

St. John's Law Review

Volume 60
Number 3 *Volume 60, Spring 1986, Number 3*

Article 1

June 2012

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Recommended Citation

Bartels, John R. (1986) "Exceptional Circumstances—Quo Vadis?," *St. John's Law Review*. Vol. 60 : No. 3 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol60/iss3/1>

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EXCEPTIONAL CIRCUMSTANCES—QUO VADIS?†

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Article III of the Constitution vests the judicial power of the United States in one supreme court and in "such inferior Courts as the Congress may from time to time ordain and establish."¹ Congress accepted this invitation and through the Judiciary Act of 1789 created a system of trial and intermediate appellate courts.²

† Submitted February 1986.

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¹ U.S. CONST. art. III, § 1.

² The Constitutional Convention devoted little consideration to the shape the federal judiciary was to assume. See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 32 (2d ed. 1973); Surrency, *A History of Federal Courts*, 28 *Mo. L. Rev.* 214, 214 (1963). Because Article III of the Constitution was not self-executing, the First Congress was thus obligated to establish the judicial system authorized by the Constitution, see Surrency, *supra*, at 214, and Congress immediately exercised this power to create inferior federal courts in the First Judiciary Act. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 4 (4th ed. 1983). The Judiciary Act created one district court for each state, manned by its own district judge. H. HART & H. WECHSLER, *supra*, at 32-33; C. WRIGHT, *supra*, at 4. The district courts were entirely courts of original jurisdiction, which were authorized to hear limited classes of cases, including admiralty and minor criminal cases. *Id.*; Surrency, *supra*, at 216.

The First Judiciary Act also established three circuit courts, which held two sessions a year, without judges of their own. H. HART & H. WECHSLER, *supra*, at 33. Two justices of the Supreme Court and the district court judges were to hold circuit court in each district within these circuits. *Id.*; Surrency, *supra*, at 215. The circuit courts had original jurisdiction in diversity cases where the amount in controversy exceeded \$500, most criminal cases, and large cases to which the United States was a party. C. WRIGHT, *supra*, at 4. The circuit courts also had appellate jurisdiction from decisions of the district court in civil cases where the amount in controversy exceeded \$500 and in admiralty cases where the amount exceeded \$300. *Id.* The Supreme Court retained original jurisdiction as provided by the Constitution, and had appellate jurisdiction over the circuit court in civil cases where the amount in controversy exceeded \$2000, and over the state courts in cases involving a federal

The jurisdiction of these federal courts originates in Article III,³ and is limited by the specific statutory grants set forth in Title 28 of the United States Code. Article III specifically includes controversies between citizens of different states. For many years, Congress and the Supreme Court have expanded diversity jurisdiction while at the same time the Court has declined jurisdiction through the use of the doctrine of abstention.

The expansion of abstention by the courts has evoked tension between the statutory grants of jurisdiction and the efforts of the federal courts to avoid the literal terms of those statutes by fashioning judge-made exceptions. In the vast majority of cases, federal jurisdiction is founded upon one of two grounds: the presence of a federal question,⁴ or diversity of citizenship.⁵ Diversity of citizenship jurisdiction is the most problematic.

Diversity jurisdiction has long been subject to much criticism from courts and commentators as an unnecessary, burdensome category of federal jurisdiction which has outlived any justification it

question. *Id.* See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (appellate jurisdiction of Supreme Court extends to final judgment or decree of highest court of state where there is question of law based on federal statute, treaty or Constitution).

³ U.S. CONST. art. III, § 2, cl. 1. This section provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

⁴ 28 U.S.C. § 1331 (1982). Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

⁵ 28 U.S.C. § 1332(a) (1982). Section 1332(a) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id.

may have once had.⁶ Such criticism has been prompted by the rapidly expanding caseloads of federal courts due to both the general increase in federal litigation⁷, and the Supreme Court's countenancing of expansions of federal jurisdiction in various areas of the law such as civil rights⁸ and, recently, civil RICO.⁹ Discontent with diversity jurisdiction is heightened where there is a state forum ac-

⁶ The traditional justification of diversity jurisdiction is the fear that state courts would be prejudiced against out-of-state litigants. C. WRIGHT, *supra* note 2, at 128. Chief Justice Marshall, in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), offered the following reason for diversity jurisdiction:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id. at 87.

A number of courts state that the danger of prejudice in a state court toward out-of-state litigants is no longer viable for diversity jurisdiction. *See Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715, 717 (7th Cir. 1982). *See also American Inst. of Chem. Eng'rs. v. Reber-Friel Co.*, 682 F.2d 382, 392 (2d Cir. 1982) (Feinberg, C.J., concurring) (diversity jurisdiction in recent years has merely afforded attorneys and clients another opportunity for forum shopping, which the federal judicial system can no longer afford).

Judge Friendly noted two major objections to diversity jurisdiction: the diversion of "judge-power" urgently needed for tasks which only the federal courts can handle, and the federal courts' inability to discharge the important objective of making law. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 141-42 (1973). Chief Justice Burger describes diversity jurisdiction in the 20th century as an "anachronism that should be eliminated." Burger, *The State of the Federal Judiciary 1979*, 65 A.B.A. J. 358, 362 (1979). *See generally* Bartels, *Recent Expansion in Federal Jurisdiction: A Call for Restraint*, 55 ST. JOHN'S L. REV. 219, 222 (1981) (since federal judges probably are less qualified than state judges to judge state law, and their decisions are not binding on the state courts, it is no wonder that the most often repeated call for jurisdictional reform is the abolition of federal diversity jurisdiction).

⁷ *See* Bartels, *supra* note 6, at 239; Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 874-79 (1983); Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A. J. 938, 939 (1974).

⁸ *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) (in absence of explicit right of action in Title IX of Education Amendments of 1972, which were patterned after Title VI of Civil Rights Act of 1964, Supreme Court implied cause of action). *Cf. Kahane v. Carlson*, 527 F.2d 492, 496 (3d Cir. 1975) (violations of civil rights when prisons fail to provide Jewish inmates with requested Kosher food); *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975) (violation of civil rights when two or more pretrial detainees confined in single occupancy cells).

⁹ *See, e.g.*, *Sedima, S.P.L.R. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 3286 (1985) (less restrictive reading of RICO amply supported by prior cases and general principles surrounding this statute, which is read broadly). *See also* Comment, *The Second Circuit Rubs Out Civil RICO: Sedima, S.P.L.R. v. Imrex Co.*, 59 ST. JOHN'S L. REV. 398, 406 (1985) (congressional mandate that RICO be "liberally construed" offers compelling evidence that an expansive reading be given to statutory language).

tually hearing the same matter at the same time the federal court is considering it. In such cases, diversity jurisdiction "can badly squander the resources of the federal judiciary."¹⁰

Despite such criticism, the Supreme Court has been reluctant to create exceptions to the jurisdictional statutes in the face of Congress's failure to enact amendments.¹¹ The Court has long held that the pendency of a state court action is no bar to proceedings on the same matter in federal court, and the Court's opinions contain repeated admonitions that federal courts may not decline the jurisdiction given by statute.¹² In *England v. Louisiana State Board of Medical Examiners*,¹³ the Court stated that compelling a party who has properly invoked federal jurisdiction to accept state court determination of his claims:

[w]ould be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."¹⁴

As stated in the oft quoted phrase from *Colorado River Water Conservation District v. United States*,¹⁵ the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."¹⁶

¹⁰ Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 323 (1967); see *Microsoft Computer Sys. v. Ontel Corp.*, 686 F.2d 531, 538 (7th Cir. 1982) (district court should have stayed proceeding in deference to state action because "there would be a grand waste of efforts by both the courts and parties in litigating the same issues. . . in two forums at once").

