

NOTE

COLORADO RIVER ABSTENTION: A PRACTICAL REASSESSMENT

*Owen W. Gallogly**

When duplicative civil suits proceed simultaneously in both state and federal court, a waste of resources is bound to occur. Nevertheless, the Supreme Court has maintained that federal courts must typically retain jurisdiction over such concurrent litigation. Under the Colorado River abstention doctrine, only “exceptional circumstances,” beyond the mere pendency of a parallel state case, will permit a federal court to relinquish jurisdiction in favor of the state action. How have the lower federal courts responded to this mandate to take jurisdiction, given the inherent waste and confusion engendered by concurrent litigation? And is there a more coherent and efficient way to manage this symptom of our dual federal-state court system? This Note seeks to answer these questions by focusing on the practical application of Colorado River “on the ground” in the lower courts, a subject largely unexplored by the otherwise voluminous scholarship on federal abstention.

By surveying decades of cases involving Colorado River abstention in two federal courts of appeals and two district courts, this Note reaches a startling conclusion. Driven by a lack of guidance from the U.S. Supreme Court and a desire to rid their dockets of duplicative suits, the lower courts have taken wildly divergent approaches to Colorado River. The Second Circuit Court of Appeals, for example, has applied the doctrine rigidly, demanding that district courts retain jurisdiction in all but the most exceptional circumstances. Under pressure from this circuit precedent, judges in the Southern District of New York have

* J.D., University of Virginia School of Law, 2019. I am indebted to Professors John C. Jeffries, Jr. and Caleb Nelson for their helpful comments and discussions. Special thanks are also due to the members of the *Virginia Law Review* who assisted in the editing and preparation of this piece, including Nick Carey, Julian Kritz, Laura Toulme, Edward Wixler, and many others. Any errors are my own.

frequently sought to “effectively” abstain via alternative means, simultaneously relinquishing federal jurisdiction and frustrating appellate review. When they instead attempt to proceed to judgment rather than effectively abstain, the result is typically (and unsurprisingly) a significant waste of judicial resources. On the other hand, the Seventh Circuit has taken a highly permissive view of Colorado River abstention, watering down the otherwise restrictive doctrine. Judges in the Northern District of Illinois have taken up this view with alacrity, abstaining pursuant to Colorado River in the vast majority of cases involving parallel state litigation, subject only to limited and deferential appellate review.

This inconsistent doctrinal development could hardly be described as desirable—a combination of informal abstention and judicial waste in the Second Circuit compared with virtually unfettered discretion to formally abstain in the Seventh Circuit. Thus, this Note concludes with a comprehensive proposal to bring greater structure and coherency to the doctrine while avoiding both of these negative results.

INTRODUCTION.....	201
I. CONCURRENT LITIGATION AND THE DEVELOPMENT OF <i>COLORADO RIVER</i>	207
II. THE APPLICATION OF <i>COLORADO RIVER</i> IN THE LOWER COURTS.....	213
A. <i>The Second Circuit and the Southern District of New York</i>	214
1. <i>Doctrinal Development in the Second Circuit</i>	215
a. <i>Generally Applicable Rules</i>	215
b. <i>The Exceptional Circumstances Test</i>	216
2. <i>Reaction and Application in the Southern District of New York</i>	217
a. <i>Effective Abstention</i>	220
b. <i>Waste of Judicial Resources</i>	223
B. <i>The Seventh Circuit and the Northern District of Illinois</i>	224
1. <i>Doctrinal Development in the Seventh Circuit</i>	225
a. <i>Generally Applicable Rules</i>	226
b. <i>The Exceptional Circumstances Test</i>	227
2. <i>Reaction and Application in the Northern District of Illinois</i>	230
III. A PROPOSAL FOR REFORM.....	233
A. <i>Underlying Principles</i>	234

1. <i>Concurrent Litigation Is Wasteful</i>	235
2. <i>Our Legal System Abjures Needless Waste</i>	236
3. <i>Congress Does Not Pursue Objectives at All Costs</i>	237
4. <i>Jurisdictional Rules Should Be Clear</i>	239
5. <i>Diversity Jurisdiction Is an Unjustifiable Burden on the Federal Judiciary</i>	240
B. <i>The Proposal in Detail</i>	241
1. <i>Exclusive Federal Jurisdiction</i>	243
2. <i>Reactive Litigation</i>	245
3. <i>Repetitive Litigation</i>	246
IV. OBJECTIONS AND REBUTTALS	248
CONCLUSION	256
APPENDIX.....	257

*If you can think of a subject which is interrelated and inextricably combined with another subject, without knowing anything about or giving any consideration to the second subject, then you have a legal mind.*¹

INTRODUCTION

Of the numerous complexities inherent in the United States' dual federal-state court system, the potential for concurrent litigation is one of the most anomalous and vexing. Concurrent litigation, as it will be discussed in this Note, occurs when adverse parties simultaneously litigate the same or similar claims in both federal and state court.² Because the subject-matter jurisdictions of these dual judicial systems are largely concurrent,³ this phenomenon is not uncommon. Though seemingly at

¹ Thurman Arnold, *Fair Fights and Foul: A Dissenting Lawyer's Life* 20–21 (1965) (quoting Professor Thomas Reed Powell).

² See Josue Caballero, Note, *Colorado River Abstention Doctrine in the Fifth Circuit: The Exceptional Circumstances of a Likely Reversal*, 64 *Baylor L. Rev.* 277, 279–80 (2012) (describing this phenomenon in the state-federal context). Concurrent litigation can also arise between two federal courts, two state courts, or even within a single state court system. Allan D. Vestal, *Repetitive Litigation*, 45 *Iowa L. Rev.* 525, 525 (1960) [hereinafter Vestal, *Repetitive Litigation*]. These other forms of concurrent litigation are beyond the scope of this Note.

³ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962) (citing *Clafin v. Houseman*, 93 U.S. 130, 136 (1876)); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 *Notre Dame L. Rev.* 1347, 1350 (2000) [hereinafter Redish, *Intersystemic Redundancy*].

odds with the U.S. Supreme Court's insistence that the state and federal courts "are not foreign to each other, nor to be treated by each other as such, but as courts of the same country,"⁴ parallel state-federal litigation is nonetheless permitted, and duplicative cases are generally allowed to proceed in both courts simultaneously.⁵ Notwithstanding the inherently wasteful nature of such litigation,⁶ the ability of a federal court to decline jurisdiction over a case that is duplicative of an ongoing state proceeding is, at least in theory, extremely narrow.⁷

As courts of limited jurisdiction, the federal courts possess only the jurisdiction conferred by the Constitution and congressional statute.⁸ While it is traditionally accepted that Congress retains plenary power to control the jurisdiction of the lower federal courts,⁹ whether those courts are *required* to exercise the jurisdiction given them is less certain.¹⁰ Where state and federal courts enjoy overlapping jurisdiction, the answer to that question is governed partially by the abstention doctrines.¹¹ Federal

⁴ *Howlett v. Rose*, 496 U.S. 356, 367 (1990) (quoting *Clafin*, 93 U.S. at 137).

⁵ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . .'" (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910))).

⁶ James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 *Stan. L. Rev.* 1049, 1064 (1994) (describing concurrent litigation as "patently wasteful").

⁷ *Colo. River*, 424 U.S. at 817–19 (explaining that federal courts should only defer to concurrent state court proceedings in "exceptional" circumstances and that "[o]nly the clearest of justifications will warrant dismissal").

⁸ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

⁹ Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 *Cath. U. L. Rev.* 671, 671–72 (1997) ("The orthodox view long has been that Congress possesses nearly plenary authority to restrict federal court jurisdiction."). The canonical citation for that view (also known as the "traditional" view) is *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Velasco, *supra*, at 674–75.

¹⁰ For examples of the differing views on this topic, compare Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71 (1984) [hereinafter Redish, *Separation of Powers*] (arguing that federal courts have little discretion to decline jurisdiction conferred by Congress), with David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543 (1985) (arguing for greater judicial discretion over jurisdiction).

¹¹ See Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!*, 36 *Creighton L. Rev.* 375, 376 (2003).

abstention law comprises a series of “judge-made” doctrines¹² that “identify the circumstances in which federal courts deem it appropriate to refrain from adjudicating a case to permit some other body—typically a state court—to adjudicate it first.”¹³

It is the most recently developed of these doctrines,¹⁴ known as *Colorado River* abstention, that governs a federal court’s limited ability to refrain from exercising jurisdiction over cases involving concurrent litigation.¹⁵ As described by the Supreme Court in the eponymous case of *Colorado River Water Conservation District v. United States*,¹⁶ this doctrine is a carefully circumscribed exception to the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”¹⁷ The Court acknowledged that considerations of judicial economy and efficiency could indeed permit a federal court to decline jurisdiction in this context, but it emphasized that “the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are

¹² *Zwickler v. Koota*, 389 U.S. 241, 248 (1967); see also Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 824–25 (2008) (describing the abstention doctrines as examples of federal common law).

¹³ Barrett, *supra* note 12, at 824; see also *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (“The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.”).

¹⁴ The three earlier-developed abstention doctrines are also named after the cases in which they were first articulated. *Pullman* abstention, a relative of the doctrine of constitutional avoidance, governs situations in which a federal court can abstain to allow a state court to answer unsettled questions of state law that are relevant to the federal case and that may obviate the need to decide a difficult constitutional question. See *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). *Burford* abstention permits federal courts to decline jurisdiction to avoid disrupting a complex state regulatory scheme. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943). Finally, *Younger* abstention prevents federal courts, absent a showing of bad faith or harassment, from enjoining ongoing state criminal or quasi-criminal proceedings. See *Younger v. Harris*, 401 U.S. 37, 54 (1971).

¹⁵ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–19 (1976). Though the Supreme Court declined to describe the doctrine promulgated in *Colorado River* as a form of abstention, see *id.* at 817, there seems to be no principled basis for this distinction. Given that most lower court judges and several Supreme Court Justices have referred to the *Colorado River* doctrine as a version of abstention, for the sake of simplicity I will refer to it as such. See 17A Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 4247, at 471 nn.77–78 (3d ed. 2007) (collecting cases referring to the doctrine as *Colorado River* abstention).

¹⁶ 424 U.S. 800 (1976).

¹⁷ *Id.* at 817.

considerably more limited than the circumstances appropriate for abstention” under the other abstention doctrines.¹⁸

Since its promulgation in 1976, *Colorado River* abstention has been the subject of significant scholarly commentary, both favorable and critical.¹⁹ Though the academy has been quick to take sides on the propriety and usefulness of the doctrine, commentators have devoted scant attention to its function in practice. Most discussion of the topic has been theoretical, and there has been virtually no effort to systematically analyze how the doctrine is applied by the lower courts.²⁰ Without a picture of the practical import of *Colorado River* abstention, it is difficult to validate much of the scholarly commentary, both positive and negative. Given that the Supreme Court has scarcely addressed the topic in more than three decades,²¹ and hence the bulk of the doctrinal development has occurred in the lower courts, this gap in the literature is all the more significant.

The purpose of this Note is to begin closing that gap by analyzing the degree to which lower federal courts fulfill their “virtually unflagging obligation” *in practice*. To do so, I reviewed all opinions that referenced

¹⁸ *Id.* at 817–18. Note that declining jurisdiction in this context could constitute either a stay or dismissal of the federal case, because when a district court abstains pursuant to *Colorado River* it is assumed that there will be no further proceedings in the federal court except perhaps application of *res judicata* upon the state court’s resolution of the controversy. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983).

¹⁹ It would be both impossible and unproductive to attempt an exhaustive survey of the literature on *Colorado River* abstention here. For representative examples of generally positive commentary, see Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 *Nw. U. L. Rev.* 847 (2013); Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 *BYU L. Rev.* 767 (1991); Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 *Case W. Res. L. Rev.* 1035 (1989); Shapiro, *supra* note 10. For more critical views, see Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of “Democracy Bashing,”* 40 *Case W. Res. L. Rev.* 1023 (1989) [hereinafter Redish, *Judge-Made Abstention*]; Donald L. Doernberg, “You Can Lead a Horse to Water . . .”: The Supreme Court’s Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress, 40 *Case W. Res. L. Rev.* 999 (1989); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 *Geo. L.J.* 99 (1986); Redish, *Separation of Powers*, *supra* note 10.

²⁰ Though a few such analyses have been undertaken, the vast majority considered the reaction of the lower courts in the immediate aftermath of the Court handing down *Colorado River* and hence are seriously outdated. See, e.g., Mullenix, *supra* note 19, at 128–49. For an example of a rare, recent attempt, see Caballero, *supra* note 2, at 277–79 (surveying cases in the Fifth Circuit and concluding that “[a] decision [by a district court] to abstain under *Colorado River* practically guarantees reversal” (footnote omitted)).

²¹ See *infra* notes 60–68 and accompanying text.

Colorado River abstention over the course of ten years, 2008–2018, in two federal district courts, the U.S. District Court for the Southern District of New York and the Northern District of Illinois. I did the same with twenty-five years of opinions, 1993–2018, issued by the appellate courts to which cases from those districts are appealed, the U.S. Courts of Appeals for the Second and Seventh Circuits.²²

Various factors informed my choice of both the courts and timeframe for analysis. With respect to courts, I chose the Southern District of New York and the Northern District of Illinois for three reasons. First, each handles a high volume of civil litigation and hears a wide variety of civil cases.²³ Second, the decisions of these courts are appealed to two different courts of appeals, enabling an investigation of differences in doctrinal development and application between circuits. Third, and most importantly, they appear to have heard the highest number of requests to

²² A few notes on methodology and scope will be helpful before proceeding. First, to find these cases, I searched both Bloomberg Law and Westlaw for the terms “*Colorado River*” and “abstention.” To ensure no cases were missed, I cross checked those results against the American Law Reports’ database of *Colorado River* abstention decisions, 193 A.L.R. Fed. 291. Second, the temporal scope of the court of appeals research was limited to cases decided between January 1, 1993, and January 1, 2018. Likewise, the district court research was limited to cases that met the following three criteria: (1) the case was filed in or transferred to either the Southern District of New York or the Northern District of Illinois on or after January 1, 2008; (2) the district court decided a question of *Colorado River* abstention prior to January 1, 2018; and (3) the case was not transferred to another district court. Third, the cases included in my analyses were limited to those in which the district court actually decided a question of *Colorado River* abstention. Cases in which *Colorado River* was provided as an alternative holding or was denied in dictum (e.g., after the court had already dismissed the case for failure to state a claim) were included and noted as such. On the other hand, cases in which the parties raised a question of *Colorado River* abstention but the court did not specifically address it were excluded. Likewise, cases which were ultimately decided under the more flexible doctrine of *Brillhart/Wilton* abstention—which governs a federal court’s discretion to decline jurisdiction over a declaratory judgment action in favor of a pending state proceeding—were excluded. See *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). Finally, except where specifically noted, cases resolved under the doctrine of so-called “international comity” abstention, in which a federal court abstains in favor of concurrent litigation in the courts of a foreign nation, were also excluded. See, e.g., *Freund v. Republic of France*, 592 F. Supp. 2d 540, 565–66 (S.D.N.Y. 2008).

²³ In 2017, the Northern District of Illinois had the third largest civil docket among the federal district courts, while the Southern District of New York ranked fifth. See U.S. Courts, Statistical Tables for the Federal Judiciary, at tbl.C-1, U.S. District Courts—Civil Cases Filed, Terminated, and Pending During the 12-Month Period Ending June 30, 2017, https://www.uscourts.gov/sites/default/files/data_tables/stfj_c1_630.2017.pdf [<https://perma.cc/RY-46-XXDT>].

abstain under *Colorado River* over the applicable timeframe.²⁴ Thus, focusing on these two courts was intended to enable an analysis of a diversity of *Colorado River* cases decided by judges relatively familiar with the doctrine. The temporal scope was chosen partially for simple administrative feasibility and to capture the most recent doctrinal developments. Furthermore, as a portion of the research involved analyzing the time between a case being filed and reaching judgment,²⁵ it was essential that the analyzed cases be governed by a relatively consistent pleading standard. Therefore, the starting date was chosen so as to fall after the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,²⁶ which announced the heightened "plausibility" pleading standard for federal suits.²⁷

Analysis of these cases reveals stark trends. By and large, the application of *Colorado River* abstention in the lower courts is a story of confusion and unpredictability. Struggling with a paucity of guidance from the Supreme Court, the courts of appeals and their corresponding district courts have taken divergent approaches to the issue. Federal cases involving parallel state court litigation can expect wildly different treatment if filed in the Southern District of New York versus the Northern District of Illinois. Moreover, though they take nearly opposite approaches, neither court's methodology has furthered the goals of either *Colorado River* abstention's critics or its supporters. Indeed, it could be said that the worst fears of both sides of the argument have been realized—the doctrine as currently applied promotes judicial waste, creates uncertainty for judges and litigants alike, and often results in the parties being denied access to a federal forum without a sufficiently clear (or any) rationale.

This Note addresses these issues and considers their resulting implications in four parts. Part I provides necessary background. It briefly reviews the types and causes of concurrent state-federal litigation. It then traces the historical development in the lower federal courts of what

²⁴ This was determined by searching both the published opinions and dockets of the federal district courts for four sets of terms related to *Colorado River* abstention and concurrent litigation. Each court was then ranked according to the combined number of results between opinions and docket for each search term. The Southern District of New York ranked first in every search, while the Northern District of Illinois ranked second, third, or fourth in each.

²⁵ See *infra* note 119 and accompanying text.

²⁶ 550 U.S. 544 (2007).

²⁷ *Id.* at 556–57.

would come to be known as *Colorado River* abstention. This Part concludes with an overview of the doctrine itself as promulgated by the Supreme Court in *Colorado River* and subsequent cases. Part II presents the findings of my lower court research. It summarizes the relevant doctrinal development in each circuit then analyzes, both quantitatively and qualitatively, the application of that doctrine in the district courts. Part III synthesizes the conclusions of the lower court research and proposes an alternative framework under which questions of *Colorado River* abstention could be decided. Given the unsatisfactory nature of the doctrine as currently applied, the purpose of this proposal is to create greater theoretical coherence and decisional consistency while simultaneously maximizing efficiency and conserving judicial resources. Part IV concludes by briefly addressing and rebutting potential objections to the proposal offered in Part III. In sum, this Note offers a practical reassessment of what could be a valuable doctrine of federal courts law but what currently represents little more than another source of needless litigation over jurisdiction.

