pursuant to the federal Arbitration Act. The hospital then moved to stay the federal proceeding in deference to the ongoing state proceeding. The district court granted the stay but the court of appeals reversed. The Supreme Court held that a stay was inappropriate because the policy of the Arbi-

(1978) (Blackmun, J., concurring); *id.* at 672-74 (Burger, C.J., and Brennan, Marshall, Powell, J.J., dissenting).

41. See *supra* notes 11, 24-26 and accompanying text. See also *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 674 (1978) (Brennan, J., dissenting) (relying only on four factor balance test ignores wholesale analytical framework set forth in *Colorado River* because it focuses on “secondary factors” supporting dismissal in that case).

42. *Colorado River*, 424 U.S. at 819. The Court stated: “The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . The . . . jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights . . . .” *Id.* By referring to the congressional policies inherent in the McCarran Amendment, the Court sought to identify authority for its abdication of jurisdiction. See *id.*; accord *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (*Colorado River* recognized that McCarran Amendment represents Congress’ judgment that field of water rights is one peculiarly appropriate for comprehensive treatment in state courts). See also *infra* notes 61-70 and accompanying text.

43. See *supra* note 10 and accompanying text.

44. See *infra* notes 62-70 and accompanying text.


46. See *id.* at 20 & n.22, 24, 27 (relevant federal law requires piecemeal adjudication when necessary to give effect to an arbitration agreement); *id.* at 24 (Congress declared a liberal federal policy favoring arbitration agreements); *id.* at 27 (Arbitration Act prescribes summary and speedy procedures).

47. *Id.* at 4-5, 7.


50. *Id.* (unpublished district court opinion).

51. *Id.* at 8; see *In re Mercury Constr. Corp. v. Moses H. Cone Memorial Hosp.*, 656 F.2d 933, 935 (4th Cir. 1981), aff’d, 460 U.S. 1 (1983).
tuation Act was to provide expeditious relief to those seeking to compel arbitration. The Court rejected the contention that exceptional circumstances were present, and emphasized that its task was "not to find some substantial reason for the exercise of federal jurisdiction by the district court [but] to ascertain whether there exist . . . the 'clearest of justifications,' [for] the surrender of that jurisdiction."

*Moses H. Cone* indicated a desire to curb the practice of deferring to a pending state suit. Indeed, the Court added two factors to be considered when utilizing the *Colorado River* test: whether the state forum is adequate to provide the requested relief and whether federal law provides the rule of decision on the merits of the case. However, the Court also noted that the decision "to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist." Courts are free to discuss additional factors as long as they consider them in light of congressional intent. Nevertheless, the practice of deferring to pending state suits continues in the lower federal courts; the danger that the rule will be swallowed by the exception persists. Proper respect for the obligation to exercise federal jurisdiction and its constitutional underpinnings requires the application of a stricter test before a federal action is stayed in deference to a state proceeding.

II. AN ADDITIONAL CONSIDERATION: THE PRECLUSIVE EFFECT OF STATE COURT JUDGMENTS IN SUBSEQUENT FEDERAL ACTIONS

A. Obligation of the Federal Courts to Exercise Jurisdiction

The federal judiciary has often acknowledged a plaintiff's right to invoke federal jurisdiction and a court's corresponding obligation to exer-

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52. See Moses H. Cone, 460 U.S. at 22-23.
53. See id. at 19.
54. Id. at 25-26 (emphasis in original).
55. Redish I, supra note 7, at 97-98; see C. Wright II, supra note 1, § 4247, at 129-30 (Supp. 1983).
57. Moses H. Cone, 460 U.S. at 16.
60. See, e.g., Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510 (1972) (quoting
cise that jurisdiction.\textsuperscript{61} This concept flows from the principle of separation of powers, which mandates that the federal judiciary abide by legislative commands, absent a finding of unconstitutionality.\textsuperscript{62} This re-