¹¹ See Phillips, *Diversity Jurisdiction: Problems and a Possible Solution*, 14 U. TOL. L. REV. 747, 750 (1983) (noting various congressional attempts to revise diversity statute).

¹² See, e.g., *McClellan v. Carland*, 217 U.S. 268, 282 (1910) (pending action in state court no bar to proceedings on same matter in federal court because of concurrent jurisdiction); *Cohens v. Virginia* 19 U.S. (6 Wheat.) 264, 404 (1821) (Court has no more right to decline exercise of jurisdiction given, than to usurp that which is not given); see also M. REDISH, *FEDERAL JURISDICTION: TENSION IN THE ALLOCATION OF JUDICIAL POWER* 250 (1980) (originally believed there was absolute right to federal forum where federal jurisdiction existed).

¹³ 375 U.S. 411 (1964).

¹⁴ *Id.* at 415 (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1908)).

¹⁵ 424 U.S. 800 (1976).

¹⁶ *Id.* at 817.

ABSTENTION

Nevertheless, exceptions have been made to this "virtually unflagging obligation" in the form of the abstention doctrine.¹⁷ The doctrine of abstention is predicated upon the avoidance of deciding a constitutional question or upon the notion of comity between federal and state courts. This principle was first enunciated in *Railroad Commission of Texas v. Pullman Co.*¹⁸ In *Pullman*, the Court stayed the pending federal case because a federal constitutional issue was presented which might otherwise be mooted by a state court determination of pertinent state law.¹⁹ Later, in *Bur-*

¹⁷ See C. WRIGHT, *supra* note 2, at 302-30. There are four lines of cases where abstention is recognized: 1) to avoid deciding federal constitutional questions where a case may be disposed of on state law grounds; 2) to avoid unnecessary conflict with the administration by a state of its own affairs; 3) to allow states to resolve unsettled questions of state law; and 4) to ease federal court congestion. *Id.* at 303.

The first case, known as the *Pullman* doctrine, applies where state action is being challenged in federal court and the case may be disposed of on state law grounds. *Id.*; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 150-51 (1978). The *Pullman* doctrine causes lengthy delays before a case is finally decided on its merits, or is dropped. C. WRIGHT, *supra* note 2, at 305; Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1085-86 (1974). The second type of abstention, developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is where the federal court defers to the state to avoid interference with state activities. C. WRIGHT, *supra* note 2, at 308. In this situation, the federal court dismisses the action rather than retaining jurisdiction pending a state court determination. *Id.*

The third type of abstention, which allows state courts to decide unsettled issues of state law, was established in the Fifth Circuit and received scattered support at first. *Id.* at 312-13. The Supreme Court, however, in *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960), ordered abstention and deference to the novel device of certification of the state questions involved to the highest state court for resolution. C. WRIGHT, *supra* note 2, at 313. The Supreme Court strongly endorsed the use of certification in cases where state law is difficult to ascertain in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

The fourth abstention doctrine, which is to ease federal court congestion, is concerned with whether a federal court can stay or dismiss an action solely on the ground that there is a similar action pending in state court which will resolve the controversy. C. WRIGHT, *supra* note 2, at 315. The Supreme Court, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), determined that the pendency of an action in state court does not bar proceedings concerning the same matters in federal court. This general rule, however, was not an absolute. C. WRIGHT, *supra* note 2, at 317. In exceptional circumstances, the federal action should be dismissed in favor of the pending state action. *Id.*

¹⁸ 312 U.S. 496 (1941).

¹⁹ *Id.* at 501. In *Pullman*, Pullman porters sought injunctive relief, claiming that a Texas regulation requiring Pullman sleeping cars, previously under the supervision of black porters, to be placed under the care of white conductors was in violation of the equal protection clause of the fourteenth amendment. *Id.* at 497-98. The Supreme Court stated that the last word on the statutory authority of the Railroad Commission belonged to the Supreme Court of Texas. *Id.* at 499-500. The Supreme Court determined that this case presented a situation where "a federal court of equity is asked to decide an issue by making a tentative

ford v. Sun Oil Co.,²⁰ a divided Court sanctioned postponement of federal jurisdiction where federal review would disrupt or conflict with the state's policy in establishing its own review system in an area of public concern. Similarly, in *Louisiana Power & Light Co. v. City of Thibodaux*,²¹ a divided Court extended *Burford* to permit abstention in a case presenting difficult questions of state law bearing on policy problems of substantial public import. Finally, the Court in *Younger v. Harris*²² held that abstention is proper where federal jurisdiction is invoked to restrain state criminal proceedings.

The Court has frequently been divided on abstention and the vehemence of the dissenting opinions indicate the tension felt by the Court in fashioning these judge-made exceptions to the district courts' statutory jurisdiction.²³ The concern expressed is not so

answer which may be displaced tomorrow by a state adjudication." *Id.* at 500. Prior to the *Pullman* decision, individual litigants were allowed to question the constitutionality of state action in federal court, even where the state has not consented to suit under the eleventh amendment. Field, *supra* note 17, at 1074-75. Each state program was subject to constitutional attack in federal court, thereby making substantial federal court interference with such programs possible. *Id.* at 1075-76. Both the courts and Congress imposed limitations upon the situation and the manner in which injunctions against state officials should issue. *Id.* at 1076. The *Pullman* doctrine represents one of the most important court-imposed limitations. *Id.*

The Supreme Court in *Pullman* ordered the district court to abstain from hearing the case, and to retain jurisdiction until the state court decided the state issues involved. *Pullman*, 312 U.S. at 501-02. Since the state court may declare that the order was unauthorized as a matter of law, this prevented the district court from prematurely or unnecessarily deciding a federal constitutional question. *Id.* at 500.

Abstention of the *Pullman* type will not be ordered if (1) the state law is clear on its face; (2) its meaning has already been authoritatively decided by the state courts; or (3) the constitutional issue would not be avoided or changed no matter how the statute is construed. C. WRIGHT, *supra* note 2, at 304. A litigant remanded to state court under the *Pullman* abstention doctrine cannot be compelled to submit his federal claims for state court disposition, and thereby retains the right to a federal determination of federal questions involved and of the facts on which resolution of such questions depends. L. TRIBE, *supra* note 17, at 151.

²⁰ 319 U.S. 315, 333-34 (1943).

²¹ 360 U.S. 25, 29-30 (1959).

²² 401 U.S. 37, 43-44 (1971).