I. CONCURRENT LITIGATION AND THE DEVELOPMENT OF *COLORADO RIVER*

Concurrent litigation is a product of what Professor Martin Redish has termed our “interactive judicial federalism.”²⁸ The ability of parties to litigate substantially the same issues in both a federal and state court primarily arises from one aspect of that judicial federalism—the overlapping jurisdictions of the state and federal courts. To begin with, state courts are presumed to exercise concurrent jurisdiction over claims based on federal law.²⁹ Though it is possible for Congress to vest exclusive jurisdiction over certain causes of action in the federal courts alone, an ouster of state court jurisdiction requires an unmistakably clear directive from Congress.³⁰ Exclusive federal jurisdiction is therefore the rare exception to the norm.³¹ Conversely, state courts of appropriate

²⁸ Redish, *Intersystemic Redundancy*, supra note 3, at 1350.

²⁹ *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981).

³⁰ *Id.* at 478 (“Congress . . . may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”).

³¹ Redish, *Intersystemic Redundancy*, supra note 3, at 1350–51.

jurisdiction are typically required to hear federal claims.³² And as a result of diversity and supplemental jurisdiction, federal courts often hear and decide questions of state law.³³ Thus, the vast bulk of potential claims arising under both federal and state law may be heard in either court system or in both simultaneously.

With a few exotic exceptions,³⁴ concurrent litigation typically takes one of two forms: reactive or repetitive.³⁵ Reactive litigation occurs when a defendant in an earlier-filed action (in either state or federal court) commences a suit in the opposite forum against the plaintiff in the first action. Most commonly, this second suit is a claim for coercive relief arising out of the same set of facts or a declaratory action seeking a judgement of non-liability in the prior case.³⁶ Repetitive litigation occurs when a plaintiff files duplicative actions against the same defendant in both state and federal court.³⁷ These actions could be filed concurrently or sequentially.

In spite of (and sometimes because of) the duplication of time and effort required to litigate the same case simultaneously in two fora,³⁸ litigants have myriad reasons to file duplicative lawsuits. These motivations typically have little to do with the merits of the underlying case and are instead driven by litigation strategy. For example, a litigant

³² *Testa v. Katt*, 330 U.S. 386, 394 (1947); *Rehnquist*, supra note 6, at 1057 n.33.

³³ See *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

³⁴ See, e.g., *A&E Television Networks, LLC v. Pivot Point Entm't, LLC*, No. 10-cv-9422, 2011 WL 182083, at *1 (S.D.N.Y. Jan. 18, 2011) (interpleader action in which the concurrent litigation was commenced by the plaintiff-in-interpleader rather than either of the two adverse parties).

³⁵ These labels were taken from Professor Allan Vestal's seminal treatments of the phenomena and are widely employed in both the courts and academy. See Allan D. Vestal, *Reactive Litigation*, 47 *Iowa L. Rev.* 11 (1961) [hereinafter Vestal, *Reactive Litigation*]; Vestal, *Repetitive Litigation*, supra note 2; see also David A. Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 *Tul. L. Rev.* 651, 664 (1985) (describing one type of concurrent litigation as "reactive").

³⁶ See Vestal, *Reactive Litigation*, supra note 35, at 11–13 (surveying these and other procedural postures in which reactive litigation may arise). While reactive claims for declaratory relief are common, they are not within the scope of my analysis, as they are governed by *Brillhart/Wilton* abstention rather than *Colorado River*. See supra note 22. For a modern example of reactive litigation, see *Hayden Capital USA, LLC v. Northstar Agri Industries, LLC*, No. 11-cv-594, 2011 WL 5024193 (S.D.N.Y. Oct. 20, 2011).

³⁷ Vestal, *Repetitive Litigation*, supra note 2, at 525 (describing examples of repetitive litigation). For a modern example, see *Abe v. New York University*, No. 14-cv-9323, 2016 WL 1275661 (S.D.N.Y. Mar. 30, 2016).

³⁸ See infra notes 188–192 and accompanying text.

may want to obtain an advantage in the second forum unavailable in the first, such as more favorable choice-of-law rules or discovery procedures.³⁹ Plaintiffs might file repetitive suits to drain the defendant's resources and coerce a more favorable settlement offer; a defendant could do the same with a reactive suit.⁴⁰ State court defendants may file a reactive suit in federal court in an effort to evade the requirements for removal jurisdiction.⁴¹ Perhaps the most common scenario occurs when a litigant for whom the prior-filed case is proceeding poorly seeks a fresh start in an alternative forum in the hopes the second suit will proceed more rapidly and eventually preclude the first.⁴²

The combination of an inevitable waste of resources and the patently strategic motivations of parties to concurrent litigation led the lower federal courts to attempt to prevent or reduce its occurrence. Historically, most lower courts were hesitant to decline jurisdiction in favor of a parallel state court proceeding. This reluctance was driven largely by commanding dicta in a series of Supreme Court opinions to the effect that federal courts were required (perhaps even constitutionally so) to exercise the entirety of the jurisdiction conferred by Congress.⁴³ Though the

³⁹ See Vestal, *Reactive Litigation*, supra note 35, at 13–15; Vestal, *Repetitive Litigation*, supra note 2, at 526–28; see also Michael M. Wilson, Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. Chi. L. Rev. 641, 643–44 (1977) (listing various “tactical advantages” that lead litigants to file reactive and repetitive suits).

⁴⁰ Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. Cal. L. Rev. 1237, 1252 (1989); Vestal, *Repetitive Litigation*, supra note 2, at 526.

⁴¹ Rehnquist, supra note 6, at 1107–08; see also *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988) (acknowledging the possibility that a party may “spurn removal and bring a separate suit in federal court” but concluding that such a strategy would not automatically trigger abstention pursuant to *Colorado River*).

⁴² Wilson, supra note 39, at 643.

⁴³ See, e.g., *McClellan v. Carland*, 217 U.S. 268, 281–82 (1910); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). The idea that once federal jurisdiction has been properly invoked it cannot be relinquished in favor of a state proceeding has come to be known as the “obligation” or “absolute right” theory. Rehnquist, supra note 6, at 1054; Sonenshein, supra note 35, at 653. Until the mid-twentieth century, this theory was generally adhered to by the lower federal courts with reflexive rigidity. See, e.g., *Checker Cab Mfg. Co. v. Checker Taxi Co.*, 26 F.2d 752, 752 (N.D. Ill. 1928) (“Plaintiff obtains jurisdiction by reason of diversity of citizenship. Under the Constitution and laws of the United States it has an absolute right to try its case in this forum. The pendency of the state

rigidity of this theory has been diminished or outright repudiated in other contexts,⁴⁴ it has retained vitality with respect to concurrent litigation. Indeed, the Supreme Court regularly recites the familiar refrain that “[g]enerally, as between state and federal courts, the rule is that ‘the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.’”⁴⁵ However, with the rapid growth of federal dockets in the mid-twentieth century⁴⁶ and increased academic focus on the issue of concurrent litigation,⁴⁷ this paradigm began to shift. Without guidance from the Supreme Court, some lower federal courts began to assert a broad discretionary authority to stay or dismiss actions in favor of parallel state court proceedings.⁴⁸

The rationale underlying this authority was most clearly articulated by Chief Judge Hand in *Mottolese v. Kaufman*.⁴⁹ After dismissing the absolute right theory as no longer controlling,⁵⁰ Judge Hand proceeded to draw an analogy between the power of a federal court to abstain from concurrent litigation and the doctrine of *forum non conveniens*. He argued that there was “no difference in kind between the inconveniences which may arise from compelling a defendant to stand trial at a distance from the place where the transactions have occurred, and compelling him to defend another action on the same claim.”⁵¹ After noting that it was, of course, impossible to consolidate the federal and state cases, the Second

court action is not a bar, and it would seem apparent that this court may not exercise its discretion to deprive plaintiff of its constitutional right to a trial in this court.”).

⁴⁴ See *infra* notes 301–304 and accompanying text.

⁴⁵ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan*, 217 U.S. at 282); see also Mullenix, *supra* note 19, at 101 (strongly advocating adherence to the absolute right theory in the context of concurrent litigation).

⁴⁶ Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921, 924 (noting that between 1960 and 1986, civil filings in federal district courts increased by 398%).

⁴⁷ See, e.g., Vestal, *Repetitive Litigation*, *supra* note 2, at 544 (presciently predicting that “[a]s the courts face the overwhelming flood of litigation of the years immediately ahead, it is extremely important that unnecessary litigation be eliminated,” and concluding that “unjustified repetitive litigation must be removed from the dockets”).

⁴⁸ Wilson, *supra* note 39, at 653–59.

⁴⁹ 176 F.2d 301 (1949).

⁵⁰ *Id.* at 302 (“It is probably true that originally the statutory privilege of access to a federal court was regarded as absolute and infeasible, no matter whether its exercise resulted in inconvenience, delay and expense to the defendant. There can be no doubt, however, that this is no longer true.” (footnote omitted)).

⁵¹ *Id.* at 303.

Circuit endorsed the district court's decision to stay the federal action pending the conclusion of the state case.⁵² Following the *Mottolese* decision, numerous other courts of appeals adopted similar doctrines giving district judges wide discretion to stay or dismiss duplicative federal proceedings.⁵³

Nearly three decades after Chief Judge Hand's opinion, the Supreme Court weighed in on the question. In *Colorado River*, the Court formally acknowledged the legitimacy of declining jurisdiction in favor of concurrent state proceedings in the interest of "[w]ise judicial administration."⁵⁴ Though the context of the *Colorado River* case itself was anomalous,⁵⁵ the principle announced by the Court was one of general applicability.⁵⁶ That said, the doctrine promulgated in *Colorado River* was significantly narrower and more restrictive than the discretionary standards being applied in the lower courts.⁵⁷ The Supreme Court emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" and asserted that only "exceptional" circumstances and "the clearest of justifications [could] warrant dismissal" of a federal action in favor of duplicative state

⁵² *Id.*

⁵³ See, e.g., *Aetna State Bank v. Altheimer*, 430 F.2d 750, 756 (7th Cir. 1970); *Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967). But see *Miller v. Miller*, 423 F.2d 145, 148 (10th Cir. 1970) (adhering to the absolute right view).

⁵⁴ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (alteration in original) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

⁵⁵ *Colorado River* concerned the appropriate forum to adjudicate federal water rights in the state of Colorado. *Id.* at 805–06. Previously, Congress had enacted a federal statute—the McCarran Amendment—that the Court held evinced an intent to favor comprehensive adjudication of water rights in state courts over piecemeal litigation in multiple court systems. *Id.* at 819. Though the case has come to stand for the more general proposition that abstention in favor of concurrent state proceedings is permissible in exceptional circumstances, it appears beyond question that the presence of the McCarran Amendment was dispositive in the Court's decision to abstain in *Colorado River* itself. See *id.* (noting that of the factors "counsel[ing] against concurrent federal proceedings," the "most important . . . is the McCarran Amendment"); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) ("By far the most important factor in our decision to approve the dismissal [in *Colorado River*] was the 'clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system' as evinced in the McCarran Amendment." (alteration in original) (citation omitted) (quoting *Colo. River*, 424 U.S. at 819)).

⁵⁶ *Wilson*, *supra* note 39, at 663 & n.153.

⁵⁷ *Id.* at 659.

proceedings.⁵⁸ Without more, the pendency of a concurrent case in state court would be insufficient to justify abstention. While declining to articulate a clear rule, the Court listed four factors relevant to determining whether such exceptional circumstances were present: (1) whether either court has assumed jurisdiction over property, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, and (4) the order in which jurisdiction was obtained.⁵⁹

The subsequent doctrinal development of *Colorado River* abstention in the Supreme Court is best described as limited.⁶⁰ The only meaningful elaboration came just seven years after *Colorado River* was handed down, when the Supreme Court announced its decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁶¹ *Moses H. Cone* can be said to stand for two propositions. First, it reaffirmed that the situations in which abstention pursuant to *Colorado River* would be appropriate are extremely narrow⁶² and that district courts have limited discretion in making such decisions.⁶³ Second, the Court again refused to articulate a bright line rule as to when exceptional circumstances warranting abstention exist, instead opining that “the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors,”⁶⁴ which are “to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand.”⁶⁵ The Court also delineated two factors relevant to the exceptional circumstances analysis in addition to the four articulated in *Colorado River*: (1) whether federal or state law provides the rule of decision (with the presence of federal law questions

⁵⁸ *Colo. River*, 424 U.S. at 817–19.

⁵⁹ *Id.* at 818–19.

⁶⁰ William P. Marshall, Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint, 107 Nw. U. L. Rev. 881, 884 (2013) (“One of the remarkable things about abstention is how stable the doctrine has been for over thirty years.”).

⁶¹ 460 U.S. 1 (1983).

⁶² *Id.* at 25–26 (“[W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist ‘exceptional’ circumstances, the ‘clearest of justifications,’ that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.”); see also Caballero, *supra* note 2, at 288 (“With *Moses H. Cone*, the Supreme Court slammed the door shut on any notion that *Colorado River* abstention would be a broadly applicable solution for duplicative litigation.”).

⁶³ *Moses H. Cone*, 460 U.S. at 19.

⁶⁴ *Id.* at 16.

⁶⁵ *Id.* at 21.

favoring retention of jurisdiction)⁶⁶ and (2) the adequacy of the state proceedings to protect the federal plaintiff's rights.⁶⁷ Since *Moses H. Cone*, the Supreme Court has not provided any further guidance, leaving lower courts to struggle with how *Colorado River*'s "unwieldy six-factor balancing test" applies to particular cases.⁶⁸

Before proceeding, one additional point of background is required. To appreciate the analysis in Part II, it is necessary to understand the framework that a modern federal court applies when considering a *Colorado River* question. The analysis typically proceeds in two steps. First, the court determines whether the concurrent state and federal cases are "parallel" in the sense required to trigger the exceptional circumstances test.⁶⁹ As further ventilated below, the precise requirements for parallelism differ between circuits, but generally the court looks to whether "substantially the same parties are contemporaneously litigating substantially the same issues in another forum."⁷⁰ If the cases are not parallel, *Colorado River* abstention is categorically inappropriate and the federal court will retain jurisdiction.⁷¹ If they are parallel, the court will move on and apply the exceptional circumstances test, balancing the six (or more) relevant factors and determining whether there is sufficient justification to abstain.⁷² With that background, Part II commences the discussion of how the lower courts, in particular the Southern District of New York and the Northern District of Illinois, have applied *Colorado River* abstention in practice.

II. THE APPLICATION OF *COLORADO RIVER* IN THE LOWER COURTS

In the absence of clear guidance from the Supreme Court, the Second and Seventh Circuits have diverged sharply in their application of *Colorado River* abstention. Unsurprisingly, this divergence has extended to the Southern District of New York and Northern District of Illinois, the

⁶⁶ Id. at 23.

⁶⁷ Id. at 26.

⁶⁸ Rehnquist, *supra* note 6, at 1095; see also Mullenix, *supra* note 19, at 119, 128–29 (critiquing the exceptional circumstances test for its lack of clarity).

⁶⁹ See, e.g., *Freed v. J.P. Morgan Chase Bank, N.A.*, 756 F.3d 1013, 1018 (7th Cir. 2014).

⁷⁰ Id. at 1019 (quoting *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988)); *Dittmer v. Cty. of Suffolk*, 146 F.3d 113, 118 (2d Cir. 1998).

⁷¹ *Freed*, 756 F.3d at 1018.

⁷² Id.; *Abe v. N.Y. Univ.*, No. 14-cv-9323, 2016 WL 1275661, at *5–6 (S.D.N.Y. Mar. 30, 2016).

decisions of which are appealed to the Second and Seventh Circuits, respectively. An analysis of these contrasting methodologies reveals that *Colorado River* does not function effectively under either approach. Rather than promoting “[w]ise judicial administration,”⁷³ the doctrine creates uncertainty for courts and litigants, engenders waste of judicial resources, and frequently deprives plaintiffs of access to a federal forum with little or no justification.

A. The Second Circuit and the Southern District of New York

The Second Circuit has stringently enforced the “unflagging obligation” to exercise federal jurisdiction. Since the Supreme Court handed down *Moses H. Cone*, the Second Circuit’s doctrinal elaboration of *Colorado River* abstention has been almost entirely restrictive.⁷⁴ As a result, in the Second Circuit, only rare and truly exceptional circumstances will justify declining jurisdiction in favor of a parallel state proceeding. And for a district judge who does abstain, reversal is quite likely. In the twenty-five-year period between 1993 and 2018, the Second Circuit affirmed a district court’s decision to abstain pursuant to *Colorado River* only twice (both in summary, unpublished opinions)⁷⁵ while reversing ten such decisions.⁷⁶

This message has resonated in the Southern District of New York. Under pressure from the clear mandate of the Second Circuit, district judges have formally abstained in less than twenty percent of cases involving concurrent state court litigation in the past decade.⁷⁷ But, cognizant of the inefficiencies associated with two cases proceeding simultaneously in different fora, district judges frequently resort to alternative means of achieving the same end. Relying on methods that are either shielded from, or regarded more favorably upon, appellate review, judges in the Southern District of New York often “effectively” abstain from concurrent litigation while technically maintaining jurisdiction.⁷⁸

⁷³ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

⁷⁴ See *infra* notes 80–83 and accompanying text.

⁷⁵ See *infra* Appendix, Table 1.

⁷⁶ See *infra* Appendix, Table 1. Over the same period, the Second Circuit has also denied three motions to abstain pursuant to *Colorado River* that were raised in the first instance on appeal while granting none. See *infra* Appendix, Table 1.

⁷⁷ See *infra* notes 94–98 and accompanying text.

⁷⁸ See *infra* notes 100–118 and accompanying text.

On the other hand, when district judges do attempt to proceed to judgement rather than effectively abstain, the result is typically a significant waste of judicial resources, with cases proceeding in two (or more) court systems for years without resolution.⁷⁹

1. Doctrinal Development in the Second Circuit

Two strands of doctrinal development have characterized and enabled the Second Circuit's restrictive position on *Colorado River* abstention. First, the court has promulgated several general rules limiting both the situations in which abstention is appropriate and the discretion of district judges. Second, it has narrowly construed many of the factors comprising the exceptional circumstances test, such that they almost invariably weigh against abstention.

a. Generally Applicable Rules

By far the most significant constraint on abstention pursuant to *Colorado River* in the Second Circuit has been the virtual elimination of district court discretion. Though decisions to abstain are purportedly reviewed under a deferential abuse of discretion standard,⁸⁰ an examination of the standard as actually applied reveals the opposite to be true. While acknowledging that “[a]buse of discretion is normally a deferential standard,” the Second Circuit clarified that “in the abstention context our review is ‘somewhat rigorous.’”⁸¹ Even “somewhat rigorous” is significantly more generous than the review actually undertaken; immediately after that statement, the court went on to opine that “the district court’s discretion must be exercised within the narrow and specific limits prescribed by the particular abstention doctrine involved. Thus, there is little or no discretion to abstain in a case which does not meet traditional abstention requirements.”⁸² Since the Second Circuit itself decides whether the “traditional abstention requirements” have been met in each case,⁸³ this amounts to *de novo* review with no discretion whatsoever left in the hands of the district court.