Zwickler v. Koota, 389 U.S. 241, 248 (1967)); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909); Korby v. Erickson, 550 F. Supp. 136, 139 (S.D.N.Y. 1982); Cottrell v. Virginia Elec. & Power Co., 363 F. Supp. 692, 696 (E.D. Va. 1973) (quoting Zwickler, 389 U.S. at 248). It is unclear whether the right is statutory, constitutional, or both. However, since the Supreme Court’s decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), it is arguable that the parties in a federal forum have a personal constitutional right to have the case determined by article III judges. \textit{Id.} at 89-90 (Rehnquist, J., concurring); Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.) (en banc) (citing \textit{Northern Pipeline}, cert. denied, 105 S. Ct. 100 (1984); Checker Cab Mfg. Co. v. Checker Taxi Co., 26 F.2d 752, 752 (N.D. Ill. 1928). \textit{But see} Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (a right which comes into existence only by virtue of congressional act and which may be withdrawn in the same manner cannot be described as a constitutional right but only as a statutory right). Some have argued that federal forums are simply superior to state courts. \textit{See England,} 375 U.S. at 427 (Douglas, J., concurring) (federal judges appointed for life are more impartial); Romero v. Weakley, 226 F.2d 399, 401 (9th Cir. 1955) (same); Redish I, \textit{ supra} note 7, at 73 & n.15 (arguments that federal courts are superior to state courts are overwhelming).

61. \textit{See} England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909). In 1821 the Supreme Court stated in dictum that a federal court has “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 constitution.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see McClellan v. Carland, 217 U.S. 268, 282 (1910); Chicot County v. Sherwood, 148 U.S. 529, 534 (1893); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1857); Giardina v. Fontana, 733 F.2d 1047, 1053 (2d Cir. 1984); Boe v. Colello, 438 F. Supp. 145, 151-52 (S.D.N.Y. 1977); \textit{see also} Rohr Indus. v. Washington Metro. Area Transit Auth., 720 F.2d 1319, 1324 & n.4 (D.C. Cir. 1983) (noting viability of Cohens dictum from which all exceptions are carefully carved); Evans v. Tubbe, 657 F.2d 661, 665 (5th Cir. 1981) (must exercise jurisdiction); Home Depot, Inc. v. Louisiana, 589 F. Supp. 1258, 1262 (E.D. La. 1984) (same). \textit{But see} C. Wright I, \textit{ supra} note 1, § 52, at 302 (stating that there is no such rule today); \textit{The Impact of Colorado River,} \textit{ supra} note 9, at 646-53 (same); \textit{Pending State Court Suits,} \textit{ supra} note 16, at 686-93 (same); Vairo, \textit{Issuing Stays in Diversity Cases: A Cure for Growing Congestion?}, Nat’l L.J., Feb. 14, 1983, at 22, col. 2 (same).

The rationale for the rule is that the jurisdictional statutes represent congressional policy determinations concerning the extent to which plaintiffs will be given access to a federal forum. The courts are obliged by the principle of separation of powers to abide by those determinations and to adjudicate suits in which a plaintiff satisfies the statutory jurisdictional requirements. \textit{See Lake Carriers’ Ass’n v. MacMullan,} 406 U.S. 498, 510 (1972) (quoting \textit{Zwickler} v. Koota, 389 U.S. 241, 248 (1967)); \textit{England,} 375 U.S. at 415; Cohens, 19 U.S. (6 Wheat.) at 404; see, e.g., Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 100 (1984); Vickers v. Trainor, 546 F.2d 739, 746 (7th Cir. 1976); Romero v. Weakley, 226 F.2d 399, 401 (9th Cir. 1955); Armour & Co. v. Miller, 91 F.2d 521, 524-25 (8th Cir. 1937); Checker Cab Mfg. Co. v. Checker Taxi Co., 26 F.2d 752, 752 (N.D. Ill. 1928). \textit{But see} Butler v. Judge, 116 F.2d 1013, 1015 (9th Cir. 1941) (notwithstanding jurisdictional statute, concurrent proceedings should be stayed); Klingenberg v. Bobbin Publications, Inc., 530 F. Supp. 173, 174 (D.D.C. 1982) (same); \textit{The Impact of Colorado River,} \textit{ supra} note 9, 646-47 & n.37, 665 (same).

62. The framers chose to prevent the tyrannical centralization of power by distributing powers among three distinct branches of the federal government, each to exercise one of the governmental powers recognized by the framers as inherently distinctive—legisla-
quirement is especially important when Congress enacts a jurisdictional statute. The Constitution delegated to Congress the power to ordain
and establish inferior federal courts. This power has been interpreted as including the authority to vest these lower courts "with jurisdiction either limited, concurrent, or exclusive, and [to] withhold jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Congress has exercised this power by enacting general jurisdictional statutes giving certain plaintiffs the right to choose to bring suit in either federal or state court.