²³ See, e.g., *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 36 (1959) (Brennan, J., dissenting). Justice Brennan argues vigorously against expanding abstention, stating, "it would obviously wreak havoc with federal jurisdiction if the exercise of that jurisdiction was a matter of *ad hoc* discretion of the District Court in each particular case." *Id.* (Brennan, J., dissenting). To Justice Brennan, the majority decision reflected "a distaste for diversity jurisdiction" which prompted him to comment:

I concede the liveliness of the controversy over the utility or desirability of diversity jurisdiction, but it has stubbornly outlasted the many and persistent attacks against it and the attempts in the Congress to curtail or eliminate it. Until Con-

much centered upon the federal courts' judicial power to limit statutory jurisdiction as compared to the legislature's power to do so,²⁴ but rather reflects the Supreme Court's sensitivity to encroachment on legislative authority in developing the abstention doctrine.

EXCEPTIONAL CIRCUMSTANCES

In spite of the rhetoric, the Court nevertheless has continued to expand the category of cases in which the federal court must decline its jurisdiction in favor of state court action. This was illustrated in *Colorado River Water Conservation District v. United States*,²⁵ where the Court enunciated for the first time a deceptively broad doctrine of "exceptional circumstances"²⁶ justifying a dismissal of a federal action in favor of a parallel state action involving the same controversy. The *Colorado River* doctrine is distinct from the abstention doctrine in that it marks the first time the Court has accepted as grounds for abstention the federal court's own administrative concerns rather than "weightier considerations of constitutional adjudication and state-federal rela-

gress speaks otherwise, the federal judiciary has no choice but conscientiously to render justice for litigants from different States entitled to have their controversies adjudicated in the federal courts.

Id. at 41 (Brennan, J., dissenting). See also *Burford*, 319 U.S. at 336 (Frankfurter, J., dissenting). Justice Frankfurter, stated: "[t]here may be excellent reasons why Congress should abolish diversity jurisdiction. But, with all deference, it is not a defensible ground for having this Court by indirection abrogate diversity jurisdiction when, as a matter of fact, Congress has persistently refused to restrict such jurisdiction . . ." *Id.* at 344-45 (Frankfurter, J., dissenting).

²⁴ See REDISH, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 n.5 (1984); ZIEGLER, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 990-91.

²⁵ 424 U.S. 800 (1976).

²⁶ Note should be made of the confused terminology applied to the exceptional circumstances test set out in *Colorado River*. The Supreme Court avoided using the term "abstention" in order to distinguish the *Colorado River* test from the traditional categories of abstention. *Colorado River*, 424 U.S. at 817-18; see C. WRIGHT, W. MILLER & E. COOPER, 17 FEDERAL PRACTICE AND PROCEDURE § 4241, at 448 (1978) (preferring to refer to it as the "exceptional-circumstances test"); see also *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 16 (1983) (discusses application of exceptional circumstances test). Other courts, however, have referred to the test variously as the "pending state action doctrine", *Safeco Ins. Co. v. Miller*, 591 F.Supp. 590, 599 (D. Md. 1984), "*Colorado River* abstention", *AIMS Enters., Inc. v. Muir*, 609 F.Supp. 257, 262 (M.D. Pa. 1985), or simply as another form of abstention, see *Alkoff v. Gold*, 611 F.Supp. 63, 65 (S.D.N.Y. 1985); C. WRIGHT, W. MILLER & E. COOPER, *supra*, § 4247, at 502 (1978) ("fourth type of abstention").

tions."²⁷ This doctrine was subsequently approved by the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction*.²⁸

Colorado River involved the McCarren Amendment,²⁹ which is an amendment to federal laws governing the allocation of water rights and resolutions of disputes relevant thereto permitting the federal government to be joined as a defendant in state court adjudication of water rights. In *Colorado River*, there were comprehensive proceedings in the state court in which the federal court was participating. Nevertheless, the federal government brought suit in federal court, on behalf of itself and certain Indian tribes, to settle water rights against private water users. The district court dismissed the federal action in favor of the state proceedings and the court of appeals reversed. The Supreme Court reversed the court of appeals and affirmed the district court, emphasizing the danger of piecemeal litigation which the McCarren Amendment sought to avoid.³⁰

Although the Court found the doctrine of abstention inapplicable in any of its forms,³¹ the Court stated:

[T]here are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions . . . by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."³²

Referring to the federal court's "virtually unflagging obligation" to

²⁷ *Colorado River*, 424 U.S. at 818.

²⁸ 460 U.S. 1 (1983). Prior to *Colorado River*, some federal circuit courts had held that district courts have the inherent power to stay a federal action for reasons of judicial administration when a similar action is pending in state court. See *Aetna State Bank v. Altheimer*, 430 F.2d 750, 758 (7th Cir. 1970); *Joffe v. Joffe*, 384 F.2d 632, 633 (3d Cir. 1967), *cert denied*, 390 U.S. 1039 (1968); *Mottolese v. Kaufman*, 176 F.2d 301, 302-03 (2d Cir. 1949). The Supreme Court finally addressed the issue for the first time in *Colorado River*, 421 U.S. at 803.

²⁹ 66 Stat. 560 (codified at 43 U.S.C. § 666 (1982)).

³⁰ *Colorado River*, 424 U.S. at 806. Several other factors caused the Supreme Court to affirm the district court's dismissal of the federal action, including: the absence of any proceedings in the district court other than the motion to dismiss; the extent to which state water rights were involved; the 300-mile distance between the district court and the state court; and the government's existing participation in the state court proceedings. *Id.* at 819.

³¹ *Id.* at 813-17.

³² *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

exercise jurisdiction, the Court emphasized the circumstances permitting the dismissal of a federal suit in favor of a concurrent state suit for reasons of wise judicial administration stating that these circumstances "are considerably more limited than the circumstances appropriate for abstention," and concluded that "[t]he former circumstances, though exceptional, do nevertheless exist."³³ Two years later, the Court confusedly applied the exceptional circumstances test in *Will v. Calvert Fire Insurance Co.*³⁴ In *Will*, American Mutual sued Calvert in state court and Calvert subsequently sued American Mutual in federal court asserting state and federal claims, including a claim for damages under the Securities Exchange Act of 1934 over which the federal court has exclusive jurisdiction. Federal District Court Judge Will stayed the federal action pending outcome of the state litigation. The Court of Appeals for the Seventh Circuit issued a writ of mandamus directing Judge Will to proceed with consideration of Calvert's Securities Act claim. The Supreme Court granted certiorari and reversed.

In a plurality opinion of four members of the Court, Justice Rehnquist asserted that the court of appeals had improperly interfered with the district court's broad discretion to stay the federal action.³⁵ The decision to stay, according to Justice Rehnquist, "is largely committed to the discretion of the district court . . . even when matters of substantive federal law are involved in the case."³⁶ The four dissenters strongly criticized the plurality opinion for refusing to apply the narrower exceptional circumstances test of *Colorado River*, under which the district court would be required to proceed, finding that "there lurks an ominous potential for the abdication of federal-court jurisdiction in the [plurality] opinion's disturbing indifference to the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'"³⁷

³³ *Id.* at 817-18. The Court then went on to identify four factors to be considered in determining whether such exceptional circumstances are present: which court first assumed jurisdiction over property involved in a suit; the inconvenience of the federal forum; desirability of avoiding piecemeal litigation; and the order in which the concurrent jurisdiction was obtained in the concurrent forums. *Id.* at 818.