⁷⁹ See *infra* notes 120–126 and accompanying text.

⁸⁰ *Vill. of Westfield v. Welch’s*, 170 F.3d 116, 120 (2d Cir. 1999).

⁸¹ *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 99 (2d Cir. 2012) (quoting *Dittmer v. Cty. of Suffolk*, 146 F.3d 113, 116 (2d Cir. 1998)).

⁸² *Id.* (quoting *Dittmer*, 146 F.3d at 116).

⁸³ See, e.g., *id.* at 99–104.

Two other limiting principles bear noting. Before conducting the exceptional circumstances analysis, the Second Circuit requires the concurrent cases to be nearly identical, both in terms of parties and claims, in order to be considered sufficiently “parallel” that abstention could be appropriate.⁸⁴ Given this demanding threshold question, numerous cases predicated on nearly identical facts as those at issue in pendant state proceedings never even reach the exceptional circumstances step of the *Colorado River* analysis.⁸⁵ Moreover, once at the second step, the Second Circuit has held that if any of the six exceptional circumstances factors are neutral (that is, the factor neither weighs in favor of or against abstention), that factor must instead be weighed against abstention.⁸⁶ This rigorous application of the Supreme Court’s command that, in applying the factors, “the balance [must be] heavily weighted in favor of the exercise of jurisdiction”⁸⁷ has meant that in virtually every case at least one of the factors counsels against abstention.

b. The Exceptional Circumstances Test

The Second Circuit has been similarly demanding in its application of the six-factor exceptional circumstances test. Its construction of three factors in particular is indicative of the court’s overall approach. First, the court has given the “source of law” and “priority of filing” factors such a crabbed interpretation as to render them essentially irrelevant. Only the presence of particularly complex or novel issues of state law will be sufficient for the source of law factor to tip in favor of abstention.⁸⁸ With regard to priority of filing, only extreme delays between the filing of the state and federal actions will weigh in favor of abstention. Relying on the Supreme Court’s statement in *Moses H. Cone* that this prong “does not

⁸⁴ Nat’l Union Fire Ins. Co. of Pittsburgh v. Karp, 108 F.3d 17, 22 (2d Cir. 1997) (“Federal and state proceedings are ‘concurrent’ or ‘parallel’ for purposes of abstention when the two proceedings are essentially the same; that is, there is an identity of parties, and the issues and relief sought are the same.”).

⁸⁵ See, e.g., DDR Constr. Servs., Inc. v. Siemens Indus., Inc., 770 F. Supp. 2d 627, 645 (S.D.N.Y. 2011).

⁸⁶ Woodford v. Cmty. Action Agency of Greene Cty., Inc., 239 F.3d 517, 522 (2d Cir. 2001).

⁸⁷ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 2 (1983).

⁸⁸ *Vill. of Westfield v. Welch’s*, 170 F.3d 116, 124 (2d Cir. 1999); see also *Camabo Indus., Inc. v. Liberty Mut. Ins. Co.*, No. 15-cv-891, 2016 WL 368529, at *4 (S.D.N.Y. Jan. 27, 2016) (noting “whether state or federal law supplies the rule of decision[] is essentially neutral,” because “[t]he state law issues here presented are routine and relatively straightforward”).

turn exclusively on the sequence in which the cases were filed, ‘but rather in terms of how much progress has been made in the two actions,’⁸⁹ the Second Circuit has found this factor to be neutral, and thus weigh against abstention, even when years passed between the filing of the state case and the subsequent commencement of the federal suit.⁹⁰

Even more important is the narrow interpretation given to the “avoidance of piecemeal litigation” factor. The Second Circuit has explained that the set of cases raising the specter of piecemeal litigation is substantially smaller than those cases simply involving duplicative state-federal litigation. The court elaborated on this point in *Woodford v. Community Action Agency of Greene County, Inc.*, noting that “the primary context in which we have affirmed *Colorado River* abstention in order to avoid piecemeal adjudication has involved lawsuits that posed a risk of inconsistent outcomes not preventable by principles of res judicata and collateral estoppel.”⁹¹ Since a federal or state case *would* normally be precluded by the resolution of a mirror image suit proceeding in the alternate forum, this factor would be neutral (and therefore weigh against abstention) in such duplicative litigation. Instead, a more exotic procedural posture is necessary to trigger this factor. The Second Circuit indicated that the “classic example” of piecemeal litigation “arises where all of the potentially liable defendants are parties in one lawsuit, but in the other lawsuit, one defendant seeks a declaration of nonliability and the other potentially liable defendants are not parties.”⁹² Restricting the applicability of the piecemeal litigation prong to such scenarios greatly reduces the likelihood that abstention will be appropriate in run-of-the-mill concurrent litigation.

2. *Reaction and Application in the Southern District of New York*

In the Southern District of New York, district judges have begrudgingly acquiesced to the Second Circuit’s command that *Colorado*

⁸⁹ *Vill. of Westfield*, 170 F.3d at 122 (quoting *Moses H. Cone*, 460 U.S. at 21).

⁹⁰ See, e.g., *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 102 (2d Cir. 2012); cf. *Abe v. N.Y. Univ.*, No. 14-cv-9323, 2016 WL 1275661, at *8 (S.D.N.Y. Mar. 30, 2016) (finding this factor weighed in favor of abstention when “the state action predated the Federal Action by four-and-a-half years” and involved “extensive motion practice and appeals, . . . voluminous discovery, and . . . numerous depositions”).

⁹¹ 239 F.3d 517, 524 (2d Cir. 2001).

⁹² *Id.*

River abstention be reserved for only the most exceptional circumstances. They have recognized that formally abstaining pursuant to *Colorado River* is generally not an option to dispose of concurrent litigation and that doing so in spite of circuit precedent is likely to result in reversal. One district judge aptly summarized the situation from his point of view in a colloquy with counsel moving for abstention:

So, look, it seems pretty clear to me that Judge Lynch, in sort of I think the last word on this from the Circuit, which is this *Niagara Mohawk* case, it is pretty clear that, boy, this is exceptional and courts get slapped down when they start leaning towards abstention unless there really are exceptional circumstances.⁹³

Bound by such strong circuit precedent, judges in the Southern District of New York have been duly restrained in employing *Colorado River* abstention, especially in federal question cases. Since 2008, they have declined jurisdiction in less than twenty percent of cases involving concurrent litigation in which *Colorado River* was raised (ten out of fifty-four cases).⁹⁴ Of thirty-one such cases in which jurisdiction was based on diversity, the court abstained in seven,⁹⁵ and retained jurisdiction in twenty-four.⁹⁶ In the twenty-three cases premised on federal question jurisdiction (or the presence of the United States as a party), the court abstained in only three⁹⁷ and refused to do so in twenty.⁹⁸ These data are summarized in Table 1 below.

⁹³ Transcript of Oral Argument at 3, *CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz*, No. 14-cv-6566, 2014 WL 7399040 (S.D.N.Y. Dec. 29, 2014), ECF No. 54.

⁹⁴ See *infra* tbl. 1.

⁹⁵ See *infra* Appendix, Table 2.

⁹⁶ See *infra* Appendix, Table 2.

⁹⁷ See *infra* Appendix, Table 2.

⁹⁸ See *infra* Appendix, Table 2.

Table 1—Abstention Pursuant to *Colorado River* in the Southern District of New York (2008–2018)

Jurisdictional basis	Outcome at district court (number of cases)	
	District court abstained	District court did not abstain
Diversity	7 (23%)	24 (77%)
Federal question / U.S. party	3 (13%)	20 (87%)
Total	10 (19%)	44 (81%)

With their discretion to abstain pursuant to *Colorado River* tightly circumscribed by circuit precedent, district judges have made no secret of their displeasure with this restrictive standard and concomitant inefficiency resulting from the simultaneous litigation of the same case in multiple fora. In lamenting the difficulties inherent in such litigation, one district judge derisively referred to a complex case involving six separate actions proceeding in three jurisdictions as “a Serbonian Bog.”⁹⁹ Though

⁹⁹ Transcript of Oral Argument at 16, *Glenclova Inv. Co. v. Trans-Res., Inc.*, 874 F. Supp. 2d 292 (S.D.N.Y. 2012) (No. 08-cv-7140), Doc. No. 186; see *Glenclova*, 874 F. Supp. 2d at 299. For additional, but somewhat less colorful, examples of such sentiments in opinions, see, e.g., *Hayden Capital USA, LLC v. Northstar Agri Indus., LLC*, No. 11-cv-594, 2011 WL 5024193, at *6 (S.D.N.Y. Oct. 20, 2011) (labeling parallel litigation “an inefficient use of judicial resources” but nonetheless retaining jurisdiction); *Mosley v. Baker*, No. 10-cv-165, 2011 WL 2693513, at *4, *6 (S.D.N.Y. June 30, 2011) (stating that the court was “sympathetic to defendants’ argument that litigating simultaneously in both courts is a waste of both the courts’ and the City’s resources” but ultimately concluding that this “unfortunate use of resources . . . is not prohibited by case law”); *Carter v. 36 Hudson Assocs., LLC*, No. 09-cv-4328, 2010 WL 2473834, at *5 (S.D.N.Y. June 17, 2010) (“The extra expense and burden imposed on many parties by the multiplicity of litigation is a serious concern. But, this type of burden has long been classified as one that is ‘insufficient to establish exceptional circumstances justifying dismissal.’” (quoting *All. of Am. Insurers v. Cuomo*, 854 F.2d 591, 603 (2d Cir. 1988))). It is in colloquies with attorneys where many judges reveal their true views on the issue. For some particularly illuminating examples, see, e.g., Transcript of Oral Argument, *CVR Energy*, supra note 93, at 33 (noting that a potential race to judgment between state and federal courts and the accompanying waste of resources “might be a good reason to sort of water down the rule to say, listen, when life is complicated by scenarios like this, federal courts ought to be able to say let the state court have it But I don’t see how you can read *Niagara Mohawk* and say I have a smooth road to affirmation in the Circuit?”); Transcript of Oral Argument at 42, *Aurelius Capital Master, Inc. v. MBIA Ins. Corp.*, 695 F. Supp. 2d 68 (S.D.N.Y. 2010) (No. 09-cv-2242), Doc. No. 36 (asking counsel “why wouldn’t it make sense

essentially forced to formally retain jurisdiction, this frustration has led district judges to employ alternative measures to effectively abstain, thus skirting the bog of duplicative litigation. And for those few that instead choose to slog through it, the result has been, unsurprisingly, a massive expenditure of resources with little return.

a. Effective Abstention

Unable to “legally” abstain pursuant to *Colorado River* but unwilling to tolerate the waste inherent in concurrent litigation, many federal district judges resort to what I will term “effective” abstention. Effective abstention refers to a diverse set of means by which judges avoid adjudicating cases with parallel proceedings pending in a state court (i.e., they *effectively* abstain from these cases). The methods by which this is effectuated fall into three broad categories, all of which are, to varying degrees, sheltered from appellate review. I refer to these categories as “formal effective abstention,” “quasi-formal effective abstention,” and “informal effective abstention.”

In formal effective abstention, a district judge faced with concurrent litigation declines to abstain under *Colorado River* but subsequently does so pursuant to an alternative (and presumably less likely to be reversed) doctrine permitting the relinquishment of federal jurisdiction. For example, after finding *Colorado River* abstention inappropriate,¹⁰⁰ the district court in *RECAP Investments XI-Fund A, L.P. v. McCullough Harris, LLC* promptly stayed the federal action pending related bankruptcy proceedings.¹⁰¹ Another particularly illustrative case arose in *Kitaru Innovations Inc. v. Chandaria*, which involved duplicative proceedings in the United States and Canada.¹⁰² After concluding that the two actions were parallel, the district court denied abstention.¹⁰³ In dismissing the federal defendant’s arguments premised on the inconvenience and waste of duplicative litigation, the court concluded

for the federal court to bow out or step to the side and allow the state court to proceed with what it is doing . . . ?”).

¹⁰⁰ *RECAP Inv. XI-Fund A, L.P. v. McCullough Harris, LLC*, 760 F. Supp. 2d 368, 371 (S.D.N.Y. 2010).

¹⁰¹ *Id.* at 372–73.

¹⁰² 698 F. Supp. 2d 386, 389 (S.D.N.Y. 2010). Note while this was a case of international comity abstention, the court premised its abstention analysis on *Colorado River*. *Id.* at 390. Hence the example remains apposite.

¹⁰³ *Id.* at 390–92.

that such considerations could not justify abstention, as they “are commonly present when a parallel foreign proceeding is ongoing.”¹⁰⁴ In the same breath, however, the court dismissed the case on the grounds of *forum non conveniens*, basing its decision partly on the likely inconvenience and burden on the defendants of having to simultaneously litigate in both New York and Canada.¹⁰⁵ Similar examples abound.¹⁰⁶

Judges practice quasi-formal effective abstention by staying the federal action in the hopes that the state case will be resolved or the parties will settle during the pendency of the stay. In these situations, the district judge is usually careful to articulate that the stay is not granted pursuant to *Colorado River* abstention but rather is an “exercise of its discretion” to “stay[] proceedings in the action before it pending a decision by a state court,”¹⁰⁷ thus rendering the decision unreviewable. Some district judges are remarkably candid in their exercise of effective abstention. For example, after concluding that “the circumstances presented in [the case] . . . are not so exceptional as to warrant the extraordinary step of abstention from the exercise of federal jurisdiction under *Colorado River*,” one district judge proceeded to announce his “preference that the question [in the case] be decided in a state court.”¹⁰⁸ Stating that it had “no interest” in resolving the issues presented by the federal action, the court issued a stay “in favor of state court proceedings wherever personal jurisdiction over all of the parties can be obtained.”¹⁰⁹ On the other hand, many judges are more opaque as to their rationale and source of authority, simply issuing repeated stays in favor of the parallel state action without significant comment.¹¹⁰

Informal effective abstention is likely the most prevalent form of effective abstention, but, as it does not require any formal action on the

¹⁰⁴ Id. at 391.

¹⁰⁵ Id. at 396–97.

¹⁰⁶ See, e.g., *Argus Media Ltd. v. Tradition Fin. Servs. Inc.*, No. 09-cv-7966, 2009 WL 5125113, at *2–4 (S.D.N.Y. Dec. 29, 2009) (denying *Colorado River* abstention but staying the federal case pursuant to the Federal Arbitration Act).

¹⁰⁷ *Chartis Seguros Mex., S.A. de C.V. v. HLI Rail & Rigging, LLC*, No. 11-cv-3238, 2011 WL 13261585, at *2 (S.D.N.Y. Nov. 3, 2011) (alteration in original) (quoting *Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981)).

¹⁰⁸ *Glenclova Inv. Co. v. Trans-Res., Inc.*, 874 F. Supp. 2d 292, 313 (S.D.N.Y. 2012).

¹⁰⁹ Id. at 313–14.

¹¹⁰ See, e.g., *Order, Aurelius Capital Master, Inc. v. MBIA Ins. Corp.*, 695 F. Supp. 2d 68 (S.D.N.Y. 2010) (No. 09-cv-2242), ECF No. 33; *Order, Aurelius*, 695 F. Supp. 2d 68 (No. 09-cv-2242), ECF No. 61.

part of the district court, it is also the hardest to identify. It often manifests subtly. For example, a federal district judge might encourage a pro se federal plaintiff to consider pursuing his claims exclusively in a parallel state proceeding where he is represented by counsel.¹¹¹ The prototypical form does not manifest in any published material whatsoever; the judge simply refuses to take action necessary to progress a federal case in an effort to ensure the state action resolves itself in the meantime. *Hayden Capital USA, LLC v. Northstar Agri Industries, LLC*¹¹² provides an apt example of this phenomenon. In *Hayden Capital*, the parties were simultaneously litigating a breach of contract action in the Southern District of New York and North Dakota state court.¹¹³ After denying the federal defendant's motion to abstain pursuant to *Colorado River*,¹¹⁴ the court took no further meaningful steps to progress the matter. Though fully-briefed cross motions for summary judgement were pending before the court as of October 2012, the court ignored those motions until September 2015.¹¹⁵ In the meantime, a trial was conducted in the District Court of North Dakota, which resulted in a judgement of non-liability in favor of the federal defendants.¹¹⁶ On appeal, the Supreme Court of North Dakota affirmed.¹¹⁷ After being informed of these developments, the federal district court promptly dismissed the federal action on the basis of *res judicata*.¹¹⁸ In essence, the federal court waited out the federal plaintiff. Such informal effective abstention is highly advantageous to a district judge, as their decision to do nothing cannot easily be appealed.

¹¹¹ *Mosley v. Baker*, No. 10-cv-165, 2011 WL 2693513, at *6 (S.D.N.Y. June 30, 2011) (“However, we encourage plaintiff to seriously consider the consequences of moving forward with this litigation given the state court action. Plaintiff should understand that it is extremely difficult to prosecute a case *pro se*, and should be mindful of the ability to pursue all of his damage claims in the state action where he is represented by counsel.”). This appeal was successful; the plaintiff dismissed his federal claims just over a month later. Memorandum, *Mosley*, No. 10-cv-165, 2011 WL 2693513, ECF No. 34.

¹¹² No. 11-cv-594, 2011 WL 5024193 (S.D.N.Y. Oct. 20, 2011).

¹¹³ *Id.* at *1.

¹¹⁴ *Id.* at *6.

¹¹⁵ See Reply Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment, *Hayden Capital USA, LLC v. Northstar Agri Indus., LLC*, No. 11-cv-594, 2015 WL 5698543 (S.D.N.Y. Sept. 25, 2015), ECF No. 78 (filed Oct. 19, 2012).

¹¹⁶ *Northstar Founders, LLC v. Hayden Capital USA, LLC*, No. 09-2011-cv-192, 2013 WL 8627968, at *9 (N.D. Dist. Ct. Apr. 25, 2013).