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64. U.S. Const. art. III, § 1. This section provides: "The 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 establish." Id. The framers provided for final review of questions of federal law in the Supreme Court and thereby curtailed the sovereign power of state judiciaries to make authoritative determinations of law. Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005, 1017 (1985). The decision whether to limit further the sovereign power of state judiciaries by creating inferior federal tribunals was postponed. In a heated debate at the Constitutional Convention it was decided that the creation of inferior federal tribunals would not be constitutionally required because the state courts were thought to be capable of handling the anticipated caseload. See 1 M. Farrand, The Records of the Federal Convention 104-05, 119 (rev. ed. 1937) (five to four vote). As a compromise, however, and because it was almost unanimously believed that a national judiciary would require more than just one supreme tribunal, the framers gave the national legislature the power to create such inferior federal courts at its discretion. Id. at 124-25 (eight to two vote); see Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Stevenson v. Fain, 195 U.S. 165, 167 (1904); C. Wright I, supra note 1, § 10, at 32-39. Not coincidentally, the first Congress, which was composed of many of the members present at the Constitutional Convention, determined that such tribunals were necessary, and exercised the power to create them by enacting the Judiciary Act of 1789. See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. See generally C. Wright I, supra note 1, § 1, at 4 (discussing history of federal jurisdiction); J. Nowak, supra note 2, at 23 (same); J. Peltason, supra note 62, at 103, 105 (same); L. Tribe, supra note 9, § 3-5, at 33 (same).

65. Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)); see, e.g., Toucey v. New York Life Ins. Co., 314 U.S. 118, 129 (1941); Lauf v. E. G. Shinnier & Co., 303 U.S. 323, 330 (1938); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Hallowell v. Commons, 239 U.S. 506, 508-09 (1916); Kentucky v. Powers, 201 U.S. 1, 24 (1906). The Supreme Court has explained that the power to define and distribute jurisdiction is incidental to the power to ordain and establish inferior federal tribunals. See Sheldon v. Sill, 49 U.S. (8 How.) 440, 448 (1850). In Sheldon the Court stated that because the Constitution gave Congress the power to establish inferior federal courts, one of two consequences must be the result with respect to the jurisdiction of those courts:

E[ither . . . each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or . . . Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences . . . could not be defended with any show of reason, and . . . the latter would seem to follow as a necessary consequence.

Id. at 448.

66. See, e.g., 28 U.S.C. § 1331 (1982) (federal question jurisdiction); id. § 1332 (diversity jurisdiction); id. § 1333 (admiralty jurisdiction); id. § 1337 (antitrust jurisdiction).
The Constitution did not grant Congress this authority without imposing a concomitant duty on the federal courts to adjudicate matters placed

Congress has made numerous specific grants of jurisdiction in chapter 85 of title 28 of the United States Code. These specific grants, however, are not exclusive of jurisdiction granted by other titles of the Code. See J. Moore, Moore's Judicial Code ¶ 0.03(22), at 135-36 (1949). Underlying the general jurisdictional statutes are congressional policy determinations favoring access to federal courts for the adjudication of certain matters. See Zwickler v. Koota, 389 U.S. 241, 245-48 (1967) (broadening of federal judicial power was based upon congressional desire to provide plaintiff the choice between state and federal forum); Microsoft Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 538-39 (7th Cir. 1982) (Doyle, J., dissenting) (creation and exercise of jurisdiction in national courts serves distinct values); Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 509-30 (1928) (addressing actual and proposed changes in jurisdictional statutes); The Federalist No. 80, at 438, 444 (A. Hamilton) (rev. ed. 1901) (discussing reasons for the creation of a federal judiciary). See supra note 61.

Congress initially enacted very limited federal question jurisdictional statutes and a general diversity jurisdictional statute. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; see C. Wright I, supra note 1, § 1, at 4, § 23, at 127. Not until 1875 did Congress confer jurisdiction to the outer limits permissible under the Constitution—to cases arising under the Constitution or laws of the United States. Act of March 3, 1875, ch. 137, 18 Stat. 470; see C. Wright I, supra note 1, § 1, at 4-6.