³⁴ 437 U.S. 655 (1978).

³⁵ *Id.* at 662-63. Justice Rehnquist stated that "a district court is 'under no compulsion to exercise [its] jurisdiction,' where the controversy may be settled more expeditiously in the state court." *Id.* (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)). *But see Calvert*, 437 U.S. at 671 (Brennan, J., dissenting) (*Brillhart* brought under 28 U.S.C. § 2201 which specifically states that assumption of jurisdiction is discretionary).

³⁶ *Calvert*, 437 U.S. at 664.

³⁷ *Id.* at 669 (Brennan, J., dissenting) (quoting *Colorado River Water Conservation*

The concurrence of Justice Blackmun gave the plurality its fifth vote in favor of reversal, however, the concurrence failed to support Justice Rehnquist's reasoning. Rather, Justice Blackmun believed that reversal was proper on the ground that the court of appeals should have remanded the case, rather than compel Judge Will to proceed, so that the district court could reconsider its decision in light of *Colorado River* which was issued after the district court's decision to stay.³⁸

While the majority in *Calvert* appeared to favor the stricter view of *Colorado River*, Justice Rehnquist's plurality opinion favoring broad discretion to decline jurisdiction left the exceptional circumstances test in a state of doubt.³⁹ The confusion continued until 1983 when the Court, by a clear majority, reviewed and reaffirmed the *Colorado River* decision in *Moses H. Cone Memorial Hospital v. Mercury Construction*.⁴⁰

In *Cone*, the hospital sued Mercury in state court for a declaratory judgment regarding rights and liabilities under a contract for the construction of an addition to the hospital. Shortly thereafter, Mercury brought its own suit in federal court to compel arbitration under section 4 of the Federal Arbitration Act,⁴¹ which action the district court stayed pending resolution of the state court suit. The stay was appealed to the Supreme Court which reversed the stay order.

Before reaching the merits, the Court rejected the argument that *Calvert* undermined the exceptional circumstances test, pointing out that the *Calvert* decision supported application of *Colorado River*, and that *Calvert* concerned a significantly different

Dist. v. United States, 424 U.S. 800, 817 (1976)).

³⁸ *Id.* at 667-68 (Blackmun, J., concurring).

³⁹ See *Zellen v. Second New Haven Bank*, 454 F. Supp. 1359, 1364 (D. Conn. 1978) ("the case law concerning the question of when a federal court can properly invoke the policy to dismiss a case is still uncertain and unformed" after *Calvert*). While some courts, in view of the lack of a clear majority in *Calvert*, continued to apply the stricter *Colorado River* test, see *Western Auto Supply Co. v. Anderson*, 610 F.2d 1126, 1127 (3d Cir. 1979); *Heritage Land Co. v. FDIC*, 572 F. Supp. 1265, 1266 n.1 (W.D. Okla. 1983), others have viewed *Calvert* as according much broader discretion than originally intended in *Colorado River* to stay federal suits in favor of parallel state court litigation. See *Microsoft Computer Sys. v. Ontel Corp.*, 686 F.2d 531, 537 (7th Cir. 1982); M. REDISH, *supra* note 12, at 253; Comment, *Federal Court Stays and Dismissals In Deference to Duplicative State Court Litigation: The Impact of Moses H. Cone Memorial Hospital v. Mercury Construction*, 46 OHIO ST. L. J. 435, 445-47 (1985).

⁴⁰ 460 U.S. 1 (1983).

⁴¹ United States Arbitration Act of 1925, 43 Stat. 883 (codified at 9 U.S.C. § 4 (1982)).

standard applicable to cases involving writs of mandamus.⁴² Turning to a review of the exceptional circumstances test, the Court added two new factors to the four previously set out in *Colorado River*.⁴³ These factors are: whether state or federal law supplies the rule of decision, and whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction.⁴⁴ Applying the *Colorado River* factors together with the two new factors, the Court found that the balance of circumstances weighed against staying the federal proceedings.⁴⁵

Since duplicative litigation is the underlying concern of the test, there must be pending state court litigation capable of addressing the essential issues existing at the same time the federal court declines jurisdiction.⁴⁶ This requirement differs from the traditional categories of abstention where there need not be a parallel state suit actually pending at the time the federal court declines jurisdiction.⁴⁷ The contemporaneous exercise of jurisdiction by two federal courts presents a more deferential standard not requiring exceptional circumstances.⁴⁸ Since the problem of depriving a litigant of his right to a federal court does not arise in the latter case, courts are considerably freer to decline jurisdiction in favor of a parallel action first instituted in another federal court for the sake of avoiding duplicative litigation.⁴⁹ The general rule when two federal courts are involved is, therefore, "that in the absence of sound reasons the second action should give way to the first."⁵⁰

⁴² *Cone*, 460 U.S. at 17-18.

⁴³ See *supra* text accompanying note 33.

⁴⁴ *Cone*, 460 U.S. at 23-27.

⁴⁵ *Id.* at 26-27.

⁴⁶ See *infra* notes 90-91 and accompanying text.

⁴⁷ See C. WRIGHT, W. MILLER & E. COOPER, *supra* note 26, § 4242, at 470; cf. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975) (more likely to order abstention when state action pending, implying state action not required).

⁴⁸ See *Colorado River*, 424 U.S. at 817 ("as between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation"); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952); *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

⁴⁹ See *Colorado River*, 424 U.S. at 817.

⁵⁰ *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1203 (2d Cir. 1970). The *Semmes* court stated:

[A]ny exception for cases where the same party is plaintiff in both actions would entail the danger that plaintiffs may engage in forum shopping or, more accurately, judge shopping. When they see a storm brewing in the first court, they may try to weigh anchor and set sail for the hopefully more favorable waters of another

There is little doubt that parallel litigation is wasteful and duplicative regardless of whether the concurrent jurisdiction is state-federal or wholly federal. The question presented in the state-federal context is, therefore, at what point is the duplicative litigation so wasteful that it warrants depriving the federal plaintiff of his statutory right to a federal forum. Since the Supreme Court's exceptional circumstances test vaguely answers this question, there is no guidance for lower courts.

The exceptional circumstances test is ambiguous, to say the least.⁵¹ While the Supreme Court emphasizes the narrowness of the test, the Court also insists that it be applied with flexibility and "with a view to the realities of the case at hand."⁵² The problem lies in the subjective nature of this balancing test; specifically, what is exceptional to one judge may not be exceptional to another.⁵³

district.

Id.

⁵¹ Recently, the doctrine of exceptional circumstances was, in effect, partially applied to justify rather than to deny federal jurisdiction in enjoining the execution of a judgment in the amount rendered by a state court.

In *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), the federal court refused to abstain from exercising jurisdiction in holding that the Texas lien and bond provisions of the statute involved were unconstitutional as applied. In that case, a judgment was obtained in the Texas state court in favor of Pennzoil Company in the amount of \$11.12 billion, for which it was impossible for Texaco to meet the mandatory bond requirement in order to appeal. The court held that due process required injunctive relief in order to render meaningful Texaco's right to appeal. While concern for federalism, comity, and judicial economy suggested abstention, the court indicated that abstention was inappropriate. The decision partly rested upon the extraordinary circumstances of the case, which appeared from the unprecedented amount of the judgment and the inability of the debtor under those circumstances to comply with Texas law.