¹¹⁷ *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614, 637 (N.D. 2014).

¹¹⁸ *Hayden Capital*, 2015 WL 5698543, at *10.

Though it is difficult to ascertain with full confidence the exact frequency of effective abstention, the data on case processing times supports the proposition that it is prevalent. The average case in which *Colorado River* abstention is raised but denied takes nearly twenty-seven months to proceed to initial disposition in the Southern District of New York. By contrast, the average non-*Colorado River* case is resolved in just over eleven.¹¹⁹ This gap is similar when the data are broken down by nature of case (e.g., contract, tort), suggesting that the level of complexity or type of underlying action cannot be the sole or even predominant driver behind this differential. Instead these data would seem to confirm what is suggested by the anecdotal evidence—that federal district judges are in no hurry to resolve concurrent litigation.

b. Waste of Judicial Resources

Worse still than effective abstention is the result when a federal district judge attempts to resolve a case of concurrent litigation with dispatch. The complexities engendered by two court systems simultaneously adjudicating the same claims, especially with respect to appeals and issues of *res judicata*, almost invariably result in a massive waste of judicial and litigant resources with little to show for it. An example will illustrate this reality. In *CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz*, both the federal and parallel state actions were filed in 2013.¹²⁰ The federal court denied abstention pursuant to *Colorado River*,¹²¹ and almost immediately thereafter the state trial court dismissed the federal court plaintiff's state counterclaim (which formed the substance of their federal suit) for failure to state a claim.¹²² On the basis of that decision, the federal court dismissed the federal action on *res judicata* grounds.¹²³ The federal

¹¹⁹ This analysis was performed using data from the Federal Judicial Center's Integrated Database of federal court cases. See Integrated Database, Fed. Judicial Ctr., <https://www.fjc.gov/research/idb> [<https://perma.cc/J36M-7QCV>] (raw data on file with the Virginia Law Review Association and available upon request). Given that it is impossible to predict how long a pending case will take to close, only those cases in which the district court proceedings had been terminated prior to January 1, 2018, were included in this analysis.

¹²⁰ No. 14-cv-6566, 2014 WL 7399040, at *1–2 (S.D.N.Y. Dec. 29, 2014).

¹²¹ *Id.* at *6.

¹²² *Wachtell, Lipton, Rosen & Katz v. CVR Energy, Inc.*, No. 654343/2013, 2015 WL 782636, at *3–6 (N.Y. Sup. Ct. Feb. 24, 2015).

¹²³ *CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz*, No. 14-cv-6566, 2016 WL 1271686, at *7 (S.D.N.Y. Mar. 29, 2016).

plaintiff appealed both decisions, and the New York Appellate Division reversed the state court judgment.¹²⁴ As a result, the federal district court vacated its order dismissing the case.¹²⁵ Thus, after nearly five years of litigation in two court systems, both cases are back where they started with no significant progress made in either action. Such confusion and waste are the unavoidable byproducts of a permissive stance towards concurrent litigation.¹²⁶

B. The Seventh Circuit and the Northern District of Illinois

The story of *Colorado River* abstention in the Seventh Circuit and Northern District of Illinois is completely different. Officially, the Seventh Circuit maintains that *Colorado River* abstention is permissible only in “exceptional” circumstances” and that the mere pendency of a duplicative case in state court is insufficiently exceptional to warrant abstention.¹²⁷ But that claim does not comport with reality. On the contrary, the Seventh Circuit has taken a highly permissive (bordering on favorable) view of the doctrine. In contrast with the Second Circuit, it has generally granted district judges significant discretion to abstain in furtherance of judicial economy, while articulating convoluted standards governing the propriety of *Colorado River* abstention that almost

¹²⁴ Wachtell, Lipton, Rosen & Katz v. CVR Energy, Inc., 39 N.Y.S.3d 772, 772 (N.Y. App. Div. 2016).

¹²⁵ CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz, No. 14-cv-6566, 2017 WL 4898221, at *1 (S.D.N.Y. July 11, 2017).

¹²⁶ Another particularly shocking example is *Yan Ping Xu v. City of New York*. *Xu* is a relatively routine unlawful termination claim that has been proceeding in both federal and state court for over a decade, having originally been filed in New York state court in 2008. After no fewer than two trips to the Court of Appeals for the Second Circuit, two to the New York Appellate Division, one to the New York Court of Appeals, and three unsuccessful petitions for certiorari to the United States Supreme Court, the federal case remains pending before the Southern District of New York, while the state case has been remanded to the New York Bureau of Human Resources for an administrative hearing. See *Yan Ping Xu v. City of New York*, 700 F. App’x 62 (2d Cir. 2017), cert. denied, 139 S. Ct. 236 (2018); *Yan Ping Xu v. City of New York*, 612 F. App’x 22 (2d Cir. 2015), cert. denied, 136 S. Ct. 1823 (2016); *Yan Ping Xu v. N.Y.C. Dep’t of Health & Mental Hygiene*, 995 N.Y.S.2d 23, 25 (N.Y. App. Div. 2014), motion for leave to appeal denied, 27 N.Y.3d 902 (N.Y. 2016), cert. denied, 137 S. Ct. 641 (2017); *Yan Ping Xu v. N.Y.C. Dep’t of Health*, 906 N.Y.S.2d 222 (N.Y. App. Div. 2010).

¹²⁷ *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 645 (7th Cir. 2011) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25–26 (1983)).

universally favor relinquishment of federal jurisdiction.¹²⁸ It is unsurprising then that in the past twenty-five years, the Seventh Circuit has affirmed district court abstention in eleven instances,¹²⁹ while reversing only five times.¹³⁰

Judges in the Northern District of Illinois have taken up this discretion with alacrity. Since 2008, they have abstained in nearly sixty percent of cases involving concurrent state litigation.¹³¹ Moreover, in about eighty percent of cases in which abstention was denied, the district court concluded that the state case was not sufficiently similar to the federal action to be considered “parallel” litigation and therefore was ineligible for abstention.¹³² Thus, in nearly ninety percent of cases in which the state and federal actions were truly parallel, the district court found “exceptional circumstances” warranting abstention.¹³³ The Supreme Court’s command that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction”¹³⁴ is largely a dead letter in the Northern District of Illinois; it seems that district judges regularly abstain from adjudicating such cases simply because the federal action is duplicative of concurrent state proceedings.¹³⁵ That said, the combination of wide discretion and borderline unintelligible standards governing abstention has also resulted in substantial unpredictability for litigants, with courts frequently reaching opposite outcomes regarding *Colorado River* abstention in cases with virtually identical facts.¹³⁶

1. Doctrinal Development in the Seventh Circuit

Three major categories of doctrinal developments have characterized this permissive view of *Colorado River* abstention. First, the overarching rules that are applied in each *Colorado River* case are highly favorable towards abstention and vest wide discretion in the district courts to decide whether abstention is proper. Second, by promulgating numerous

¹²⁸ See *infra* notes 143–166 and accompanying text.

¹²⁹ See *infra* Appendix, Table 3.

¹³⁰ See *infra* Appendix, Table 3.

¹³¹ See *infra* tbl. 2.

¹³² Data on file with the Virginia Law Review Association and available upon request.

¹³³ Data on file with the Virginia Law Review Association and available upon request.

¹³⁴ *McClellan v. Carland*, 217 U.S. 268, 282 (1910).

¹³⁵ See *infra* notes 167–170 and accompanying text.

¹³⁶ See *infra* note 183 and accompanying text.

additional factors and interpreting the original factors quite broadly, the Seventh Circuit has turned the already complex exceptional circumstances test into a subjective and confusing muddle, the application of which seems almost always to support abstention.

a. Generally Applicable Rules

The general framework under which courts in the Seventh Circuit analyze issues of *Colorado River* abstention stands in sharp contrast to that employed by the Second Circuit. At the outset of the analysis, the court has adopted a broad and flexible definition to determine whether concurrent cases are “parallel” within the meaning of *Colorado River*, resulting in significantly more cases being eligible for abstention. Unlike the Second Circuit, which requires that both the parties and claims in the duplicative action be nearly identical,¹³⁷ the Seventh Circuit has indicated that “formal symmetry between the two actions” is not necessary; rather, “[t]wo suits are considered “parallel” when substantially the same parties are contemporaneously litigating substantially the same issues in another forum.”¹³⁸ Furthermore, when applying the exceptional circumstances test, courts in the Seventh Circuit have generally not held that neutral factors weigh against abstention; they are simply neutral.¹³⁹ Most importantly, unlike the “rigorous” abuse of discretion standard employed by the Second Circuit,¹⁴⁰ the Seventh Circuit has applied a highly

¹³⁷ See supra notes 84–85 and accompanying text.

¹³⁸ *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004) (quoting *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 695 (7th Cir. 1985); and then *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988)); see also *Pieleanu v. Mortg. Elec. Registration Sys., Inc.*, No. 08-cv-7404, 2010 WL 1251445, at *1 (N.D. Ill. Mar. 24, 2010) (“Parallel suits need not be identical, but must involve substantially the same parties and substantially the same issues.”).

¹³⁹ See, e.g., *Clark*, 376 F.3d at 688 (holding that, with regards to the priority of filing factor, “[a]t best, this factor is neutral, but it does not push us towards allowing the federal case to proceed”). Recently, the Seventh Circuit appears to have attempted to change course on this question. In 2011, the court, relying on cases from the Second and Fifth Circuits, held that “because of the presumption against abstention, absent or neutral factors weigh in favor of exercising jurisdiction.” *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 648 (7th Cir. 2011). But this pronouncement seems to have had no effect on the district courts, who have almost universally continued to conclude that neutral factors do not weigh against abstention. See, e.g., *Smith v. Bank of Am., N.A.*, No. 14-cv-1041, 2014 WL 3938547, at *3–4 (N.D. Ill. Aug. 12, 2014); *Williams v. Quantum Servicing Corp.*, No. 11-cv-9106, 2013 WL 271669, at *4 n.5 (N.D. Ill. Jan. 23, 2013).

¹⁴⁰ See supra notes 81–83 and accompanying text.

deferential standard of review to district court decisions to abstain under *Colorado River*.¹⁴¹ Provided the district court adequately analyzes whether the concurrent proceedings are parallel and even perfunctorily applies each of the exceptional circumstances factors, the court of appeals will rarely disturb its decision to abstain.¹⁴²

b. The Exceptional Circumstances Test

As articulated by the Seventh Circuit, the exceptional circumstances test can only be described as a doctrinal mess. The six-factor analysis announced by the Supreme Court was already criticized for its lack of clarity,¹⁴³ and the Seventh Circuit has added an additional four factors to that already confusing inquiry.¹⁴⁴ The exact content of each of these new factors is more or less opaque, but insofar as they can be understood and applied, they generally favor abstention. The court has simultaneously given broad constructions to a number of the original factors, such that they also support relinquishment of federal jurisdiction in nearly every case of concurrent litigation. By nature, such multi-factor tests are difficult for judges to apply consistently, encouraging highly discretionary decision-making and producing unpredictable outcomes.¹⁴⁵ Indeed, the Seventh Circuit has acknowledged with respect to its own test that “the sheer number of factors to be considered creates the risk of unpredictable and inconsistent results.”¹⁴⁶ That prediction has been borne out, as the ten-factor inquiry has led district courts to reach opposite conclusions on cases with nearly identical facts and procedural postures.¹⁴⁷

¹⁴¹ See, e.g., *Tyrer v. City of South Beloit*, 456 F.3d 744, 757 (7th Cir. 2006).

¹⁴² See, e.g., *id.* at 755 (concluding that the district court did not abuse its discretion in deciding to abstain after it “listed the relevant factors in a descriptive fashion and summarily applied them to the facts”).

¹⁴³ See, e.g., *Mullenix*, *supra* note 19, at 119, 128.

¹⁴⁴ See *AXA Corp. Sols. v. Underwriters Reinsurance Corp.*, 347 F.3d 272, 278 (7th Cir. 2003).

¹⁴⁵ Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 117–21 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (criticizing the decision to replace a more rule-like inquiry “with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test”).

¹⁴⁶ *AXA Corp.*, 347 F.3d at 278.

¹⁴⁷ See *infra* note 183 and accompanying text.

Of the four new exceptional circumstances factors, two have been propounded in such a way as to require virtually no analysis by the court while favoring abstention in nearly every case. First, “the presence or absence of concurrent jurisdiction”¹⁴⁸ has been applied such that the mere existence of concurrent jurisdiction between state and federal courts over the underlying claims is a reason for the federal court to abstain.¹⁴⁹ Indeed, this factor has been held to weigh against abstention only in cases involving causes of action within the exclusive jurisdiction of the federal courts,¹⁵⁰ or in which the relevant state court is one of limited jurisdiction that would have no authority to hear all claims presented in the federal action.¹⁵¹ This expansive reading is all the more incredible in light of its apparent direct conflict with the Supreme Court’s admonition that, since concurrent jurisdiction is presumed, it is typically no bar to parallel proceedings in both state and federal court.¹⁵²

The second such factor, “the availability of removal,”¹⁵³ has been given an utterly incoherent construction. Logic dictates that for any analytical factor to be a meaningful decision-making tool, it must be capable of pointing in at least two different directions based on the circumstances. For example, it would seem that whether removal was available in a duplicative state proceeding would either weigh in favor of or against abstention, and the opposite would be true if removal were not available. On the contrary, this factor has been interpreted to support abstention *either way*, both when the state proceeding could be removed to federal court *and* when it could not. The reasoning behind this astounding interpretation is difficult to divine, but it appears to rest on at least three arguments. First, if the federal action is reactive but removal were

¹⁴⁸ *AXA Corp.*, 347 F.3d at 278 (quoting *Caminiti & Iatarola, Ltd. v. Behnke Warehousing Inc.*, 962 F.2d 698, 701 (7th Cir. 1992)).

¹⁴⁹ See, e.g., *Clark v. Lacy*, 376 F.3d 682, 688 (7th Cir. 2004); *Knight v. DJK Real Estate Grp., LLC*, No. 15-cv-5960, 2016 WL 427614, at *7 (N.D. Ill. Feb. 4, 2016).

¹⁵⁰ *Medema v. Medema Builders, Inc.*, 854 F.2d 210, 212 (7th Cir. 1988); see also *G4S Secure Integration LLC v. EX2 Tech., LLC*, No. 17-cv-4277, 2017 BL 256705, at *6–7 (N.D. Ill. July 19, 2017) (holding that since the plaintiff’s claim was not one over which the federal courts had exclusive jurisdiction, the concurrent jurisdiction factor weighed in favor of abstention).

¹⁵¹ See, e.g., *Caminiti*, 962 F.2d at 702–03 (finding that the inability of a state probate court of limited jurisdiction to hear a federal claim for attorney’s fees weighed “slightly against” a stay).

¹⁵² *McClellan v. Carland*, 217 U.S. 268, 282 (1910).

¹⁵³ *AXA Corp.*, 347 F.3d at 278 (quoting *Caminiti*, 962 F.2d at 701).

available, the federal plaintiff should have removed rather than filed a duplicative federal action.¹⁵⁴ Second, if removal were not available, then a federal court should refrain from interfering with matters more properly heard in state court and should not permit litigants to escape the requirements of removal jurisdiction simply by filing a duplicative federal case.¹⁵⁵ Finally, if the federal action is repetitive, then the policy of allowing only state court defendants to remove supports holding the plaintiff to their original choice of a state forum.¹⁵⁶ Taken together, these arguments lead to the conclusion that the pendency of a parallel state action is all that is required for this factor to favor abstention.

A third new prong of the exceptional circumstances inquiry also merits discussion—“the vexatious or contrived nature of the federal claim.”¹⁵⁷ This inherently subjective inquiry permits evaluation of the federal plaintiff’s motives in filing the federal action.¹⁵⁸ In doing so, it places even greater discretion over whether to relinquish jurisdiction in the hands of the district court, as such a subjective judgment is virtually impossible to review on appeal. Furthermore, it appears that this factor can favor abstention even without impugning the actual motives of the litigants. Courts in the Seventh Circuit have held that the very fact that the federal plaintiff could have removed the state action but failed to do so establishes the vexatious nature of the federal claim.¹⁵⁹ Similarly, if the federal plaintiff’s claims could have been litigated in the state court case (e.g., via a counterclaim), that too renders the federal action vexatious.¹⁶⁰

With respect to the original exceptional circumstances factors, the Seventh Circuit’s broad construction of three in particular has facilitated its permissive policy towards *Colorado River* abstention. First, in stark contrast to the Second Circuit’s dismissive treatment of the source of law

¹⁵⁴ See, e.g., *Bank of Am., N.A. v. Zahran*, No. 10-cv-4461, 2011 WL 167241, at *5 (N.D. Ill. Jan. 19, 2011).

¹⁵⁵ See, e.g., *Freed v. J.P. Morgan Chase Bank, N.A.*, 756 F.3d 1013, 1023 (7th Cir. 2014); *Clark v. Lacy*, 376 F.3d 682, 688 (7th Cir. 2004).

¹⁵⁶ See, e.g., *LaDuke v. Burlington N. R.R. Co.*, 879 F.2d 1556, 1561 (7th Cir. 1989).

¹⁵⁷ *AXA Corp.*, 347 F.3d at 278 (quoting *Caminiti*, 962 F.2d at 701).

¹⁵⁸ See, e.g., *Schuller v. Am.’s Wholesale Lender*, No. 14-cv-4097, 2015 WL 5316413, at *5 (N.D. Ill. Sept. 9, 2015).

¹⁵⁹ See, e.g., *Delaney v. Specialized Loan Servicing, LLC*, No. 15-cv-5260, 2015 WL 7776902, at *4 (N.D. Ill. Dec. 3, 2015).

¹⁶⁰ *BCI Acrylic Bath Sys., Inc. v. Chameleon Power, Inc.*, No. 16-cv-68, 2016 WL 2987006, at *5 (N.D. Ill. May 24, 2016).

prong,¹⁶¹ in the Seventh Circuit, “a state court’s expertise in applying its own law favors a *Colorado River* stay.”¹⁶² Similarly, if the state action was filed prior to the federal action, that factor will weigh in favor of abstention, even if the difference in filing time was insignificant.¹⁶³ Importantly, the very presence of duplicative litigation and the attendant potential for waste of judicial resources is sufficient to trigger the factor counseling avoidance of piecemeal litigation.¹⁶⁴ The Seventh Circuit has noted that “[p]iecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results”¹⁶⁵ and that this factor is designed to avoid “what we have called a ‘grand waste of efforts by both the court and parties in litigating the same issues . . . in two forums at once.’”¹⁶⁶ Since all concurrent litigation bears this risk, it is plain that this factor will favor abstention in every case in which parallel state proceedings are pending.