There are several reasons for Congress' determination that the federal judicial power should be expanded to the limits permissible by the Constitution. First, it was thought necessary to enable a plaintiff to avoid the perceived prejudices of a local forum. See Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 124 n.11 (1981); Middle Atlantic Utils. Co. v. S.M.W. Dev. Corp., 392 F.2d 380, 386 (2d Cir. 1968); Frankfurter, supra, at 520; Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Colum. L. Rev. 1163, 1178 & n.54 (1963). A second reason to expand the federal judicial power was to deal with local opposition to, or disregard of, the federal law. Lusky, supra, at 1178 & n.54. One of the primary ways to achieve these goals was to grant a plaintiff the right to construct a factual record in federal court. It was feared that federal appellate review of state court litigation would be inadequate if the factual record were constructed in a less-than-impartial forum. See Will v. Calvert Fire Ins. Co., 437 U.S. 655, 675 (1978) (Brennan, J., dissenting) (access to federal court intended to give litigants opportunity to take advantage of liberal federal discovery rules and to have impartial adjudication of factual disputes); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964) (objectionable to force a plaintiff to litigate in state court without chance to construct factual record in a federal forum); Dombrowski v. Pfister, 227 F. Supp. 556, 570 n.12 (E.D. La. 1964) (Wisdom, J., dissenting) (advantages of federally constructed record), rev'd, 380 U.S. 479 (1965). A second means of achieving these goals was to guarantee a plaintiff's access to an impartial forum protected by the institutional safeguards of article III. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 436 (1964) (Douglas, J., concurring) (in addition to advantages of constructing factual record in federal court, plaintiff entitled to litigate claims in forum that is guaranteed to be impartial); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 790 (D.C. Cir. 1984) (Edward, J., concurring) (congressional intent was to provide alternative forum to state courts), cert. denied, 105 S. Ct. 1354 (1985); Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.) (en bane) (parties to case in federal forum are entitled to have case determined by article III judges), cert. denied, 105 S. Ct. 100 (1984); Romero v. Weakley, 226 F.2d 399, 400 (9th Cir. 1955) (right to litigate in federal court enables plaintiff to choose court presided over by elected or appointed judge); Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665, 697-98 (1969) (provisions in article III, including life tenure, not created for benefit of judges but for benefit of judged).
within their jurisdiction.67 To argue otherwise would lead to the untenable conclusion that every substantive right created by Congress could effectively be subject to a practical veto by a judiciary unwilling to enforce certain laws.68 A stay or dismissal of federal jurisdiction, therefore,

67. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910); Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909); Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481, 489 (1960); Redish I, supra note 7, at 77-79, 112. The constitutional obligation emerges from the principle of separation of powers, which was designed to give the federal judiciary a considerable amount of independence. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-60 (plurality opinion), judgment stayed, 459 U.S. 813 (1982); The Federalist No. 78, at 356-57 (A. Hamilton) (rev. ed. 1901). See supra notes 60-61. However, Congress was given the power to create, define and distribute the jurisdiction of the federal courts, see Lockerty v. Phillips, 319 U.S. 182, 187 (1943); J. Nowak, supra note 2, at 23; C. Wright I, supra note 1, § 1, at 1-4, as a check on the power of the judiciary, see Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); see also Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 98th Cong., 1st Sess. 2 (1983) (Congress possesses the check but has not exercised it). The framers delegated the decision of how to allocate federal jurisdiction to Congress, which was to make that determination in accordance with the public interest. Lockerty, 319 U.S. at 187; Cary, 44 U.S. (3 How.) at 244; I M. Farrand, supra note 64, at 124-25. In effect the framers postponed the determination whether access to the federal judiciary should be guaranteed. Instead, that determination was to be made by the representative national legislature, which was better able to respond to the needs of the public. See supra note 64. Regardless of whether that decision was made at the Constitutional Convention or in Congress, however, the judiciary was never intended to be free to ignore the command. Ordinarily the judiciary does not possess the power to substitute its judgments as to the proper allocation of jurisdiction for those of either the framers or the Congress. See Lake Carriers’ Ass’n v. MacMullan, 406 U.S. 498, 510 (1972) (quoting Zwickler v. Koota, 389 U.S. 241, 248 (1967)); Meredith v. Winter Haven, 320 U.S. 228, 234-36 (1943); Cary, 44 U.S. (3 How.) at 245; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789-90 (D.D.C. 1984) (per curiam) (Edwards, J., concurring), cert. denied, 103 S. Ct. 1354 (1983); Redish I, supra note 7, at 112-13; Pending State Court Suits, supra note 10, at 687. But see Bezanson, supra note 20, at 1107 (Supreme Court has assumed the power to allocate jurisdiction).