⁵² *Cone*, 460 U.S. at 21. The Court, repeating the warning in *Colorado River*, stated: [T]he decision whether to dismiss . . . does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case.

Id. at 16.

⁵³ See *Microsoft Computer Sys. v. Ontel Corp.*, 686 F.2d 531, 536-37 (7th Cir. 1982). In *Microsoft*, the majority found that the case presented circumstances so exceptional that it was an abuse of discretion *not* to abstain, *id.* at 538, while the dissent termed the case "distinctly unexceptional." *Id.* at 540 (Doyle, J., dissenting). See also *Thibodaux*, 360 U.S. at 36 (Brennan, J., dissenting) (it would wreak havoc if exercise of federal jurisdiction was matter for ad hoc discretion of district court); *Forehand v. First Alabama Bank*, 727 F.2d 1033, 1035-36 (11th Cir. 1984) (compare majority and dissenting opinions reviewing district court abstention under *Colorado River*); *Mobil Oil Corp. v. City of Long Beach*, 578 F. Supp. 1197, 1199 (C.D. Cal. 1984) (dismissed federal claim due to concurrent state

CASES APPLYING THE TEST

Perhaps the most satisfactory application of the test occurs in cases such as *Colorado River*, which involve a large number of litigants with closely related claims who are pursuing action in state court at the time federal jurisdiction is invoked. For example, in *Arkwright-Boston Manufacturers Mutual Insurance Co. v. City of New York*,⁵⁴ following a blackout in New York City's garment district, several insurance companies, subrogated to the claims of those affected by the outage, brought suit against the City and its agencies for having negligently caused the power failure. The district court dismissed in favor of some fifty state court actions then pending, brought by others affected by the blackout against the same defendants, which actions had been placed under the supervision of a single state court judge. The Court of Appeals for the Second Circuit affirmed noting the "distinct likeness to the pattern of *Colorado River*."⁵⁵

The court of appeals emphasized that "[a]s in *Colorado River*, the danger of piecemeal litigation is the paramount consideration in this case,"⁵⁶ pointing out that if the federal court did not abstain, the numerous defendants would be forced to defend the complex litigation on two fronts and run the risk of a destructive race to judgment and further litigation over inconsistent dispositions in concurrent forums.⁵⁷ On the other hand, the *Arkwright-Boston* court noted that, like *Colorado River*:

[T]he instant case involves hundreds of claims and numerous parties, and implicates significant local interests. The state litigation has already been assigned to a single state-court judge. Thus it appears likely that the numerous claims arising out of the blackout will be consolidated for all purposes, including discovery and joint trial, in a single state-court action.⁵⁸

In addition to wasteful duplication which is present whenever there is parallel litigation, such multi-claim cases arising out of a single incident present special problems of administration of complex litigation, avoidance of piecemeal litigation, and providing

proceeding for reason of wise judicial administration), *rev'd*, 772 F.2d 534 (9th Cir. 1985) (lower court dismissal inconsistent with narrow boundaries of *Colorado River*).

⁵⁴ 762 F.2d 205 (2d Cir. 1985).

⁵⁵ *Id.* at 212.

⁵⁶ *Id.* at 211.

⁵⁷ *Id.*

⁵⁸ *Id.*

comprehensive disposition of the numerous claims and defenses of the many litigants.⁵⁹ These concerns appear to be more urgent than the concerns of duplicative litigation present in the garden-variety diversity case which ends up in federal court. However, it is in just such garden-variety cases that the test is most frequently applied.

Some courts have sought to limit application of the test to cases in which federal statutes may be read to indicate a congressional intent favoring, in the particular case, a dismissal in favor of state court adjudication.⁶⁰ The Third Circuit, for example, has clearly embraced this 'federal policy' limitation, summarizing the test as follows:

The Supreme Court has recognized a narrow exception to the basic rule, *where it has been able to identify, in other Congressional legislation, a tempering of the policy of enforcing the plaintiff's choice of a federal forum in favor of a policy of avoiding duplicative and inconvenient litigation.*⁶¹

While this limitation on the exceptional circumstances test seems to accord more respect to the legislature's authority to amend the jurisdictional statutes,⁶² such limitation has not become a central part of the test. Although *Cone* emphasized the importance of a "clear federal policy" favoring dismissal, the *Cone* court did not make the existence of such a policy an absolute prerequisite to application of the test, and other courts have not recognized such a limitation. The question of whether the test should be lim-

⁵⁹ See *Liberty Mut. Ins. Co. v. Foremost-McKesson Inc.*, 751 F.2d 475, 477 (1st Cir. 1985) (insurance action concerning coverage of manufacturer's liability for DES injuries dismissed in favor of state suit involving all of manufacturer's insurers to avoid problems of piecemeal litigation and inconsistent decisions); *Schomber v. Jewel Cos.*, 614 F. Supp. 210, 218 (N.D. Ill. 1985) (dismissal in favor of some 200 state court suits arising out of salmonella poisoning in view of "complexity of this litigation and of the extraordinary steps already taken by the state court to supervise the consolidated cases").

⁶⁰ See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16; *Will v. Calvert Fire Ins.*, 437 U.S. 665, 673 (Brennan, J., dissenting). In both cases, Justice Brennan asserted that *Colorado River* rested heavily on "[t]he clear federal policy" evinced by the McCarran Amendment favoring state court adjudication of water rights. *Calvert*, 437 U.S. at 673; see also *Cone*, 460 U.S. at 16 (same).

⁶¹ *Harris v. Pernsley*, 755 F.2d 338, 345 (3d Cir.), *cert denied*, 106 S.Ct. 331 (1985) (emphasis added). In *Pernsley*, the court of appeals refused to permit a stay under *Colorado River* in part because "[n]o federal statute suggests a congressional policy tempering in any way the basic policy of affording plaintiffs a choice of forum." *Pernsley*, 755 F.2d at 346. See *Forehand v. First Alabama Bank*, 727 F.2d 1033, 1036 (11th Cir. 1984); *United States v. SCM Corp.*, 615 F. Supp. 411, 419 (D. Md. 1985).

⁶² See *supra* note 24 and accompanying text.

ited to cases where Congress has evinced a policy favoring dismissal in favor of state proceedings must await a future decision from the Supreme Court.