2. Reaction and Application in the Northern District of Illinois

Judges in the Northern District of Illinois have taken note of the Seventh Circuit’s permissive stance on *Colorado River* abstention and have responded accordingly. Likely desirous of avoiding judicial waste and happy to clear some space on their dockets, district courts have regularly abstained in the face of concurrent state court litigation. Since 2008, judges in the Northern District of Illinois have abstained in nearly sixty percent of cases in which *Colorado River* was raised. Of thirty-seven such cases in which jurisdiction was premised on diversity, the federal court abstained in twenty-two¹⁶⁷ and retained jurisdiction in fifteen.¹⁶⁸ In the forty-one federal question cases, the court relinquished jurisdiction in

¹⁶¹ See supra note 88 and accompanying text.

¹⁶² Day v. Union Mines Inc., 862 F.2d 652, 660 (7th Cir. 1988).

¹⁶³ See, e.g., *Chameleon Power*, 2016 WL 2987006, at *3–4 (two weeks); *Pirard v. Bank of Am.*, No. 12-cv-2901, 2013 WL 1154294, at *4 (N.D. Ill. Mar. 19, 2013) (two months).

¹⁶⁴ See, e.g., *Freed v. J.P. Morgan Chase Bank, N.A.*, 756 F.3d 1013, 1022 (7th Cir. 2014).

¹⁶⁵ *Day*, 862 F.2d at 659 (quoting *Am. Int’l Underwriters, (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988)); see also *Knight v. DJK Real Estate Grp., LLC*, No. 15-cv-5960, 2016 WL 427614, at *7 (N.D. Ill. Feb. 4, 2016) (noting the same and holding that this factor “strongly favors abstention”).

¹⁶⁶ *Day*, 862 F.2d at 659 (quoting *Microsoft v. Ontel Corp.*, 686 F.2d 531, 538 (7th Cir. 1982)).

¹⁶⁷ See infra Appendix, Table 4.

¹⁶⁸ See infra Appendix, Table 4.

twenty-two¹⁶⁹ while denying abstention in the remaining nineteen.¹⁷⁰ These data are summarized in Table 2 below.

Table 2—Abstention Pursuant to *Colorado River* in the Northern District of Illinois (2008–2018)

Jurisdictional basis	Outcome at district court (number of cases)	
	District court abstained	District court did not abstain
Diversity	22 (59%)	15 (41%)
Federal question / U.S. party	22 (54%)	19 (46%)
Total	44 (56%)	34 (44%)

More importantly, the court has abstained pursuant to *Colorado River* in nearly ninety percent of cases after making the initial determination that the state and federal actions were parallel. In twenty-eight of the thirty-four cases in which abstention was denied, that decision was premised on a lack of parallelism between the state and federal cases. Accordingly, in the fifty cases in which the state and federal actions were truly duplicative, the court abstained in forty-four.¹⁷¹ These results likely reflect the virtually unbounded discretion given to a district judge who is instructed to apply a muddled ten-factor test and reviewed only for abuse of discretion. Either way, these data indicate that judges in the Northern District of Illinois abstain almost as a matter of course in the face of parallel state court litigation rather than only in “exceptional circumstances.” Circumstances that obtain ninety percent of the time can hardly be described as exceptional.

For an illustration of how the Seventh Circuit’s permissive approach is applied in practice, the case of *BCI Acrylic Bath Systems, Inc. v. Chameleon Power, Inc.*¹⁷² is particularly instructive. *Chameleon Power* was a routine state law breach of contract suit in which federal jurisdiction was premised on diversity.¹⁷³ Two weeks prior to BCI commencing the

¹⁶⁹ See *infra* Appendix, Table 4.

¹⁷⁰ See *infra* Appendix, Table 4.

¹⁷¹ Data on file with the Virginia Law Review Association and available upon request.

¹⁷² No. 16-cv-68, 2016 WL 2987006 (N.D. Ill. May 24, 2016).

¹⁷³ *Id.* at *1.

federal action, Chameleon Power had filed suit against BCI in Michigan state court.¹⁷⁴ The district court began its analysis by noting that “abstention is appropriate only in exceptional circumstances”¹⁷⁵ and that it was the court’s task “not to find some substantial reason for the *exercise* of federal jurisdiction” but rather “to ascertain whether there exist exceptional circumstances, the clearest of justifications, that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.”¹⁷⁶ On its face, this case seems to present an unremarkable instance of the exercise of concurrent jurisdiction not approaching the exceptional circumstances required to abstain. Nevertheless, after reciting those familiar refrains, the court proceeded to stay the federal action pursuant to *Colorado River*.¹⁷⁷ The court’s analysis of the exceptional circumstances factors—especially regarding the avoidance of piecemeal litigation, source of law, and concurrent jurisdiction—is illustrative of the pro-abstention bent typically given to each in the Seventh Circuit.¹⁷⁸ If the facts of *Chameleon Power* are sufficient to permit abstention, it is hard to see how a district court could err in abstaining from any cases involving concurrent litigation.¹⁷⁹

The results of the Seventh Circuit’s relaxed interpretation of *Colorado River* abstention have been twofold: (1) creation of confusion and unpredictability over the propriety of jurisdiction, a subject that demands clarity¹⁸⁰ and (2) routine denial of plaintiffs’ access to a federal forum on insufficient and opaque grounds.¹⁸¹ The relative frequency of abstention by the district courts (and similar rate of affirmance at the court of appeals) does not accord with the rhetoric employed by both courts limiting abstention to exceptional circumstances.¹⁸² Litigants are left to

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *2 (internal quotation marks omitted) (quoting *AXA Corp. Sols. v. Underwriters Reinsurance Corp.*, 347 F.3d 272, 278 (7th Cir. 2003)).

¹⁷⁶ *Id.* (quoting *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 591 (7th Cir. 2005)).

¹⁷⁷ *Id.* at *6.

¹⁷⁸ *Id.* at *3–5.

¹⁷⁹ Indeed, numerous similar cases exist in which the Northern District of Illinois abstained on little more grounds than obtained in *Chameleon Power*. See, e.g., *Commercial Forged Prods. v. Best Swivel Joints, L.P.*, No. 12-cv-10250, 2013 WL 5163760, at *4 (N.D. Ill. Sept. 13, 2013); *Playboy Enters. Int’l, Inc. v. Play Beverages, LLC*, No. 13-cv-0826, 2013 WL 2151557, at *5–6 (N.D. Ill. May 15, 2013).

¹⁸⁰ See *infra* notes 212–223 and accompanying text.

¹⁸¹ See *supra* tbl. 2.

¹⁸² See, e.g., *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 645 (7th Cir. 2011).

wonder as to whether their case will be adjudicated under the court's rhetoric or its practice. This uncertainty is compounded by the fact that, at least partially due to the ambiguity of the exceptional circumstances test, district courts regularly reach conflicting outcomes in cases presenting virtually identical facts and procedural postures.¹⁸³ These results indicate that decisions to abstain are largely being made on an ad hoc basis with little theoretical grounding other than the district judge's view of the particular circumstances. Such subjective and unguided judgments are insufficient to deprive a plaintiff of his choice of a federal forum.

III. A PROPOSAL FOR REFORM

The application of *Colorado River* abstention in the lower federal courts demonstrates the inadequacy of the doctrine as currently articulated. Whether construed narrowly (as by the Second Circuit) or permissively (as by the Seventh Circuit), the results are sub-optimal for both litigants and the judicial system. The strict approach results in a combination of effective abstention, laggardly case processing timelines, and needless waste of judicial resources. On the other hand, the permissive approach leads to inconsistent applications in virtually identical cases. As such, it creates confusion and uncertainty for litigants, whose access to a federal forum is made to depend on a baffling (and hence inherently subjective) multi-factor inquiry. These outcomes are particularly ironic in light of the fact that they are caused by a doctrine designed to promote “[w]ise judicial administration.”¹⁸⁴

Thus, change is needed if *Colorado River* abstention is to be more than just an additional procedural tool in the experienced federal lawyer's belt. Such reform must be focused on eliminating the negative outcomes engendered by the current doctrine. It should reduce or eliminate concurrent litigation, thus limiting judicial waste and removing the incentive for district judges to effectively abstain when formal abstention

¹⁸³ Compare *Nieves v. Bank of Am., N.A.*, No. 14-cv-2300, 2015 WL 753977, at *1 (N.D. Ill. Feb. 20, 2015) (staying the federal case pursuant to the *Colorado River* doctrine), with *Muhammad v. Aurora Loan Servs., LLC*, No. 13-cv-01915, 2015 WL 1538409, at *6 (N.D. Ill. Mar. 31, 2015) (rejecting *Colorado River* abstention for lack of parallelism between the state and federal case).

¹⁸⁴ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

is unavailable. It should also provide greater clarity, consistency, and predictability for both courts and litigants facing duplicative proceedings.

What follows is a proposal to effectuate that reform. The approach outlined below has two broad objectives: (1) the elimination of all concurrent litigation and (2) significant simplification of the abstention analysis applied by the district courts. It recognizes and validates the pragmatic and efficiency-based objectives behind *Colorado River* abstention¹⁸⁵ by transforming the doctrine from a vague and inconsistently applied standard into a clear, rule-like analysis. By forcing the consolidation of almost all concurrent litigation into one proceeding, the proposal eliminates the tactical advantages sought by duplicative suits¹⁸⁶ and would likely discourage litigants from filing such actions in the first place. Furthermore, by creating a simple but specific framework for courts to analyze abstention cases in the context of parallel litigation, this proposal would make application of the doctrine significantly easier for judges, ensure greater consistency across courts, and enable litigants to anticipate the response of a federal court to duplicative litigation.

A. Underlying Principles

The next Section describes in detail how my proposal to reform *Colorado River* abstention would operate. However, before proceeding, it is necessary to briefly review its theoretical underpinnings. The framework presented below is based on and designed to implement five broad and interrelated principles: (1) concurrent litigation is inherently wasteful; (2) our legal system generally does not tolerate needless waste, and there is no reason concurrent litigation should be treated otherwise; (3) in enacting legislation, Congress is presumed not to pursue its goals at all costs; (4) jurisdictional rules should be clear and efficient to apply; and (5) the costs of federal diversity jurisdiction far outweigh its benefits (if indeed there are any), and its scope should be restricted where

¹⁸⁵ *Id.* (noting that the justification for abstention in the face of concurrent litigation is “unrelated to considerations of proper constitutional adjudication and regard for federal-state relations” but rather rests on “considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation” (alterations and internal quotation marks omitted)); see also Sharyl Walker, Note, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation*, 67 *Cornell L. Rev.* 219, 239 (1981) (arguing that “courts should recognize that abstention can be justified legitimately by considerations of pragmatism”).

¹⁸⁶ For a summary of these advantages, see *supra* notes 38–42 and accompanying text.

possible.¹⁸⁷ A brief discussion of these principles will help illuminate the source of and rationale for the proposal's treatment of each type of concurrent litigation.

1. Concurrent Litigation Is Wasteful

That the simultaneous prosecution of identical proceedings in multiple court systems is wasteful for both the parties and the judicial system is a fact so clear as to barely require treatment. However, a few points on this topic deserve further elaboration. First, even if both court systems attempt to resolve their respective cases with dispatch, it is almost inevitable that the efforts of one will be in vain. Since one court will resolve the case before the other, provided the judgement it reaches is on the merits, that judgment will preclude the duplicative action, rendering all progress in the alternative forum fruitless.¹⁸⁸ This fact promotes an “unseemly and destructive race” to judgment between the federal and state courts,¹⁸⁹ and it encourages strategic efforts by the parties to delay the action in which they are faring relatively poorly while expediting the other.¹⁹⁰ This duplicative and ultimately wasted effort undermines society's interests in judicial efficiency.¹⁹¹ Moreover, as concurrent suits are frequently brought for reasons that suggest gamesmanship and are often prosecuted

¹⁸⁷ The treatment I propose as to each type of concurrent litigation is based on considerations specific to the given type in addition to these general principles. Two additional premises underlie my proposal: that federal jurisdictional statutes are not absolute mandates for courts to take jurisdiction when properly invoked and that the Anti-Injunction Act does not preclude federal courts enjoining ongoing state court proceedings in the context of concurrent litigation. These assumptions are dealt with in Part IV as potential objections to the proposal.

¹⁸⁸ Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 *Yale L.J.* 978, 983 (1950).

¹⁸⁹ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567 (1983). Some elements of my proposal could replace this “race to judgment” with a “race to the courthouse” by litigants seeking to secure their preferred forum, but, in the end, I concur with James Rehnquist's assessment of the tradeoffs between these two risks: “If there must be a race, let it exhaust only the litigants, not the courts as well.” Rehnquist, *supra* note 6, at 1068.

¹⁹⁰ *Power to Stay Federal Proceedings*, *supra* note 188, at 983; see also *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 694 n.2 (7th Cir. 1985) (describing a scenario in which state and federal courts reach opposite conclusions on a discovery matter and concluding that “[t]his single, simple conflict, on matters ordinarily within the trial courts' broad discretion, leads ineluctably to a ‘rush to judgment,’ with each side attempting to push forward the litigation in the forum ruling in its favor on the preliminary matter. In the end, the forum that loses the race will have engaged in a ‘grand waste of efforts’” (citations omitted)).

¹⁹¹ Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 *U. Pitt. L. Rev.* 809, 832–33 (1989).

in a similar manner, courts' expenditure of significant resources in processing them undermines public confidence in the judicial system.¹⁹²

These concerns about waste are magnified significantly in cases where federal jurisdiction is premised on diversity of citizenship. In a diversity action, state law generally supplies the rule of decision.¹⁹³ No substantive federal right or policy is implicated in these cases; rather, as Professor Herbert Wechsler has noted, "[i]n these instances [federal] jurisdiction is employed . . . solely to administer state law."¹⁹⁴ As a result, the Supreme Court has characterized a federal court sitting in diversity as "in effect, sitting as a state court."¹⁹⁵ Given that, when a federal diversity action proceeds in parallel with a duplicative state proceeding, that case is, in essence, being heard by two state courts simultaneously. Whether the waste caused by duplicative litigation could be defensible if necessary to vindicate substantive federal rights is a challenging question and one that I reserve for Part IV. But the same cannot be said for diversity cases. There is simply no reason to force the judicial system and the opposing party to bear such costs just to simultaneously litigate the same question of state law before two state courts.¹⁹⁶

2. *Our Legal System Abjures Needless Waste*

The waste associated with concurrent litigation is put into bold relief when considered against the backdrop of our legal system's strong preference for efficient and comprehensive disposition of litigation. Both federal and state law have developed numerous mechanisms to enable (and often compel) parties and the courts to consolidate related claims

¹⁹² Rehnquist, *supra* note 6, at 1064–65; see also *Lumen*, 780 F.2d at 694 ("When a case proceeds on parallel tracks in state and federal court, the threat to efficient adjudication is self-evident. But judicial economy is not the only value that is placed in jeopardy. The legitimacy of the court system in the eyes of the public and fairness to the individual litigants also are endangered by duplicative suits that are the product of gamesmanship . . .").

¹⁹³ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938).

¹⁹⁴ Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & Contemp. Probs. 216, 235 (1948).

¹⁹⁵ *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956)). For a somewhat less charitable view of a federal court's role when sitting in diversity, see *Richardson v. Comm'r*, 126 F.2d 562, 567 (2d Cir. 1942) (describing it as "the [role] of ventriloquist's dummy to the courts of some particular state").

¹⁹⁶ Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstinence with Recommendations for Legislative Action*, 1990 BYU L. Rev. 321, 372 (1990).

into the most expeditious form for resolution.¹⁹⁷ For example, the federal compulsory counterclaim rule¹⁹⁸ requires a federal defendant to assert any counterclaims arising out of the same transaction or occurrence that is the subject of the plaintiff's claim or risk those claims being barred in a subsequent action.¹⁹⁹ Similarly, if a plaintiff files two parallel cases in federal court, they may be consolidated²⁰⁰ or the later-filed action will yield in favor of the earlier under the "first filed rule."²⁰¹ Myriad similar procedures exist.²⁰² Indeed, it could accurately be said that "[i]t is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties."²⁰³ The presumption in favor of permitting concurrent litigation stands as a glaring outlier to that policy.²⁰⁴ As will be discussed further in Part IV, there is no justification for this aberration; the law should be equally as intolerant of the inefficiencies caused by concurrent state-federal litigation as it is in almost all other contexts.

3. Congress Does Not Pursue Objectives at All Costs

At first glance, this assertion may seem a bit out of place. On the contrary, however, the presumption that, in enacting a given statute, Congress does not pursue the aims of that legislation at all costs is fundamental to the legitimacy of my proposal. The logic underlying this presumption is compelling. Congress faces competing policy priorities, and "the unremitting pursuit of any single objective may impact other objectives that Congress also wishes to pursue, requiring some

¹⁹⁷ Redish, *Intersystemic Redundancy*, supra note 3, at 1351–53.

¹⁹⁸ See Fed. R. Civ. P. 13(a).

¹⁹⁹ 6 Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 1409 (3d ed. Supp. 2019).

²⁰⁰ See Fed. R. Civ. P. 42(a).

²⁰¹ See, e.g., *Futurewei Techs., Inc. v. Acacia Research Corp.*, 737 F.3d 704, 707–08 (Fed. Cir. 2013); see also Rehnquist, supra note 6, at 1064 (noting that the "courts rightly decry duplication as intolerable" and so apply the "first filed rule").

²⁰² See, e.g., 28 U.S.C. § 1367 (2012) (granting federal district courts "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy," including "claims that involve the joinder or intervention of additional parties"); see also Redish, *Intersystemic Redundancy*, supra note 3, at 1351 (listing and discussing other examples).

²⁰³ *Rilcoff v. Superior Court*, 123 P.2d 540, 542 (Cal. App. 1942).