68. See Redish I, supra note 7, at 113. Redish argues that a congressional provision for jurisdiction must be more than simply an option for the federal court to act. This contention is based on the belief that Congress could not have intended to vest the federal judiciary with the power to disregard a particular federal statute. Id. The argument can be taken a step further: The framers themselves did not intend that the judiciary be vested with the power to ignore jurisdictional statutes. Congress’ power to allocate jurisdiction, as well as its power to overrule the courts by constitutional amendment, were the major legislative checks on the judiciary. Accordingly, the Constitution obliges a federal court to adhere to the allocation of jurisdiction by a coordinate branch of the federal government—the legislature. See Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 725 F.2d 537, 544-45 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 100 (1984).

Article III is one of the provisions of the Constitution that delineates the separation of powers among the branches of government. Two sections of article III are relevant to a court’s duty to exercise its jurisdiction. The first grants Congress the power to create, define and distribute the jurisdiction of the federal courts, see U.S. Const. art. III, § 1, as a check against the power of the judiciary, see Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Cary v. Curtis, 44 U.S. (3 How.) 235, 245 (1845); C. Wright I, supra note 1, § 7, at 23. The second, which requires that article III judges have permanent office and a right to undiminished compensation, see U.S. Const. art. III, § 2, was intended to preserve the independence and impartiality of the judiciary, see Northern Pipeline Constr.
"could be characterized as a judicial usurpation" because the task of defining and distributing federal jurisdiction "must be . . . the work of the legislature," not the judiciary.

B. The Res Judicata Factor

Despite the fact that the Colorado River stay procedure effectively amounts to a dismissal of the federal action, the lower federal courts have not attempted to identify congressional authority, express or implied, when they have utilized this procedure. Furthermore, there has been no effort to temper res judicata principles to permit a plaintiff to return to federal court following the conclusion of the state action. Accordingly, preclusion should also be considered when determining whether a stay is appropriate.

The Supreme Court has considered the impact of res judicata principles in the context of a Colorado River stay. In Moses H. Cone the Court rejected the argument that abstention was appropriate when jurisdiction was stayed rather than dismissed. The Court recognized that "a stay is as much a refusal to exercise federal jurisdiction as a dismissal," because "the state court's judgment on the issue would be res judicata." Unfortunately, the Court did not declare this concern to be an additional factor.

There is reason, based upon Supreme Court precedent, how-

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Separation of powers has two components: One encompasses the relationship of individuals to a government branch, and the other runs among the governmental branches to ensure separation and independence in the constitutional structure. Pacemaker Diagnostic Clinic, 725 F.2d at 541; Chadha v. INS, 634 F.2d 408, 422, 431 (9th Cir. 1980), aff'd, 462 U.S. 919 (1985). "Where a case is transferred . . . from an Article III court to a different forum, both the right of the parties and the relations between the separate branches of the government are implicated." Pacemaker Diagnostic Clinic, 725 F.2d at 541; see England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)); Redish I, supra note 7, at 112; Pending State Court Suits, supra note 10, at 687, 688 & n.28.

69. Redish I, supra note 7, at 76.
71. See supra note 63 and accompanying text.
72. See supra note 6 and infra notes 76-78 and accompanying text.
73. See supra notes 11, 24-26, 41 and accompanying text.
74. See infra note 105 and accompanying text.
75. See infra notes 80-92 and accompanying text.
76. See 460 U.S. 1, 28 (1983).
77. Id.
78. Id. at 10.
79. The Court did, however, reject the contention that a stay order could not be appealed pursuant to 28 U.S.C. § 1291 (1982). See Moses H. Cone, 460 U.S. at 10. Section 1291 provides in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts. . . ." The Court ruled that a stay order is "final" because the plaintiff is effectively deprived of access to the federal forum due to the preclusive effect that must be given to state court judgments. See Moses H.
ever, to modify this approach.