OPEN-ENDED NATURE

A discussion of some of the cases in which *Colorado River* and *Cone* have been applied or rejected is useful in highlighting the concerns discussed above. One problem lies in delineating the factors relevant when applying the test. While some courts, despite the Supreme Court's directions to the contrary, have rigidly applied the six factors presented in *Colorado River* and *Cone* in the manner of a checklist,⁶³ other courts have felt free to consider a wider range of circumstances not expressly sanctioned in the Supreme Court's opinions. These courts often refer to the test as "open-ended in nature"⁶⁴ and "not limited to" the factors found in the Supreme Court's opinions.⁶⁵ Courts have considered, for example, the "peculiarly local" nature of a dispute;⁶⁶ whether dismissal will promote settlement;⁶⁷ and the fact that the parallel state suit has been bogged down in state court for an extended period.⁶⁸

Although the Supreme Court itself did not characterize the test as open-ended, authority to look beyond the factors found in *Colorado River* and *Cone* is implicit in the Court's emphasis on flexibility and case-by-case determinations. The open-ended nature of the test is further suggested by the fact that the *Cone* Court added factors not mentioned in *Colorado River* and noted with approval still another factor to be considered in an appropri-

⁶³ See *Kruse v. Snowshoe Co.*, 715 F.2d 120, 123-24 (4th Cir. 1983), cert. denied, 465 U.S. 1065 (1984); *Safeco Ins. Co. v. Miller*, 591 F. Supp. 590, 598-99 (D. Md. 1984).

⁶⁴ *North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs*, 590 F. Supp. 311, 317 (N.D. Ind. 1984); see *Voktas, Inc. v. Central Soya Co.*, 689 F.2d 103, 107 (7th Cir. 1982) ("open-ended nature" of test).

⁶⁵ *Barron v. Spectrum Emergency Care, Inc.*, 619 F. Supp. 1011, 1014 (N.D. Ga. 1985).

⁶⁶ *Board of Educ. v. Bosworth*, 713 F.2d 1316, 1321 (7th Cir. 1983); see *Rattner v. Board of Trustees*, 611 F. Supp. 648, 654 (S.D.N.Y. 1985); *Delaney v. Capitol Hill Anesthesia Assoc.*, 602 F. Supp. 1069, 1070 (D.D.C. 1985); *Northeast Mines, Inc. v. Town of Smithtown*, 584 F. Supp. 112, 116 (E.D.N.Y. 1984).

⁶⁷ See *Calvert*, 437 U.S. at 663; *Armco, Inc. v. Moore Exploration, Inc.*, 603 F. Supp. 1, 2 (S.D. Tex. 1984).

⁶⁸ See *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 518 F. Supp. 1053, 1062 (C.D. Cal. 1981); cf. *Coatings, Inc. v. National Cold Drawn, Inc.*, 611 F. Supp. 958, 961 (E.D. Wis. 1985) (court denied stay of federal proceedings where moving party failed to show case would be decided in parallel state action).

ate case: the "vexatious or reactive nature" of the litigation.⁶⁹

DIFFERENT INTERPRETATIONS

"Vexatiousness" provides a good example of a related problem inherent in the test, namely the range of interpretation possible even with the factors listed by the Court. Vexatiousness, bad faith, or "procedural gamesmanship",⁷⁰ have been cited as reasons to stay or dismiss in favor of state proceedings. Courts have frowned on a state court defendant who has jeopardized his state court case through procedural or tactical errors and attempts to salvage his position, where removal is not possible, by bringing a federal suit.⁷¹ Similarly, courts have been impatient with a state court plaintiff who, having failed to achieve results in state court, decides to try federal waters in hopes of more favorable treatment.⁷² As one court stated "[plaintiff] is asking this Court to short-circuit a parallel six-year old state court suit . . . [He] chose the state court forum . . . [and] must live with his original choice. . . ."⁷³ Other examples exist describing the range of interpretation given to the Supreme Court's factors. Courts have treated the "adequacy of the

⁶⁹ *Cone*, 460 U.S. at 18 n.20. This factor originally was applied by the district court and the Seventh Circuit to uphold dismissal of the *Calvert Fire Insurance* case following remand by the Supreme Court. *Calvert Fire Ins. Co. v. American Mut. Reinsur. Co.*, 600 F.2d 1228, 1234 (7th Cir. 1979), *aff'g* 459 F. Supp. 859 (N.D. Ill. 1978).

⁷⁰ *Hartford Accident and Indem. Co. v. Hop-On Int'l Corp.*, 568 F. Supp. 1569, 1573 (S.D.N.Y. 1983).

⁷¹ See, e.g., *Heritage Land Co. v. F.D.I.C.*, 572 F. Supp. 1265, 1267 (W.D. Okla. 1983). In *Heritage Land*, the plaintiff, Heritage, was a defendant in a state court action to foreclose on properties held by Heritage. FDIC was also named a defendant in the state court in its role as receiver of Penn Square Bank which held Heritage's mortgages on the properties. FDIC cross-petitioned in state court against Heritage and then moved for summary judgment. In response to FDIC's motion, Heritage alleged a breach of contract between Heritage and Penn Square Bank, and almost immediately thereafter filed the federal suit against FDIC based on the same alleged breach of contract. The federal district court, in dismissing the suit under *Colorado River*, noted the various times when Heritage should have raised its breach of contract claim in the state proceedings, concluding, "[y]et, inexplicably, Heritage failed to raise these matters [in state court] until the FDIC moved for summary judgment on its cross-petition. Then, after it had flailed about in the state court for months and as it was facing imminent judgment, Heritage sought refuge in this Court." *Id.* at 1267. See also *Byer Museum of Arts v. North River Ins. Co.*, 622 F. Supp. 1381, 1386-87 (N.D. Ill. 1985) (dismissing federal action as mere "tactical maneuver"); *Barron v. Spectrum Emergency Care, Inc.*, 619 F. Supp. 1011, 1014 n.3 (N.D. Ga. 1985) (concern for judicial resources belied by lack of timeliness in filing motion); *Mobil Oil Corp. v. City of Long Beach*, 578 F. Supp. 1197, 1202 (race to courthouse considered in decision on abstention), *rev'd*, 772 F.2d 534, 540-43 (9th Cir. 1985).

⁷² See *Telesco v. Telesco Fuel & Masons*, 765 F.2d 356, 363 (2d Cir. 1985).

⁷³ *Thompson v. Ashner*, 601 F. Supp. 471, 475 (N.D. Ill. 1985).

state court" factor not only to mean the state court's legal power to grant the relief sought, as was intended in *Cone*,⁷⁴ but also to mean the administrative competency of the state court to handle the matter expeditiously.⁷⁵ This interpretation was clearly not intended by the *Cone* Court.⁷⁶

OVERLAP OF JURISDICTIONAL DOCTRINES

The exceptional circumstances test also involves some overlap and confusion with other jurisdictional doctrines. It should be noted that the test itself incorporates concerns typically associated with the doctrine of *forum non conveniens*⁷⁷ and the long established rule requiring a court to refrain from asserting jurisdiction over a res over which another court previously has assumed jurisdiction.⁷⁸

The catch-all or open-ended nature of the test allows courts to resort to bits and pieces of other doctrines which otherwise are inapplicable to the case. Using aspects of several doctrines to reinforce each other, one court has held that "the *Burford* abstention doctrine, the priority factor from the *Colorado River* analysis, and the source-of-law factor from *Calvert* all point in favor of abstention."⁷⁹ Similarly, courts have mixed into the exceptional circum-

⁷⁴ *Cone*, 460 U.S. at 26-27.