²⁰⁴ Redish, *Intersystemic Redundancy*, supra note 3, at 1351.

accommodation or trade-off.”²⁰⁵ It would be inconsistent with this practical reality to assume that Congress intended any single piece of legislation to achieve its ends through any means necessary, regardless of the detrimental effect on other governmental purposes. The Supreme Court has adopted and adheres to this approach in interpreting congressional statutes.²⁰⁶

This presumption is equally applicable to the statutes conferring jurisdiction on the lower federal courts as it is to other legislation passed by Congress. Obviously, the purpose of federal jurisdictional statutes is to provide access to the federal courts,²⁰⁷ but there is no reason to assume that Congress intended to extend that access without regard to other considerations such as efficient administration of the courts or the legitimacy of the judicial branch.²⁰⁸ On the contrary, the federal courts are a public resource,²⁰⁹ and it is highly unlikely that Congress would want the nation’s investment in that resource squandered on duplicative litigation brought largely for strategic rather than meritorious purposes.²¹⁰ It is equally improbable that Congress intended to create the needless friction in federal-state relations that can result from the simultaneous exercise of concurrent jurisdiction over the same case.²¹¹ Thus, we can

²⁰⁵ Christopher H. Schroeder, *Supreme Court Preemption Doctrine, in Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question* 119, 133–34 (William W. Buzbee ed., 2009).

²⁰⁶ *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (describing this principle as a presumption that “no legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law” (emphasis omitted)).

²⁰⁷ David J. McCarthy, Note, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 *Fordham L. Rev.* 1183, 1199 n.66 (1985).

²⁰⁸ Fallon, *supra* note 19, at 879–80; Redish, *Intersystemic Redundancy*, *supra* note 3, at 1360 n.73 (arguing that while “the courts are bound by the intent of the legislature, as manifested in the statutory text,” the “assumption that Congress would want wasteful duplicative litigation to go unpunished is dubious”).

²⁰⁹ Freer, *supra* note 191, at 832.

²¹⁰ See *id.*; see also Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 *Stan. L. Rev.* 971, 1011 (2009) (noting that an utterly inflexible jurisdictional obligation might impose more burdens on the federal courts than Congress intended).

²¹¹ Barry Friedman, *A Revisionist Theory of Abstention*, 88 *Mich. L. Rev.* 530, 536 (1989) [hereinafter *Friedman, A Revisionist Theory of Abstention*]; Rehnquist, *supra* note 6, at 1065–68; see also Fallon, *supra* note 19, at 860 (noting that it is a difficult question as to whether, in enacting the jurisdictional statutes designed to increase access to the federal courts, “reasonable [Reconstruction Era] legislators . . . would have wanted to permit the federal

assume that the jurisdictional statutes must incorporate some internal limit and are not unyielding mandates requiring federal judges to heedlessly take jurisdiction over every duplicative action that comes within the statutory terms.

4. Jurisdictional Rules Should Be Clear

Equally important to my proposal is the principle that jurisdictional rules, such as the abstention doctrines, should be clear and easy to apply. Clear jurisdictional rules promote efficiency and conserve judicial resources by enabling courts to quickly determine the propriety of jurisdiction at the outset of litigation.²¹² Similarly, such rules typically reduce costs to litigants;²¹³ for example, they may lessen the likelihood that parties will mistakenly file in the improper forum.²¹⁴ On the other hand, when questions of jurisdiction are decided under malleable standards, both litigants and the courts are compelled to expend significant resources resolving questions wholly unrelated to the merits.²¹⁵ This waste is often compounded by the fact that jurisdictional defects can be raised at any stage in the litigation, even at the Supreme Court, thus mooting all foregoing proceedings on the merits.²¹⁶ Proper jurisdiction is also essential to the power of the court to hear a case and render judgment;²¹⁷ mistakes can thus undercut the legitimacy of both an individual decision and the judicial system more broadly.²¹⁸

As such, “[j]urisdictional requirements that are simple to spot, as well as easy to apply, thus seem a definite advantage.”²¹⁹ This premise is

courts, acting within principled bounds, to accommodate the statutes’ principal policy goals with other values of enduring concern, including federalism values in some cases”).

²¹² Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 8 (2011).

²¹³ Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 Notre Dame L. Rev. 1891, 1906 (2004).

²¹⁴ Dodson, *supra* note 212, at 7; Eric Kades, *The Law & Economics of Jurisdiction* 4 (William & Mary Law Sch., Research Paper No. 09-11, 2009).

²¹⁵ Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 Wm. & Mary L. Rev. 683, 683 (1981).

²¹⁶ *Id.* at 683–84.

²¹⁷ *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 511–12 (1868); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 Hastings L.J. 1613, 1622–24 (2003).

²¹⁸ Dodson, *supra* note 212, at 8–9.

²¹⁹ Field, *supra* note 215, at 684.

widely accepted by courts²²⁰ and commentators²²¹ alike. Professor John F. Preis aptly summarized the current consensus: “Just about nobody, it seems, thinks that jurisdictional rules should be fuzzy.”²²² Since much of the criticism of *Colorado River* abstention stems from its lack of clarity,²²³ my proposal attempts to redress this shortcoming by bringing the doctrine in line with the prevailing preference for jurisdictional simplicity.

5. Diversity Jurisdiction Is an Unjustifiable Burden on the Federal Judiciary

The argument that federal diversity jurisdiction is an antiquated and needless burden on the federal courts is not a new one.²²⁴ But given that diversity forms the jurisdictional basis for many federal cases involving concurrent state court litigation, it is worth briefly reprising some of the strongest arguments that have been levied against this jurisdictional anachronism. Initially, the primary argument in favor of diversity jurisdiction—that out-of-state plaintiffs require the protection of a federal forum from potential state court bias towards home state defendants—can no longer be taken seriously given the changes in both American society and the state courts themselves over the last two hundred years.²²⁵ In spite of its questionable justification, diversity litigation places a huge drain on federal resources. Diversity actions account for nearly thirty percent of filings in federal district court, amounting to a total of 75,822 cases in 2017 alone,²²⁶ the entirety of which must be handled by the relatively

²²⁰ Indeed, the preference for clear jurisdictional rules appears to bridge the Supreme Court’s traditional ideological divides. See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011) (Alito, J.); *Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010) (Breyer, J.); *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 350 n.27 (1985) (Brennan, J., dissenting).

²²¹ See, e.g., Zechariah Chafee, Jr., *Some Problems of Equity* 312 (1950); Field, *supra* note 215, at 683–84.

²²² John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. Cin. L. Rev. 145, 167 (2006).

²²³ See Fallon, *supra* note 19, at 866 (noting that many of the critiques of abstention are due to its undisciplined formulation); Redish, *Intersystemic Redundancy*, *supra* note 3, at 1356–57.

²²⁴ See, e.g., Thomas D. Rowe, Jr., *Abolish Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963 (1979).

²²⁵ Henry J. Friendly, *Federal Jurisdiction: A General View* 146–49 (1973).

²²⁶ U.S. District Courts—Judicial Business 2017, U.S. Courts, <http://www.uscourts.gov/-statistics-reports/us-district-courts-judicial-business-2017> [https://perma.cc/6ZDG-BGBC].

small cadre of not even 700 federal district judges.²²⁷ If reallocated to the thousands of state court judges, however, these cases would make for a relatively small increase in workload.²²⁸

This burden is even less justifiable when considered in light of the fact that federal judges sitting in diversity must apply state law. This means they are effectively precluded from carrying out a “profound function” of the judiciary, “to establish a precedent and organize a body of law”; instead, diversity cases “can badly squander the resources of the federal judiciary”²²⁹ as federal judges attempt, often inaccurately,²³⁰ to predict the likely treatment of an issue by the state courts. Moreover, the huge body of jurisdictional law necessary to maintain this ultimately needless encumbrance encourages gamesmanship on the part of lawyers and wasteful litigation unrelated to the merits.²³¹ Though Congress has steadfastly refused to abolish diversity jurisdiction,²³² the federal courts have typically, and appropriately, taken a restrictive stance towards its application and expansion.²³³ That same approach should be applied in the context of concurrent litigation.

B. The Proposal in Detail

In the proposal that follows, federal courts would resolve all cases of concurrent litigation in one of two ways: either the federal court abstains and allows the state court to proceed to judgment, or the federal court takes jurisdiction and simultaneously enjoins further prosecution of the

²²⁷ Status of Article III Judgeships—Judicial Business 2017, U.S. Courts, <http://www.uscourts.gov/statistics-reports/status-article-iii-judgeships-judicial-business-2017> [<https://perma.cc/W4NC-UQNZ>].

²²⁸ See Robert W. Kastenmeier, Abolition of Diversity of Citizenship Jurisdiction, H.R. Rep. No. 95-893, at 3 (1978) (“32,000 cases pending before 400 Federal district judges will cause few problems when allocated among 6,000 State judges of general jurisdiction.”).

²²⁹ J. Skelly Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne L. Rev. 317, 323 (1967).

²³⁰ See Doris DeTosto Brogan, Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases, 51 Tulsa L. Rev. 39 (2015).

²³¹ David Crump, The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, from the Race to the Bottom to the Substitution Effect, 62 Me. L. Rev. 1, 7–14 (2010).

²³² For a summary of some of the attempts, see Redish, Separation of Powers, *supra* note 10, at 103–04, 104 n.140.

²³³ Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 25–27 (1990) [hereinafter Friedman, A Different Dialogue].

duplicative state action.²³⁴ Thus, under either outcome, duplicative litigation is avoided. To determine the result in a given case, the court would undertake a three-step inquiry. As a threshold matter, it would ensure that the state and federal actions were truly parallel.²³⁵ Next, it would determine the “category” of concurrent litigation with which it was dealing. The category of each case is controlled by three factors: the basis of federal jurisdiction, the nature of the concurrent litigation (i.e., reactive or repetitive), and the relative order of filing of the two actions. Finally, the court would reference a framework to determine the appropriate response to the specific category of concurrent litigation and rule accordingly. The framework is summarized in Table 3 below, and the following Sections provide further details on and justifications for each element.

²³⁴ Students of federal abstention will note the similarities between this proposal and those put forward by Professor Martin Redish and James Rehnquist. See Redish, *Intersystemic Redundancy*, supra note 3, at 1348–49; Rehnquist, supra note 6, at 1053; see also Erwin Chemerinsky, *Federal Jurisdiction 673–74* (1989) (offering a similar model as a blueprint for congressional reform of federal jurisdiction). My proposal builds off these concepts, but it differs in important ways. Redish’s idea requires federal courts to consider a complex mosaic of factors in deciding which court should assume jurisdiction, including the relative expertise of the two fora, issues of comity, and even the views of the individual state judge with jurisdiction over the duplicative action. Redish, *Intersystemic Redundancy*, supra note 3, at 1373–74. Such an open-textured analysis runs afoul of the principle that jurisdictional rules should be clear, simple, and easy to apply. On the other hand, Rehnquist’s suggestion provides clear guidance as to whether the federal court should assume jurisdiction over a given action, but it offers no mechanism to terminate the duplicative state proceeding in such cases. Rehnquist, supra note 6, at 1112 n.365. Hence, though it would occur less frequently, the Rehnquist model would still permit some concurrent litigation. This violates both my first and second principles, that duplicative litigation is inherently wasteful and should not be tolerated.

²³⁵ The question of whether two actions are sufficiently “parallel” to qualify for abstention is both difficult and complex. See Redish, *Intersystemic Redundancy*, supra note 3, at 1362–67 (describing three potential models for evaluating parallelism). Almost by necessity, making this determination will involve some exercise of discretion and careful line drawing. Though I leave the detailed development of this concept to another day, one point is worth noting with respect to the current proposal. In general, insofar as federal courts face a choice between a “broad” formulation of parallelism (e.g., requiring only substantial similarity between the parties and claims in each action) and a “narrow” one (e.g., requiring parties and claims to be identical), the broad interpretation should be preferred. Though this will invariably result in a subset of truly non-parallel claims being denied immediate access to judicial relief, those claimants can refile suit after the initial proceedings have concluded. Whether they will be able to maintain these actions will depend on the applicable principles of claim and issue preclusion. This “back end” resolution of this likely small set of claims is preferable to a narrower definition of parallelism that permits significant concurrent litigation on the “front end.”

Table 3—Proposed Outcome in Federal Court by Category of Concurrent Litigation

		Type of concurrent litigation			
		Reactive		Repetitive	
		State suit filed first	Federal suit filed first	State suit filed first	Federal suit filed first
Basis of federal jurisdiction	Federal question (exclusive jurisdiction)	Do not abstain unless the exclusive federal claim is patently frivolous; enjoin state proceedings			
	Federal question (non-exclusive jurisdiction)	Abstain	Do not abstain; enjoin state proceedings	Abstain	Do not abstain; enjoin state proceedings
	Diversity	Abstain	Do not abstain; enjoin state proceedings	Abstain	Apply two-factor test

1. Exclusive Federal Jurisdiction

In cases in which the cause of action is one within exclusive federal jurisdiction,²³⁶ the federal court should almost always retain jurisdiction and enjoin the duplicative state proceeding.²³⁷ Where Congress has unambiguously provided that a given cause of action is to be prosecuted only in the federal courts, it amounts to a command that the federal courts take jurisdiction over such claims.²³⁸ Such a clear jurisdictional mandate provides the strongest possible basis for a federal court to enjoin ongoing state proceedings that could interfere with its exercise of that

²³⁶ See 13 Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 3527 (3d ed. 2008) (collecting and discussing examples of exclusive federal jurisdiction).

²³⁷ See Chemerinsky, *supra* note 234, at 673 (concluding that “federal courts should not abstain when there are matters before them within their exclusive jurisdiction”).

²³⁸ See Walker, *supra* note 185, at 231–32.

jurisdiction.²³⁹ Moreover, unlike all other concurrent litigation contexts, federal abstention in the face of an exclusive federal jurisdictional grant leaves the plaintiff with no forum in which to pursue his claim.²⁴⁰ As a result, there is no justification for the federal court to relinquish jurisdiction unless it determines that the exclusive federal claim is frivolous and was pleaded solely as a pretext to ensure access to federal court.²⁴¹ Even commentators who generally favor greater discretion for federal courts over jurisdiction agree that abstention in exclusive jurisdiction cases is unwarranted.²⁴² Most courts to consider the issue have adopted this approach,²⁴³ though the Supreme Court has not yet explicitly endorsed it.²⁴⁴

²³⁹ See 28 U.S.C. § 2283 (2012) (prohibiting federal courts from enjoining state proceedings but creating an exception “where necessary in aid of its jurisdiction”). The exceptions to this statute, otherwise known as the Anti-Injunction Act, have been given a cramped reading by the Supreme Court, such that under current doctrine federal courts may not enjoin state proceedings even to protect their exclusive jurisdiction. 17A Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 4225 (3d ed. 2007). For further discussion, see *infra* notes 305–312 and accompanying text.

²⁴⁰ Paul S. Maurer, Comment, *Jurisdiction—A Stay of Federal Court Proceedings Involving an Issue Within Exclusive Federal Jurisdiction, Pending Termination of a Parallel State Court Action, Is Justified When the Federal Suit Is Found to Be Vexatious*, 55 *Notre Dame L. Rev.* 601, 610–13 (1980); Sonenshein, *supra* note 35, at 674 (“[A]ll courts agree that a state court is powerless to decide an affirmative claim within exclusive federal jurisdiction . . .”).

²⁴¹ The standard applied to assess whether a plaintiff’s exclusive federal claim is frivolous could be similar to that adopted in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), which asked whether the federal claims in a plaintiff’s complaint had sufficient “substance” to permit the federal court to assume jurisdiction over pendant state law claims. For a discussion of this issue in the *Colorado River* context, see *Medema v. Medema Builders, Inc.*, 854 F.2d 210, 215 (7th Cir. 1988).

²⁴² See, e.g., *Shapiro*, *supra* note 10, at 576.

²⁴³ See, e.g., *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 500 (7th Cir. 2011) (“Our precedent holds that where a plaintiff’s nonfrivolous claim invokes the exclusive jurisdiction of federal courts, the *Colorado River* stay is not appropriate.” (internal quotation marks omitted)); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 62 (2d Cir. 1986); see also *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 829 (9th Cir. 1963) (noting that to stay an action premised on an exclusively federal claim in favor of a state proceeding would “fly in the face of congressional purpose”).

²⁴⁴ But cf. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983) (noting that “the presence of federal-law issues must always be a major consideration weighing against surrender [of jurisdiction pursuant to *Colorado River* abstention]”).

2. *Reactive Litigation*

When faced with a reactive suit in which the concurrent state action was filed prior to the federal action, the federal court should always abstain, regardless of the jurisdictional basis for the federal suit. In addition to the five general principles discussed above, three additional considerations support this conclusion. First, the plaintiff's choice of forum is entitled to substantial deference.²⁴⁵ In this procedural posture, the plaintiff chose to litigate in state court; the state court defendant then attempted to usurp that choice by filing a reactive suit in federal court. There is no reason the federal courts should suborn such brazen attempts to defeat the plaintiff's choice of forum. Furthermore, Congress has already provided a mechanism by which state court defendants can obtain access to a federal forum—removal jurisdiction.²⁴⁶ If the state court defendant can remove the state case, he should be required to do so and should not be permitted to file a duplicative and wasteful action in federal court instead.²⁴⁷ Alternatively, if the state case *cannot* be removed, the state defendant should not be permitted to avoid the strictures of removal jurisdiction by artfully pleading a federal complaint.²⁴⁸

The situation is reversed when it is the federal suit that was filed first and the federal defendant initiates a reactive action in state court. In this context, the federal court should never abstain, irrespective of the jurisdictional basis for the suit. Instead, the federal court should enjoin the duplicative state proceedings to prevent both judicial waste and an unseemly race to judgment.²⁴⁹ Two considerations counsel in favor of this rule. First, the plaintiff's choice of forum is entitled to even greater

²⁴⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (summarizing Supreme Court doctrine as laying down a general rule that “a plaintiff's choice of forum should rarely be disturbed”).

²⁴⁶ See 28 U.S.C. § 1441 (2012).

²⁴⁷ *Wilson*, *supra* note 39, at 667; see also Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 *Colum. L. Rev.* 684, 704 (1960).

²⁴⁸ See *Rehnquist*, *supra* note 6, at 1107 (noting that while the federal removal statute has been “strictly construed,” current law permits “a state defendant who drums up a counterclaim [to] file a retaliatory federal suit against the state plaintiff, thereby gaining a federal forum for the counterclaim and possibly for the entire dispute in circumvention of the strict statutory requirements for removal”).

²⁴⁹ See *Redish*, *Intersystemic Redundancy*, *supra* note 3, at 1349; *Vestal*, *Reactive Litigation*, *supra* note 35, at 21–22. See also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567 (1983).

deference when he has properly invoked federal jurisdiction.²⁵⁰ However dubious the arguments regarding the superiority of or need for access to a federal forum,²⁵¹ the Supreme Court has made clear that plaintiffs should not be deprived of this access absent compelling justification.²⁵² A preference by the federal defendant to litigate in state court is insufficient to surmount this high standard.²⁵³ Moreover, permitting the federal defendant to open a second front in state court would effectively circumvent the federal compulsory counterclaim rule.²⁵⁴ There is no reason to allow such obvious gamesmanship to go unchecked.