When claims are within the exclusive jurisdiction of a federal court, the preclusive effect of a state court judgment requires that a stay be denied. Preclusion is important in the context of concurrent jurisdiction as well. In *Moses H. Cone* the Court denied a stay, explaining that even when jurisdiction is concurrent with that of the state court, the mere "presence of federal-law issues must always be a major consideration weighing against surrender [of jurisdiction]." The prospect of granting a stay when a federal suit would later be barred was clearly offensive to the Court.

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Cone, 460 U.S. at 10. In the alternative, the Court ruled that a stay order also falls within the exception to the finality rule recognized in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), in that it conclusively determined the question whether federal jurisdiction should be exercised, it resolved an issue separate from the merits of the action, and it was effectively unreviewable on appeal from a final judgment. See *Moses H. Cone*, 460 U.S. at 11-13. The Court's distaste for the res judicata effect of the anticipated state court judgment was central to its holding that the stay was inappropriate. See id. at 10, 12 & n.13, 27-28.


In a recent decision, the Supreme Court explained that "a state judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Marrese v. American Academy of Orthopaedic Surgeons*, 105 S. Ct. 1327, 1332 (1985). It was clear to the Court that such a judgment could have an issue preclusive effect, however, the Court stated that generally a state judgment "will not have a claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts," id. at 1333, because "claim preclusion does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" Id. (quoting Restatement (Second) of Judgments § 26(1)(c) (1982)). The possibility of issue preclusion alone, however, is sufficient to warrant the denial of a stay of a claim within the court's exclusive jurisdiction. Additionally, the Court noted that an exclusively federal claim may be barred by a state court judgment "if application of state preclusion law suggests that the [judgment] bars the subsequent federal claim and if there is no exception to § 1738 in [the] circumstances." 105 S. Ct. at 1333 n.2. This possibility also should warrant the denial of a stay of an exclusively federal claim.


82. Id. at 26.

83. See *id.* at 10, 12 & n.13, 27-28. See supra note 66 and accompanying text. Although the Court did not pronounce its res judicata concern as a factor, it did consider the doctrine substantively. The hospital had argued that the *Colorado River* test was inapplicable because the federal action in *Moses H. Cone* was merely stayed, not dismissed. See *id.* at 27. The Court rejected this argument, refusing to condone an arrangement in which a state court judgment would surely be pleaded as res judicata in the federal action. See *id.* at 23, 27-28. A stay having such a res judicata effect would be permissible only when an affirmative congressional policy favoring abstention could be identified, *id.* at 23 n.29, or in rare circumstances when the presence of state law issues counsels for the dismissal of federal jurisdiction, *id.* at 23 & n.29, 25-26. The Court ac-
The Supreme Court has given res judicata an expansive interpretation. The harshness of the res judicata doctrine is not the result of a "practice or procedure inherited from a more technical [era]. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." The rule is not a technical formulation to be balanced against other public policies; it is the balance of public policy. Res judicata encompasses the interests of finality, conserving judicial resources, preventing burdensome relitigation, and, in the context of section 1738, promoting federalism and comity. The justifications for a stay of jurisdiction in deference to a parallel state suit are the same: The procedure frees litigants and courts from the burden of duplicative litigation and avoids friction between the state and federal judiciaries. The res judicata doctrine, however, does not operate until a judgment has been rendered by a court; it presupposes a system in which litigants are free to sue at the time and in the forum of their choice. A federal court

should not, in the context of a stay—in other words, before a judgment triggers res judicata considerations—use these same policy justifications prospectively to bar a plaintiff from litigating in a federal forum.\(^9\) Accordingly, a federal court disrupts the balance that is res judicata when, in the interest of judicial efficiency, it relegates a plaintiff to a state court.\(^9\)

Recognition of the true nature of res judicata will not always counsel against a stay.\(^9\) Abstention has been permitted either when congressional authority warranting a dismissal of federal jurisdiction can be implied\(^9\) or when the abdication of jurisdiction can be avoided through the tempering of res judicata principles.\(^9\) A federal court should identify such authority or develop a similar procedure before granting a stay in deference to a similar state proceeding which will inevitably result in a plea of res judicata to dispose of the federal action.\(^9\)

Utilizing the res judicata factor to permit fewer stays will result in the pendency of similar proceedings in state and federal court. While this

\(^9\) See supra notes 14, 92 and accompanying text. Res judicata is not operative until a judgment is rendered in one forum, while a stay operates to bar litigation in the federal forum prospectively.