⁷⁵ See, e.g., *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 518 F. Supp. 1053, 1062 (C.D. Cal. 1981), *rev'd*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). The *Unified School* court refused to stay the federal action despite comprehensive and longstanding state court litigation, finding "the fact that the [parallel state action] has been pending in the state courts for 18 years is a factor which militates in favor of this Court's exercising [jurisdiction] . . ." *Id. Cf. Coatings, Inc. v. National Cold Drawn, Inc.*, 611 F. Supp. 958, 961 (E.D. Wis. 1985) (plaintiff asked court to take judicial notice of reputation of state court system in considering jurisdiction of federal court).

⁷⁶ *Cone*, 460 U.S. at 26 (by the "inadequacy of the state-court proceeding . . . [w]e are not to be understood to impeach the competence or procedures of the North Carolina courts").

⁷⁷ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Hartford Accident & Indem. Co. v. Hop-On Int'l Corp.*, 568 F. Supp. 1569, 1574 n.12 (S.D.N.Y. 1983); see also *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (diversity action always subject to motion for *forum non conveniens*).

⁷⁸ See *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939); *United States v. SCM Corp.*, 615 F. Supp. 411, 416 n.9 (D. Md. 1985) ("This 'factor' might be viewed as a restatement of the rule" in *Princess Lida*).

⁷⁹ *Adams v. Pennsylvania Chiropractic Soc.*, 563 F. Supp. 434, 437 (M.D. Pa. 1983). The district court's holding in *Shean v. White*, 620 F. Supp. 1329, 1331 (N.D. Tex. 1985) evidences the patch-work approach that while "it is far from clear that abstention is warranted under any of the doctrines discussed above . . . [c]onsideration of all the doctrines collectively, however, weighs in favor of exercising abstention here." *Id. See also Tovar v.*

stances test comity considerations which the Supreme Court indicated were not relevant under *Colorado River*.⁸⁰

The test has also provided an excuse for introducing factors which the Supreme Court has held, in other respects, to be improper grounds for declining jurisdiction. Thus, for example, while the *Cone* Court included as a factor whether state or federal law provides the rule of decision,⁸¹ the Court has also clearly held that the *difficulty* of a state law issue is not grounds for refusing to exercise jurisdiction.⁸² Nevertheless, district courts applying the exceptional circumstances test have found this to be a relevant factor weighing in favor of dismissal.⁸³

Some courts have gone even further by dismissing suits which were found to be essentially a "local matter" with which the federal court should not concern itself.⁸⁴ Finally, at least one court has found, without justification, authority in *Colorado River* to deny a federal forum to litigants because the court believed the underlying concern of the diversity statute to protect out-of-state litigants was not present. In *Byer Museum of Arts v. North River Insurance Co.*, the district court dismissed the case under *Colorado River* and found that "the plaintiffs . . . are undeserving of the protections afforded by diversity jurisdiction."⁸⁵

Billmeyer, 609 F.2d 1291, 1293 (9th Cir. 1979) ("The district court in this cases applied to [*Colorado River*] a gloss derived from *Younger v. Harris* . . . and *Juidice v. Vail*, [430 U.S. 327 (1977)]") (applying *Younger* abstention), *cert. denied.*, 105 S. Ct. 223 (1984); *Mobil Oil Corp. v. City of Long Beach*, 578 F. Supp. 1197, 1202-03 (C.D. Cal. 1984) (similarity to *Younger* type abstention warrants dismissal under *Colorado River*).

⁸⁰ See *Colorado River*, 424 U.S. at 817-18; *supra* notes 25-26 and accompanying text. Compare *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 571 (7th Cir. 1984) ("comity is not relevant to a decision whether to stay the federal suit," but rather only considerations of wise judicial administration), [*and*] *United States v. SCM Corp.*, 615 F. Supp. 411, 416 (D. Md. 1985) ("[t]he principles governing contemporaneous exercise of concurrent jurisdiction are unrelated to considerations of proper constitutional adjudication or regard for federal-state relations"), with *Schomber v. Jewell Cos.*, 614 F. Supp. 210, 215 (N.D. Ill. 1985) (exceptional circumstances test involves "considerations of judicial economy and federal-state comity").

⁸¹ *Cone*, 460 U.S. at 26.

⁸² *Thibodaux*, 360 U.S. at 27.

⁸³ See *Arkwright-Boston Mfrs. Mut. v. City of New York*, 762 F.2d 205, 211 (2d Cir. 1985); *Delaney v. Capitol Hill Anesthesia Assoc.*, 602 F. Supp. 1069, 1070 (D.D.C. 1985); *Safeco Ins. Co. v. Miller*, 591 F. Supp. 590, 599 (D. Md. 1984); *cf. Burger, supra* note 6, at 362 (state judges better equipped to decide questions of state law).

⁸⁴ See *Rattner v. Board of Trustees*, 611 F. Supp. 648, 654 (S.D.N.Y. 1985); *Delaney v. Capitol Hill Anesthesia Assoc.*, 602 F. Supp. 1069, 1070 (D.D.C. 1985); *Northeast Mines Inc. v. Town of Smithtown*, 584 F. Supp. 112, 116 (E.D.N.Y. 1984).

⁸⁵ See *Byer Museum of Arts v. North River Ins. Co.*, 622 F. Supp. 1381, 1385 (N.D. Ill.

The *Byer Museum* case presents one of the most troubling aspects of the exceptional circumstances test; one which completely ignores the supposedly unflagging obligation to exercise jurisdiction. A plaintiff's right to bring a diversity suit in the federal court of his home state, while subject to criticism,⁸⁶ is nevertheless clear from the terms of the diversity statute. The rationale of *Byer Museum*, making the very fact of diversity jurisdiction a factor weighing for dismissal, runs directly counter to the terms of the statute and long standing practice. As the court in *Byer Museum* acknowledged, federal courts are "not to treat diversity litigants as second-class litigants."⁸⁷ One is hard pressed to find support in *Colorado River* or its progeny for the authority assumed by the court in *Byer Museum* to determine which litigants are "undeserving" of a federal forum.

PARALLEL ACTIONS

Still other uncertainties exist; decisions conflict on just how parallel the state and federal actions must be before the federal

1985). *Byer Museum*, an Illinois citizen, was sued in Illinois state court by North River Insurance over the coverage of certain insurance policies. In the course of what the district court termed "some elaborate strategic posturing within the state and federal judicial systems", *Byer* brought the parallel federal action, basing jurisdiction on diversity of citizenship. *Id.* at 1382. The court stated:

As citizens of Illinois, the plaintiffs (state court defendants) are undeserving of the protections afforded by diversity jurisdiction. The [state court] is quite capable of acting impartially towards each of the federal plaintiffs. Moreover, the Court believes that the plaintiffs have circumvented Congress' express desire to keep litigants, such as the plaintiffs, out of federal court. Congress, in enacting the removal provision, 28 U.S.C. § 1441(b), specifically provided that actions cannot be removed from state to federal court if the state defendants are citizens of the state in which the state litigation is brought. That is exactly the position plaintiffs are in.

Because plaintiffs have been foreclosed by Congress from removing this action and because the traditional justification for diversity jurisdiction is not present, the Court holds that there is no substantial federal interest served by proceeding with this case.

Id. at 1385.