3. *Repetitive Litigation*

When a state plaintiff subsequently files a repetitive action in federal court, the federal court should abstain in favor of the state proceedings, regardless of the basis for federal jurisdiction. The justifications for such a rule are twofold. First, it is eminently reasonable to require the plaintiff to abide by their original choice of forum.²⁵⁵ Having initially filed suit in state court, the plaintiff implicitly waived any objections to the neutrality, convenience, and competence of the state forum.²⁵⁶ To allow such a plaintiff to claim the benefits of a federal forum *ex post* (likely for strategic reasons) would be to authorize meritless jurisdictional trickery of the worst kind. Second, it is well-established that only state defendants

²⁵⁰ *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (“Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor’s choice of a federal forum . . .”).

²⁵¹ See *infra* notes 313–321 and accompanying text.

²⁵² *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959) (noting that a federal court should only relinquish jurisdiction “where the order to the parties to repair to the state court would clearly serve an important countervailing interest”).

²⁵³ See *Bryant Elec. Co. v. Joe Rainero Tile Co.*, 84 F.R.D. 120, 126 (W.D. Va. 1979) (“It would be illogical to allow a defendant in a federal court action based on diversity jurisdiction to move to stay it because of a subsequently filed state court action. To do so would destroy the concept of diversity jurisdiction. The nonresident plaintiff has availed itself of a neutral forum and should not be deprived of it . . .”).

²⁵⁴ See Fed. R. Civ. P. 13(a).

²⁵⁵ *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106 n.2 (1941) (“[I]t is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause.” (quoting H.R. Rep. No. 196, at 2 (1884))).

²⁵⁶ *Sonenshein*, *supra* note 35, at 676 (“A litigant who foregoes a federal forum can hardly complain if another federal court abstains.”).

can remove state actions to federal court.²⁵⁷ But to permit the type of repetitive litigation described here would effectively enable a state plaintiff to “remove” the case they filed in state court.²⁵⁸

The category of repetitive litigation in which the plaintiff files suit first in federal court and subsequently in state court is more complex. This procedural posture seems quite rare.²⁵⁹ Nevertheless, depending on the basis for federal jurisdiction, this category can raise competing values which require a more nuanced treatment. If federal jurisdiction is premised on the presence of a federal question, the proper course is clear—the federal court should retain jurisdiction and enjoin the duplicative state proceedings. As previously noted, it is reasonable to hold the plaintiff to their original choice of forum,²⁶⁰ and in this context, there are no countervailing reasons to do otherwise.

On the other hand, when the federal suit is a diversity action, such countervailing interests are present. First, while it is indeed reasonable to hold the plaintiff to their choice of forum, it is also preferable that issues of state law be resolved by state courts. Myriad reasons for such a policy exist, including relying on state courts’ greater expertise in administering state law,²⁶¹ avoiding potential negative effects on state law resulting from excessive interpretation by federal courts,²⁶² and advancing the general “interest each level of government has in having its own courts decide its law.”²⁶³ Moreover, there is value in reducing the burdens of diversity jurisdiction on the federal judiciary.²⁶⁴ This is especially true when the plaintiff has, by filing a repetitive action in state court, waived any

²⁵⁷ See 28 U.S.C. § 1441 (2012); 14C Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3721 (Rev. 4th ed. 2018).

²⁵⁸ Wilson, *supra* note 39, at 666–67; Power to Stay Federal Proceedings, *supra* note 188, at 988.

²⁵⁹ Of the 111 cases included in my analysis, just three presented this procedural posture.

²⁶⁰ See *supra* note 255 and accompanying text.

²⁶¹ See *Day v. Union Mines Inc.*, 862 F.2d 652, 660 (7th Cir. 1988) (acknowledging “a state court’s expertise in applying its own law”).

²⁶² For a variety of reasons, channeling state-law based litigation to federal courts can be detrimental to both the development and predictability of state law, and state interests would often be better served if such questions were decided by state courts. See Brogan, *supra* note 230, at 41; Mitchell Turbenson, Note, Negative Implications of State Law Entrenchment in Federal Courts, 57 *Ariz. L. Rev.* 849 (2015).

²⁶³ Chemerinsky, *supra* note 234, at 674.

²⁶⁴ See *supra* notes 224–233 and accompanying text.

objections to that court's neutrality, thus negating the only justification (however weak) for federal diversity jurisdiction.

When faced with this procedural posture, federal courts should apply a simple, two-step test. If the state action is more advanced and the relative burdens of the court systems suggest the state case will reach judgment more quickly, the federal court should abstain; otherwise it should retain jurisdiction and enjoin the state suit.²⁶⁵ This analysis rationally balances competing values around the fulcrum of judicial economy. It is also relatively simple to apply and would not violate the principle favoring clear jurisdictional rules.

IV. OBJECTIONS AND REBUTTALS

Though I believe this proposal to be compelling, it will undoubtedly face objections. In this Part, I address three possible grounds for disagreement: (1) that the jurisdiction of the federal courts is obligatory and cannot be relinquished in favor of concurrent state proceedings, (2) that portions of the proposal are impermissible under the Anti-Injunction Act, and (3) that channeling litigation from federal to state courts is normatively undesirable. This is not intended to be an exhaustive list of potential objections; rather, it is designed to begin the discussion by focusing on those that seem likely to be raised.

Perhaps the primary objection to the proposal is that it ignores the allegedly obligatory nature of federal jurisdiction. The crux of this so-called "obligation theory" is simple—federal courts are compelled to exercise the statutory jurisdiction conferred upon them by Congress when it is properly invoked.²⁶⁶ Numerous commentators have supported the obligation theory, premising their claims on such varied grounds as

²⁶⁵ The first prong of this analysis would be similar to the priority of actions factor described in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, with the relative progress of the actions not "measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." 460 U.S. 1, 21 (1983). The second prong is modeled on the identical "public interest factor" from the doctrine of *forum non conveniens*, which permits consideration of the relative congestion of the court systems involved. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

²⁶⁶ See, e.g., Redish, Separation of Powers, *supra* note 10, at 112–13 ("[A]n argument that construes a jurisdictional statute as somehow vesting a power in the federal courts to adjudicate the relevant claims without a corresponding duty to do so is unacceptable.").

separation of powers,²⁶⁷ democratic theory,²⁶⁸ congressional control over federal jurisdiction,²⁶⁹ the proper interpretation of the relevant jurisdictional statutes,²⁷⁰ the existence of a right to access a federal forum,²⁷¹ and the role of federal courts in protecting federal rights.²⁷² Leaving aside some of the more philosophical arguments, it is clear that none of these justifications can sustain an unyielding obligation to take jurisdiction over concurrent litigation.

At the outset, it bears noting that the historical and precedential support for the obligation theory is tenuous at best. Through the mid-nineteenth century, it was unclear whether the common law doctrine of abatement would bar a federal court from assuming jurisdiction over a claim when a suit on the same cause of action and between the same parties was pending in a state court.²⁷³ Though the courts eventually clarified that this doctrine did not create a categorical prohibition on concurrent proceedings, the opposite proposition—that federal jurisdiction is mandatory—has never clearly been established.²⁷⁴

Many proponents of the obligation theory base its jurisprudential legitimacy almost entirely on dicta in a series of early Supreme Court cases,²⁷⁵ the most prominent of which is *Cohens v. Virginia*.²⁷⁶ There, Chief Justice Marshall stated that “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”²⁷⁷

²⁶⁷ See, e.g., *id.* at 74.

²⁶⁸ See, e.g., Redish, Judge-Made Abstention, *supra* note 19, at 1027.

²⁶⁹ See, e.g., McCarthy, *supra* note 207, at 1197–200.

²⁷⁰ See, e.g., Redish, Separation of Powers, *supra* note 10, at 77–78.

²⁷¹ See, e.g., Mullenix, *supra* note 19, at 105–06, 117.

²⁷² See Friedman, A Revisionist Theory of Abstention, *supra* note 211, at 538–43 (summarizing this view).

²⁷³ Rehnquist, *supra* note 6, at 1104–05; see also *id.* at 1105 n.318 (noting that this question was not clearly resolved in the negative until the Supreme Court’s decision in *Stanton v. Embrey*, 93 U.S. 548 (1876)).

²⁷⁴ Charles Alan Wright, *The Law of Federal Courts* 302–03 (4th ed. 1983) (concluding with regards to the obligation theory that “[i]t may be that there was never such a rule, uniformly applied, in the federal courts” and that “[i]t is clear that there is no such rule today”).

²⁷⁵ See, e.g., Doernberg, *supra* note 19, at 1020–21; McCarthy, *supra* note 207, at 1196 n.61; Mullenix, *supra* note 19, at 157 & n.319; see also Shapiro, *supra* note 10, at 544 (noting that while Professor Redish has not expressly relied on these cases, his arguments implicitly do so).

²⁷⁶ 19 U.S. (6 Wheat.) 264 (1821).

²⁷⁷ *Id.* at 404; see also Shreve, *supra* note 19, at 779 (noting the frequency with which *Cohens* is cited for this proposition).

Despite its thunderous rhetoric, *Cohens* is inapposite to the context of concurrent litigation. *Cohens* concerned a challenge to the appellate jurisdiction of the United States Supreme Court over decisions of the highest courts of the states;²⁷⁸ it made no mention of the original jurisdiction of the lower federal courts. In addressing this radically different question,²⁷⁹ Chief Justice Marshall “took pains to defend not only the wisdom but the necessity of Supreme Court authority to review state court decisions,”²⁸⁰ which likely led to his capacious statement regarding jurisdictional obligation. The other cases frequently cited in support of the obligation theory are similarly distinguishable.²⁸¹ In light of later developments in federal jurisdiction jurisprudence,²⁸² the dicta in these cases cannot possibly still be considered good law, if it ever was. That the Court’s early pronouncements on the subject were overly broad and hence not controlling has been acknowledged by the Supreme Court,²⁸³ lower federal courts,²⁸⁴ and commentators²⁸⁵ alike.

Defenses of the obligation theory based on statutory interpretation are similarly unavailing. The fundamental premise of this argument is that since the jurisdictional statutes are phrased in unlimited language, courts

²⁷⁸ *Cohens*, 19 U.S. (6 Wheat.) at 376.

²⁷⁹ See Rehnquist, *supra* note 6, at 1103 (“Plainly, the ‘obligation’ of the Supreme Court to review final state decisions within its appellate jurisdiction, where no other appellate jurisdiction exists, is a wholly different sort of duty than that of a federal district court to hear a case within its jurisdiction regardless of the pendency of an identical case in state court.”).

²⁸⁰ Shapiro, *supra* note 10, at 544.

²⁸¹ For example, in *McClellan v. Carland*, 217 U.S. 268, 281–83 (1910), no state proceedings were actually ongoing at the time of the federal action, and the Supreme Court specifically reserved judgment as to whether the pendency of such an action would have justified a stay of the federal suit. Similarly, no parallel state case existed in *Chicot County v. Sherwood*, 148 U.S. 529, 533 (1893), another commonly cited authority for the obligation theory. Still other cases simply point back to these distinguishable precedents to support a broader theory of obligatory concurrent jurisdiction. See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (citing *Chicot County* and *McClellan*); see also Rehnquist, *supra* note 6, at 1105–07 (heavily criticizing *Kline* as “outdated,” “antiquated,” and characterized by “an otherworldly, mystical quality”).

²⁸² See *infra* notes 301–304 and accompanying text.

²⁸³ *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939) (“We have observed that the broad statement that a court having jurisdiction must exercise it (see *Cohens v. Virginia*, 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum.”).

²⁸⁴ See, e.g., *Rohr Indus., Inc. v. Wash. Metro. Area Transit Auth.*, 720 F.2d 1319, 1324 (D.C. Cir. 1983).

²⁸⁵ See, e.g., Shapiro, *supra* note 10, at 547; Sonenshein, *supra* note 35, at 652–54.

have no authority to read implicit limitations into their terms.²⁸⁶ This assertion is at odds with well-settled principles of statutory interpretation. Indeed, courts have developed doctrines by which they regularly imply qualifications on general congressional enactments. These doctrines, typically known as clear statement rules, are judicially created interpretive principles that require courts to read certain limitations into seemingly unqualified legislative language unless Congress has specifically addressed the issue and mandated the opposite conclusion.²⁸⁷ Perhaps the most common of these rules are the so-called presumptions against extraterritoriality and retroactivity. Unless Congress provides otherwise, the former acts to limit the reach of federal statutes to the United States and its territories,²⁸⁸ while the latter restricts the operation of federal statutes to transactions occurring after the statute's enactment.²⁸⁹

Clear statement rules have both descriptive and normative justifications.²⁹⁰ Descriptively, they are designed to capture latent congressional intent by enforcing policies that Congress would ordinarily accept and from which generally worded statutes would not be expected to deviate.²⁹¹ Normatively, they “ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.”²⁹²

The proposal detailed above would operate much like a clear statement rule by limiting the otherwise general language of federal jurisdictional statutes to avoid concurrent litigation.²⁹³ That limitation would yield

²⁸⁶ See Redish, *Separation of Powers*, supra note 10, at 77–78 (asserting that “separation-of-powers . . . should be deemed to impose a heavy burden of proof on one who would assert that a legislative body implicitly intended to allow the judiciary to amend unlimited legislation”).

²⁸⁷ Caleb Nelson, *Statutory Interpretation* 180–81 (2011); see also *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (Kennedy, J.) (plurality opinion) (describing “the absence of a clear congressional statement” on certain questions as “in effect, equivalent to a statutory qualification”).

²⁸⁸ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

²⁸⁹ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

²⁹⁰ See Nelson, supra note 287, at 181–82 (discussing these justifications).

²⁹¹ *Id.*

²⁹² *Spector*, 545 U.S. at 139 (Kennedy, J.) (plurality opinion).

²⁹³ Indeed, there is an extent to which Congress already treats the abstention doctrines somewhat like clear statement rules. See Fallon, supra note 19, at 871 (arguing that to eliminate the abstention doctrines would “upset the law-based expectations of past Congresses

where Congress so mandated by vesting the federal courts with exclusive jurisdiction over a given claim.²⁹⁴ Likewise, the justifications for my proposal are both descriptive and normative. It is based on the descriptive presumption that Congress would not normally intend for jurisdictional statutes to create duplicative and wasteful litigation while overburdening federal courts.²⁹⁵ And it draws further support from the normative presumption that congressional legislation should not unnecessarily create the type of friction in the sensitive area of federal-state relations that can be caused by duplicative litigation.²⁹⁶

Justifications for the obligation theory premised on the fact that Congress has plenary authority to control the jurisdiction of the lower federal courts are unconvincing as well. Even assuming the accuracy of the traditional view of congressional control over federal jurisdiction,²⁹⁷ this argument fundamentally confuses congressional action conferring jurisdiction with a mandate to exercise the same.²⁹⁸ Similarly, it fails to differentiate between the instances in which Congress has clearly expressed its view that jurisdiction over a given case must be maintained in the federal courts (i.e., exclusive federal causes of action) and the general grants of jurisdiction. The argument is also historically inaccurate, as it fails to account for the substantial role that the federal courts have played in shaping federal jurisdiction alongside Congress.²⁹⁹ Moreover, it is normatively unsatisfying, excluding the possibility of a productive partnership between Congress and the courts—which generally have greater expertise in the day-to-day realities of jurisdictional line-drawing—to fine tune broad grants of jurisdiction into functional legal regimes.³⁰⁰

that jurisdictional legislation would be interpreted in light of longstanding background understandings that federal courts sometimes should and would abstain”).

²⁹⁴ See Barrett, *supra* note 12, at 819 (noting that this type of procedural common law “is wholly subject to congressional abrogation”).

²⁹⁵ See *supra* notes 208–210 and accompanying text.

²⁹⁶ See *supra* note 211 and accompanying text.

²⁹⁷ See *supra* note 9 and accompanying text.

²⁹⁸ Shapiro, *supra* note 10, at 574–75.

²⁹⁹ Friedman, *A Different Dialogue*, *supra* note 233, at 12–24.

³⁰⁰ Fallon, *supra* note 19, at 863–65; Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 *Sup. Ct. Rev.* 343, 408 (“[I]t is [difficult] to expect that Congress will, by virtue of detailed textual specification, be able to get things right the first time, or, when initial legislative efforts misfire, to fix things later. There are thus real pitfalls in the assumption that

As a practical matter, the obligation theory has been totally undermined by wide swaths of modern federal jurisdiction jurisprudence. Numerous doctrines have emerged to restrict the federal courts' exercise of the full jurisdictional authority conferred upon them by Congress. Some of these, such as the so-called "well pleaded complaint rule" limiting federal question jurisdiction under 28 U.S.C. § 1331, purport to establish that Congress never in fact conferred the jurisdiction at issue.³⁰¹ This explanation is largely unconvincing, and these rules are more realistically seen as attempts to limit the influx of certain types of cases to federal courts.³⁰² Moreover, other doctrines have been developed that make no such pretense; they unambiguously permit federal courts to decline to exercise jurisdiction conferred by Congress. These include *forum non conveniens*, the so-called "prudential" elements of justiciability, requirements that plaintiffs exhaust administrative or state remedies before commencing proceedings in federal court, the earlier abstention doctrines, and many more.³⁰³ Fully enforcing the obligation theory would require the elimination of these well-established and invaluable limitations on federal jurisdiction, an outcome which seems both practically unlikely and normatively undesirable.³⁰⁴

Regardless of the theoretical legitimacy of the obligation theory, it cannot be maintained with respect to concurrent litigation when viewed in light of the on-the-ground realities in the federal district courts. As Part II indicated, district courts regularly decline to exercise the jurisdiction conferred upon them in the face of parallel state proceedings through both formal and informal means. Since the Supreme Court does not have the institutional capacity to enforce the obligation theory uniformly across the district courts, continued adherence to the theory in this context is a purely academic exercise. It would be better to acknowledge, as my proposal does, the practical irrelevance of the theory and focus instead on

Congress can and should be expected to resolve matters in legislative text without the aid of courts acting as junior partners in shaping a workable legal system.").

³⁰¹ See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908). A similar example is the limitation of diversity jurisdiction to cases of complete diversity, such that diversity jurisdiction will only be proper if "there is no plaintiff and no defendant who are citizens of the same State." See *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998).