\(^9\) Arguably a plaintiff is not forced to litigate in state court if he has voluntarily brought the state action as well as the federal action. See The Impact of Colorado River, supra note 9, at 666. However, there are tactical reasons for bringing the multiple actions, see id. at 648; Vairo, supra note 61, at 22, col. 2, and the federal plaintiff should not be deprived of such strategic opportunities when Congress has guaranteed access to a federal forum.

\(^9\) Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567 (1983). The Supreme Court in San Carlos applied the res judicata factor in the context of concurrent jurisdiction and concluded that the factor counselled for a stay. The Court stated:

Since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary to the entire spirit of the McCarran Amendment. . .

Id. at 567. The Court's concern for res judicata focused the Court's attention on the congressional policies inherent in the jurisdictional statutes. It is doubtful that the res judicata factor would have counselled for a stay in the absence of such a clear congressional policy as that inherent in the McCarran Amendment.

\(^9\) See supra note 44 and accompanying text.

\(^9\) See infra note 105 and accompanying text.

\(^9\) See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567 (1983) (permits stay after concluding res judicata factor lies within spirit of congressional policy in McCarran Amendment); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983) (res judicata factor is important where there is any doubt that state court is adequate for complete and prompt resolution of the dispute); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674-76 (1978) (plurality opinion) (Brennan, J., dissenting) (discussion of possible res judicata or collateral estoppel effects state court judgment would have on federal claims is necessary); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (congressional authority permitted ignoring res judicata principles).
result may be viewed as inefficient and burdensome, a court's interest in maintaining its proper role within the constitutional scheme of government overrides these concerns. In any case, the problems inherent in duplicative litigation can be addressed in a number of other ways.

When federal jurisdiction is concurrent with that of the state court, the federal court can deny a stay and permit the litigants to pursue their claims in both forums until a judgment in one can be used to preclude the other action. While res judicata may not promote the same degree of judicial efficiency as the stay procedure, it does not force the parties to litigate only in state court. The court also could abstain and apply the *Pullman* procedure, which allows the plaintiff to reserve his federal claims for adjudication upon his return to federal court. Finally, the federal court may request the state tribunal to stay its proceedings pending adjudication upon his return to federal court.

100. *Mottolese v. Kaufman*, 176 F.2d 301, 303 (2d Cir. 1949); *see* P. Beiersdorf & Co. v. McGrohey, 187 F.2d 14, 15 (2d Cir. 1951) (relying on *Mottolese*); Redish I, supra note 7, at 97; *cf.* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (pendent jurisdiction permitting a federal court to hear related claims not within its jurisdiction rests on notions of efficiency of hearing all claims in one proceeding); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984) (might be more efficient to try related claims in one proceeding).


Permitting two similar actions to proceed concurrently may encourage a race to judgment and stall tactics. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567-68 (1983). However, the Federal Rules of Civil Procedure can be used effectively to prevent the stalling of the federal action. *See* Fed. R. Civ. P. 11 (court may impose sanctions for pleadings which are interposed for delay); Fed. R. Civ. P. 16 (court has control of pretrial procedure and can schedule time limits); Fed. R. Civ. P. 26(d), (f), 37, 41 (court may control ongoing discovery).

103. Application of res judicata does not occur until after a judgment is reached in one forum. The doctrine, therefore, does not prevent a party from litigating his claim in the forum of his choice. *See* Federated Dept Stores, Inc. v. Moitie, 452 U.S. 394, 401-02 (1981) (court will not interfere when res judicata is invoked against a party because the situation is due to the party's own making) (quoting Reed v. Allen, 268 U.S. 191, 198-99 (1932)); *see also* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 185 (1952) (right to federal forum ensures equal start in race to the courthouse, not head start).


ing a judgment in the federal court.\textsuperscript{106} State courts have been willing to consider such a stay,\textsuperscript{107} and the Supreme Court has indicated its approval of this procedure, stating that "[c]ertainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action."\textsuperscript{108}

A court's interest in exercising its jurisdiction is strongest when Congress has conferred exclusive jurisdiction.\textsuperscript{109} The potential that a stay of an exclusively federal claim will amount to a dismissal due to the preclusive effect of a state court judgment\textsuperscript{110} is particularly offensive when Congress has designated the federal court as the only appropriate forum.\textsuperscript{111}

\begin{footnotesize}


Indeed, the presence of a duplicative state proceeding is a threat to federal jurisdiction. For example, it has been held that a state court adjudication of state antitrust claims may preclude an action in federal court concerning the exclusively federal antitrust laws.