⁸⁶ See *supra* note 6; see also American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 124-25 (1968) (right of in-state plaintiff to institute diversity action against out-of-state defendant not responsive to any acceptable justification for diversity jurisdiction); Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOKLYN L. REV. 197, 221-22 (1982) (modifying diversity statute to bar in-state plaintiffs from bringing diversity actions, paralleling removal statute, 28 U.S.C. § 1414(b), has received wide support).

⁸⁷ See *Byer Museum*, 622 F. Supp. at 1385; *Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715, 717 (7th Cir. 1982).

court will consider dismissal in favor of the state litigation. While some courts have required strict identity of parties and issues,⁸⁸ others have stayed the federal action in favor of a state court proceeding because "the goals in both proceedings are the same," although the parties were not the same and the federal plaintiff had raised issues not found in the state suit.⁸⁹

BURDEN OF PROOF

An important procedural aspect of the test, which is subject to conflicting decisions, concerns the party who must carry the burden of persuasion on a motion to stay or dismiss the federal action. Given the Supreme Court's emphasis on the narrowness of the test and the "virtually unflagging obligation" to exercise jurisdiction, most courts assume that the moving party must persuade the court to decline jurisdiction.⁹⁰ However, a number of courts have reversed the burden, requiring the non-moving party to show cause why the federal action should *not* be stayed or dismissed.⁹¹ Such a shift in the burden of persuasion obviously creates a presumption in favor of dismissal which appears to conflict with the supposedly "unflagging obligation" to retain jurisdiction.

DISCRETION

A related issue is the discretion to be accorded the district court in deciding to grant or deny dismissal upon review by the court of appeals. Although the Supreme Court has generally emphasized the narrowness of the abstention doctrine,⁹² the Court has never clarified the standard appropriate for review of a district court's decision to abstain.⁹³ The standard of review has been equally unclear under the exceptional circumstances test.

The district court's discretion to apply the exceptional circum-

⁸⁸ See, e.g., *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 31 (6th Cir. 1984) (requiring strict identity of parties and issues).

⁸⁹ *North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs*, 590 F. Supp. 311, 314 (N.D. Ind. 1984).

⁹⁰ See, e.g., *St. Paul Fire & Marine Ins. Co. v. Trenor Corp.*, 614 F. Supp. 525, 528 (E.D.N.C. 1985).

⁹¹ *Klingenberg v. Bobbin Publications, Inc.*, 530 F. Supp. 173 (D.D.C. 1982); *Bagley v. Florida First Nat'l Bank*, 508 F. Supp. 11 (M.D. Fla. 1980).

⁹² See *Colorado River*, 424 U.S. at 813; *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

⁹³ See *Traugher v. Beauchane*, 760 F.2d 673, 675 (6th Cir. 1985) (comparing standards of review for abstention generally in various circuits).

stances test would seem to be narrow in view of the *Colorado River* Court's assertion that the circumstances permitting dismissal because of a parallel state proceeding "are considerably more limited than the circumstances appropriate for abstention"⁹⁴ and that "[o]nly the clearest of justifications will warrant dismissal."⁹⁵ However, the plurality in *Hill v. Calvert* created doubt in this area by asserting that in cases of concurrent state-federal jurisdiction, the district court is "under no compulsion to exercise that jurisdiction"⁹⁶ and the "decision in such circumstances is largely committed to the discretion of the district court."⁹⁷

The confusion which followed in the wake of *Calvert*⁹⁸ was cleared somewhat by the *Cone* decision which reiterated the narrowness of the exceptional circumstances test and specifically rejected the broad discretion seemingly given to district courts to stay or dismiss a suit in favor of parallel state proceedings. As the *Cone* Court stated, "[y]et to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standard prescribed by this Court."⁹⁹

Apparently this statement was insufficient because confusion nevertheless ensues and many courts continue to display broad discretion to abstain under *Colorado River*.¹⁰⁰ Courts feel free to abstain in cases brought under the Declaratory Judgement Act, which itself provides that federal jurisdiction is discretionary.¹⁰¹ In contrast, other courts have held that "[a]lthough the court has discretion to grant or deny relief authorized by the Declaratory Judgement Act, . . . where the court's denial of relief is based on principles of 'wise judicial administration,' its discretion is limited, and must be exercised within the narrow boundaries drawn by *Colorado River*."¹⁰²

⁹⁴ *Colorado River*, 424 U.S. at 818.

⁹⁵ *Id.* at 819.

⁹⁶ *Calvert*, 437 U.S. at 662 (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

⁹⁷ *Calvert*, 437 U.S. at 664.

⁹⁸ See *supra* note 39 and accompanying text.

⁹⁹ *Cone*, 460 U.S. at 19.

¹⁰⁰ See, e.g., *Schomber v. Jewell Cos.*, 614 F. Supp. 210, 216 (N.D. Ill. 1985) (abstention within district court's discretion).

¹⁰¹ See 28 U.S.C. § 2201 (1982); *Safeco Ins. Co. v. Miller*, 591 F. Supp. 590, 599 (D. Md. 1984) ("abstention under pending state action doctrine is uniquely appropriate").

¹⁰² *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985).

In view of the *Cone* Court's emphasis that courts apply the test "with the balance heavily weighted in favor of the exercise of jurisdiction,"¹⁰³ district courts are accorded greater discretion to decline to abstain and instead retain jurisdiction.¹⁰⁴ Even so, at least one court, over a strong dissent, found an abuse of discretion in the district court's failure to abstain, while another court in a recent decision has found an abuse of discretion in the district court's abstention and dismissal.¹⁰⁵

CONCLUSION

As aforementioned, the exceptional circumstances doctrine is so open-ended that its application is far from uniform as indicated by the variety of cases applying the doctrine. The circumstances in some of these cases raise serious questions as to whether they are exceptional, while others apparently come within the parameters indicated by the Supreme Court. In the final analysis, the district court must await more specific guidelines from the Supreme Court, although it should be noted that this opportunity recently was foregone in *Roberts & Schaefer Co. v. Lake Coal Co.*¹⁰⁶ Until further clarification by the Supreme Court of the guidelines for declining federal jurisdiction in favor of parallel state litigation, it appears that further confusion and litigation of this issue are certain to follow. In the meantime, the district court must rely upon experience and common sense in applying the doctrine.

¹⁰³ *Cone*, 460 U.S. at 16.

¹⁰⁴ See *United States v. Adair*, 723 F.2d 1394, 1402-03 (9th Cir. 1983).

¹⁰⁵ *Microsoft Computer Sys. v. Ontel Corp.*, 686 F.2d 531, 538 (7th Cir. 1982) (Doyle, J., dissenting) (failure to abstain); *Bethlehem Contracting Co. v. Lehrer-McGovern, Inc.*, No. 86-7179, slip op. (2d Cir. Sept. 15, 1986) (abstention and dismissal).

¹⁰⁶ 751 F.2d 386 (6th Cir. 1984) (*mem.*), *cert. granted*, 105 S. Ct. 1841, *dismissed as moot*, No. 84-1240, slip op. Dec. 3, 1985. The Supreme Court, after granting certiorari to review the exceptional circumstances test, dismissed the case as moot, over both parties' objections, because of a settlement. *Id.*