A court in such instance may elect to couple the denial of abstention with a request that the state court stay its proceedings or with an injunction of the state proceedings pending the conclusion of the federal action. Although Congress has restricted the use of such an injunction, a federal court may enjoin state proceedings when “necessary in aid of its jurisdiction.” Case law, however, presently defines this exception narrowly. Injunctions are permitted when a federal and a state court have assumed jurisdiction over the same res, but this exception has not been extended to permit injunctions of an in personam state

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(when claim is within exclusive jurisdiction stay should be denied); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 670 (1978) (Brennan, J., dissenting from a 4-1-4 plurality opinion) (same); Kaholokula v. Hula Records, Inc., 746 F.2d 583, 585 (9th Cir. 1984) (same); Judicial Abstention, supra note 7, at 231-33 (same). But see Classen v. Weller, 516 F. Supp. 1243, 1244-45 (N.D. Cal. 1980) (permitting stay of exclusively federal claim).


13. Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 488-93 (4th Cir.), cert. denied, 454 U.S. 878 (1981); Key v. Wise, 629 F.2d 1049, 1064-68 (5th Cir. 1980), cert. denied, 454 U.S. 1103 (1981). But see Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1333 (1985) (while a state court judgment may have issue preclusive effect in a subsequent exclusive federal action, it ordinarily will not have a claim preclusive effect because the state court would not have had subject matter jurisdiction to hear the exclusive federal claim).

14. See supra notes 106-08 and accompanying text.

15. Capital Serv., Inc. v. NLRB, 347 U.S. 501, 504 (1954); see Redish II, supra note 112, at 753-60. The Court in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), reserved the question whether a federal court may enjoin a state proceeding that threatens the exercise of its jurisdiction. See id. at 25 n.32.

16. 28 U.S.C. § 2283 (1982) provides: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” Id. 17.

17. Id.


action.\textsuperscript{120}

When the federal action is within a court's exclusive jurisdiction, a more expansive interpretation of this exception is appropriate. Res judicata principles indicate that the refusal of a state court to relinquish jurisdiction when a similar federal action is pending can effectively destroy the federal court's exclusive jurisdiction if the state court renders a judgment first.\textsuperscript{121} A federal court wishing to avoid duplicative litigation of an exclusively federal claim should not be forced to stay the federal suit. It is more appropriate for the court to retain jurisdiction and enjoin the state proceeding.

CONCLUSION

The manner in which lower federal courts have applied the Colorado River abstention doctrine offends the narrow holding of that case and compromises the constitutional role of the federal judiciary. The tendency of a similar action in state court warrants no exception to a federal court's obligation to exercise its jurisdiction. Efficiency concerns alone are not sufficiently exceptional for a court to decline the exercise of its jurisdiction. Absent exceptional circumstances, separation of powers re-


121. See Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1333 n.2 (1985); Key v. Wise, 454 U.S. 1103, 1107-08 (1981) (Brennan, J., dissenting from denial of certiorari); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 669-70 (1978) (Brennan, J., dissenting); Key v. Wise, 629 F.2d 1049, 1064-68 (5th Cir. 1980), cert. denied, 454 U.S. 1103 (1981); Currie, supra note 120, at 324. The question whether a federal court may enjoin state proceedings to prevent the potential preclusive effect a judgment emanating from that state court may have in a later federal action was reserved in Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1982). The Supreme Court's narrow reading of § 2283, however, was in the context of concurrent jurisdiction. See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 283-84 (1970). Arguably the need for an injunction is greater and its harmful effects are minimized when claims are within the federal court's exclusive jurisdiction.
quires a federal court to hear all cases in which its jurisdiction is properly invoked.

Federal courts must consider the fact that staying a federal case in deference to concurrent state proceedings effectively bars access to a federal forum due to the preclusive effect of state court judgments. The policies a stay is said to serve do not support the prospective barring of access to a federal court. Only when express or implied congressional policies mandate this result should a federal court issue a stay. Otherwise, courts must permit litigants to sue when and where they choose.

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