³⁰² Friedman, *A Different Dialogue*, supra note 233, at 21–28.

³⁰³ See Shapiro, supra note 10, at 552–60.

³⁰⁴ Fallon, supra note 19, at 871–76.

remedying the combination of uncertainty, informal abstention, and judicial waste to which current doctrine has given rise.

The argument that the Anti-Injunction Act (“AIA”) makes crucial elements of the proposal impossible is more difficult to address. The AIA prohibits federal courts from “grant[ing] 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.”³⁰⁵ There is no doubt that under current AIA jurisprudence, the federal courts do not have authority to enjoin state proceedings simply because they are duplicative of a federal action.³⁰⁶ Indeed, they likely are precluded from doing so even to protect their exclusive jurisdiction.³⁰⁷ A shift in doctrine would thus be required to effectuate the proposal in full and ensure that all concurrent proceedings were consolidated into one action either by abstention or injunction.³⁰⁸

That said, this objection is more practical than theoretical. Though the Supreme Court’s view of the three exceptions to the AIA has generally been exceedingly chary, there is substantial doubt that approach aligns with the history and purpose of the Act.³⁰⁹ And simply as a practical matter, it is hard to see how the injunctions contemplated by my proposal do not fit squarely within the language of the second exception, permitting a federal court to enjoin state proceedings “in aid of its jurisdiction.”³¹⁰ Once its jurisdiction has been properly invoked and the federal court decides not to abstain in favor of a parallel state case, allowing the state proceedings to continue presents an obvious threat to the maintenance of federal jurisdiction.³¹¹ If the state court reaches judgment first, any

³⁰⁵ 28 U.S.C. § 2283 (2012).

³⁰⁶ *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 294–95 (1970).

³⁰⁷ See 17A Wright & Miller, et al., *supra* note 15, § 4225 (discussing this question and collecting cases to this effect).

³⁰⁸ See Redish, *Intersystemic Redundancy*, *supra* note 3, at 1348–50 (advocating for such a shift in the context of concurrent litigation).

³⁰⁹ See, e.g., James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 *Tex. L. Rev.* 1, 6–8 (2013).

³¹⁰ See William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 *Colum. L. Rev.* 330, 356–69 (1978). This is especially true with respect to cases falling within the exclusive jurisdiction of the federal courts; indeed, it is hard to contemplate a context in which the “in aid of its jurisdiction” exception seems more applicable. See McCarthy, *supra* note 207, at 1207–08.

³¹¹ Redish, *Intersystemic Redundancy*, *supra* note 3, at 1358.

concurrent federal proceedings will be precluded.³¹² Thus, though giving my proposal full effect would require a doctrinal shift as a practical matter, that shift seems neither radical nor unjustified on either a theoretical or a normative level.

A final objection could be predicated on the normative undesirability of shifting litigation from federal to state courts, which would be the result of at least portions of my proposal.³¹³ This argument is typically premised on two independent but related ideas: (1) that federal courts are generally superior to state courts³¹⁴ and (2) that federal courts must act as the primary guarantors of federal rights because state courts cannot be trusted to do so.³¹⁵ Therefore, proponents of this thesis might argue that my proposal, by authorizing greater levels of federal abstention in favor of state court proceedings, would shunt litigants against their will into a normatively inferior forum, one that is especially inept if federal rights are implicated.

It is unnecessary to consider these arguments in great depth to conclude that they are wholly inapposite to the merits of my proposal. The question of parity, i.e., whether federal courts are in fact superior to their state counterparts, has generated significant scholarly commentary but ultimately proven intractable.³¹⁶ There is simply insufficient empirical evidence to support either possible conclusion.³¹⁷ Likewise, which court system should serve as the primary vindicator of federal rights, if indeed either one should take priority in that endeavor, has generated much discussion but no resolution.³¹⁸ Though the Supreme Court has, at times,

³¹² See 28 U.S.C. § 1738 (2012).

³¹³ Indeed, this belief may be the true concern underlying the other, more theoretical objections to abstention. See Althouse, *supra* note 19, at 1039.

³¹⁴ See, e.g., Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1105–06 (1977).

³¹⁵ See, e.g., Redish, *Judge-Made Abstention*, *supra* note 19, at 1031–32.

³¹⁶ See Erwin Chemerinsky, *Parity Reconsidered: Defining a Rule for the Federal Judiciary*, 36 *UCLA L. Rev.* 233, 235 (1988) (“The debate over parity continues with little sign of abatement or resolution.”).

³¹⁷ *Id.* at 235–36.

³¹⁸ Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1401 (1953) (arguing that state courts should be “the primary guarantors” of federal constitutional rights), with Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141, 1158–64 (1988) (summarizing the contrary position regarding the priority of federal courts), and Rehnquist, *supra* note 6, at 1058–59 (arguing that the Constitution is fundamentally forum neutral between state and federal courts). See also Field, *supra* note 215, at 686 (“When both lines of decision are read, we simply do not know whether federal courts are ‘the primary and powerful reliances for

taken the position that the federal courts are “interpose[d] . . . between the States and the people, as guardians of the people’s federal rights,”³¹⁹ it has largely abandoned that exalted view of the federal courts, instead asserting the equality of the two systems on this score.³²⁰ Regardless of the current position of the Supreme Court, the fact that it so drastically changed course on the question illuminates the underlying flaw of the argument—its historical contingency. Insofar as these debates are resolvable, any conclusions are highly dependent on the historical context and can vary significantly over relatively short periods of time.³²¹ Such context-sensitive inquiries should not form the basis of general jurisdictional policy, which must be designed to be applied repetitively and consistently over many years.

CONCLUSION

As applied today, *Colorado River* abstention represents some of the worst aspects of federal jurisdictional law—complexity, unpredictability, needless waste of resources, and ultimately little gain. Nevertheless, the doctrine is not one that should simply be abandoned. On the contrary, its underlying premise, that considerations of wise judicial administration should sometimes counsel abstention in favor of concurrent state court proceedings, is fundamentally sound. In order to effectuate that principle, however, significant change is needed. I have attempted here to lay out a roadmap for such reform. Though there are undoubtedly gaps in my argument that must be reconsidered, my fundamental objective was to shed light on the doctrine as it currently exists in the hope that others will continue the conversation. In that way, *Colorado River* abstention might yet prove an effective tool for promoting efficiency, fairness, and predictability in federal litigation.

vindicating’ federal rights or whether that proposition improperly belittles state judges and disregards their responsibilities under the supremacy clause. We do not know which of these sets of propositions is appropriate to consider in interpreting the contours of particular jurisdictional statutes or judge-made jurisdictional doctrines.” (footnote omitted)).

³¹⁹ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

³²⁰ See, e.g., *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (“Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.”).

³²¹ *Rehnquist*, *supra* note 6, at 1062–63.

APPENDIX

Table 1: Second Circuit Cases Cited

Case	Outcome	Notes
Garfield v. Ocwen Loan Servicing, LLC, 811 F.3d 86 (2d Cir. 2016)	Reversed abstention	
Smulley v. Mut. of Omaha Bank, 634 F. App'x 335 (2d Cir. 2016)	Reversed abstention	
Aventura Techs. Inc. v. World of Residence II Ltd., 646 F. App'x 92 (2d Cir. 2016)	Reversed abstention	
Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84 (2d Cir. 2012)	Reversed abstention	
Woodford v. Cmty. Action Agency of Greene Cty., Inc., 239 F.3d 517 (2d Cir. 2001)	Reversed abstention	
Vill. of Westfield v. Welch's, 170 F.3d 116 (2d Cir. 1999)	Reversed abstention	
FDIC v. Four Star Holding Co., 178 F.3d 97 (2d Cir. 1999)	Reversed abstention	
Dittmer v. Cty. of Suffolk, 146 F.3d 113 (2d Cir. 1998)	Reversed abstention	
Burnett v. Physician's Online, Inc., 99 F.3d 72 (2d Cir. 1996)	Reversed abstention	
Youell v. Exxon Corp., 48 F.3d 105 (2d Cir. 1995)	Reversed abstention	Vacated on other grounds, 516 U.S. 801 (1995)
Gregory v. Daly, 243 F.3d 687 (2d Cir. 2001)	Denied abstention	<i>Colorado River</i> raised in first instance on appeal
Williams v. Lambert, 46 F.3d 1275 (2d Cir. 1995)	Denied abstention	<i>Colorado River</i> raised in first instance on appeal
Sheerbonnet, Ltd. v. Am. Express Bank Ltd., 17 F.3d 46 (2d Cir. 1994)	Denied abstention	<i>Colorado River</i> raised in first instance on appeal
Gen. Star Int'l Indem., Ltd. v. Chase Manhattan Bank, 57 F. App'x 892 (2d Cir. 2003)	Affirmed abstention	
Cadle Co. v. Cohen, 173 F.3d 843 (2d Cir. 1999)	Affirmed abstention	Unpublished table opinion

Table 2: Southern District of New York Cases Cited

Case	Jurisdictional Basis	Outcome	Notes
Sitgraves v. Fed. Home Loan Mortgaging Corp., 265 F. Supp. 3d 411 (S.D.N.Y. 2017)	Diversity	Abstained	
Phillips v. Citibank, N.A., 252 F. Supp. 3d 289 (S.D.N.Y. 2017)	Diversity	Abstained	
Jenkinson v. Baptiste-Bruno, No. 16-cv-4519, 2016 WL 7377234 (S.D.N.Y. Dec. 20, 2016)	Diversity	Abstained	
Wenegieme v. Bayview Loan Servicing, No. 14-cv-9137, 2015 WL 2151822 (S.D.N.Y. May 7, 2015)	Diversity	Abstained	Alternative holding
Millennium Drilling Co. v. Prochaska, No. 14-cv-1985, 2014 WL 6491531 (S.D.N.Y. Nov. 18, 2014)	Diversity	Abstained	
Pabco Constr. Corp. v. Allegheny Millwork PBT, No. 12-cv-7713, 2013 WL 1499402 (S.D.N.Y. Apr. 10, 2013)	Diversity	Abstained	
Bank of Am. v. Sharim, Inc., No. 10-cv-7570, 2010 WL 5072118 (S.D.N.Y. Dec. 13, 2010)	Diversity	Abstained	
Kirby McInerney LLP v. Lee Med., Inc., No. 17-cv-4760, 2017 WL 4685101 (S.D.N.Y. Oct. 16, 2017)	Diversity	Did not abstain	
Kleeberg v. Eber, No. 16-cv-9517, 2017 WL 2895913 (S.D.N.Y. July 6, 2017)	Diversity	Did not abstain	

Artists Rights Enft Corp. v. Estate of Robinson, No. 15-cv-9878, 2017 WL 933106 (S.D.N.Y. Mar. 8, 2017)	Diversity	Did not abstain	
Am. First Fed., Inc. v. Gordon, No. 16-cv-3958, 2016 WL 7477564 (S.D.N.Y. Dec. 29, 2016)	Diversity	Did not abstain	
Sylvester v. Bayview Loan Servicing LLC, No. 15-cv-1736, 2016 WL 3566234 (S.D.N.Y. June 24, 2016)	Diversity	Did not abstain	
Camabo Indus., Inc. v. Liberty Mut. Ins. Co., No. 15-cv-891, 2016 WL 368529 (S.D.N.Y. Jan. 27, 2016)	Diversity	Did not abstain	
U.S. Specialty Ins. Co. v. A-Val Architectural Metal Corp., No. 15-cv-760, 2015 WL 3948115 (S.D.N.Y. June 29, 2015)	Diversity	Did not abstain	
CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz, No. 14-cv-6566, 2014 WL 7399040 (S.D.N.Y. Dec. 29, 2014)	Diversity	Did not abstain	
Balance Point Divorce Funding, LLC v. Scrantom, 978 F. Supp. 2d 341 (S.D.N.Y. 2013)	Diversity	Did not abstain	
Shields v. Murdoch, 891 F. Supp. 2d 567 (S.D.N.Y. 2012)	Diversity	Did not abstain	
Glenclova Inv. Co. v. Trans-Res., Inc., 874 F. Supp. 2d 292 (S.D.N.Y. 2012)	Diversity	Did not abstain	
Simington v. Lease Fin. Grp., LLC, 10-cv-6052, 2012 WL 651130 (S.D.N.Y. Feb. 28, 2012)	Diversity	Did not abstain	

Hayden Capital USA, LLC v. Northstar Agri Indus., LLC, No. 11-cv-594, 2011 WL 5024193 (S.D.N.Y. Oct. 20, 2011)	Diversity	Did not abstain	
Tramposch v. Winter, No. 10-cv-8286, 2011 WL 2039700 (S.D.N.Y. May 25, 2011)	Diversity	Did not abstain	
CP III Rincon Towers, Inc. v. Cohen, No. 10-cv-4638, 2011 WL 651434 (S.D.N.Y. Feb. 16, 2011)	Diversity	Did not abstain	
A&E Television Networks, LLC v. Pivot Point Entm't, LLC, No. 10-cv-9422, 2011 WL 182083 (S.D.N.Y. Jan. 18, 2011)	Diversity	Did not abstain	
RECAP Invs. XI-Fund A, L.P. v. McCullough Harris, LLC, 760 F. Supp. 2d 368 (S.D.N.Y. 2010)	Diversity	Did not abstain	
Aurelius Capital Master, Inc. v. MBIA Ins. Corp., 695 F. Supp. 2d 68 (S.D.N.Y. 2010)	Diversity	Did not abstain	
Mersentes v. Corrigan, No. 09-cv-486, 2010 WL 3959615 (S.D.N.Y. Sept. 30, 2010)	Diversity	Did not abstain	
Discovery Ortho Partners, LLC v. Osseous Techs. of Am., Inc., No. 10-cv-1729, 2010 WL 3239428 (S.D.N.Y. Aug. 17, 2010)	Diversity	Did not abstain	
Carter v. 36 Hudson Assocs., LLC, No. 09-cv-4328, 2010 WL 2473834 (S.D.N.Y. June 17, 2010)	Diversity	Did not abstain	
Allsettled Grp. Inc. v. Charter Oak Fire Ins. Co., No. 10-cv-150, 2010 WL 1924455 (S.D.N.Y. May 11, 2010)	Diversity	Did not abstain	

Stone v. Patchett, No. 08-cv-5171, 2009 WL 1108596 (S.D.N.Y. Apr. 23, 2009)	Diversity	Did not abstain	
Expl. II, Inc. v. Biallas, No. 09-cv-319, 2009 WL 1066244 (S.D.N.Y. Apr. 21, 2009)	Diversity	Did not abstain	
Kingsley v. N.Y.C. Hous. Auth., No. 16-cv-169, 2016 WL 5939359 (S.D.N.Y. Oct. 6, 2016)	Federal question / U.S. party	Abstained	Alternative holding
Abe v. N.Y. Univ., No. 14-cv-9323, 2016 WL 1275661 (S.D.N.Y. Mar. 30, 2016)	Federal question / U.S. party	Abstained	
Yan Ping Xu v. City of New York, No. 08-cv-11339, 2010 WL 4878949 (S.D.N.Y. Dec. 1, 2010)	Federal question / U.S. party	Abstained	
Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-cv-9350, 2017 WL 6403087 (S.D.N.Y. Nov. 16, 2017)	Federal question / U.S. party	Did not abstain	
Fernandez v. City of New York, No. 17-cv-2431, 2017 WL 2894144 (S.D.N.Y. July 7, 2017)	Federal question / U.S. party	Did not abstain	
Frydman v. Verschleiser, 172 F. Supp. 3d 653 (S.D.N.Y. 2016)	Federal question / U.S. party	Did not abstain	
Henvill v. Metro. Transp. Auth., No. 13-cv-7501, 2016 WL 519039 (S.D.N.Y. Feb. 5, 2016)	Federal question / U.S. party	Did not abstain	
Bloomington Jewish Educ. Ctr. v. Vill. of Bloomington, 111 F. Supp. 3d 459 (S.D.N.Y. 2015)	Federal question / U.S. party	Did not abstain	
Stahl York Ave. Co., LLC v. City of New York, No. 14-cv-7665, 2015 WL 2445071 (S.D.N.Y. May 21, 2015)	Federal question / U.S. party	Did not abstain	
Baez v. New York, 56 F. Supp. 3d 456 (S.D.N.Y. 2014)	Federal question / U.S. party	Did not abstain	

Cameron v. LR Credit 22, LLC, 998 F. Supp. 2d 293 (S.D.N.Y. 2014)	Federal question / U.S. party	Did not abstain	
Gaspar v. Pers. Touch Moving, Inc., No. 13-cv-8187, 2014 WL 4593944 (S.D.N.Y. Sept. 15, 2014)	Federal question / U.S. party	Did not abstain	
Uni-World Capital L.P. v. Preferred Fragrance, Inc., No. 13-cv-7204, 2014 WL 888372 (S.D.N.Y. Mar. 6, 2014)	Federal question / U.S. party	Did not abstain	
Hon Hai Precision Indus. Co. v. Wi-Lan, Inc., No. 12-cv-7900, 2013 WL 2322675 (S.D.N.Y. May 28, 2013)	Federal question / U.S. party	Did not abstain	
Dalzell Mgmt. Co. v. Bardonia Plaza, LLC, 923 F. Supp. 2d 590 (S.D.N.Y. 2013)	Federal question / U.S. party	Did not abstain	
Winfield v. Citibank, N.A., 842 F. Supp. 2d 560 (S.D.N.Y. 2012)	Federal question / U.S. party	Did not abstain	
DDR Constr. Servs., Inc. v. Siemens Indus., Inc., 770 F. Supp. 2d 627 (S.D.N.Y. 2011)	Federal question / U.S. party	Did not abstain	
Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC, No. 11-cv-3238, 2011 WL 13261585 (S.D.N.Y. Nov. 3, 2011)	Federal question / U.S. party	Did not abstain	
Mosley v. Baker, No. 10-cv-165, 2011 WL 2693513 (S.D.N.Y. June 30, 2011)	Federal question / U.S. party	Did not abstain	
Sheri Torah, Inc. v. Vill. of South Blooming Grove, No. 10-cv-3762, 2010 WL 3466487 (S.D.N.Y. Aug. 31, 2010)	Federal question / U.S. party	Did not abstain	
In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260 (S.D.N.Y. 2010)	Federal question / U.S. party	Did not abstain	

Argus Media Ltd. v. Tradition Fin. Servs. Inc., No. 09-cv-7966, 2009 WL 5125113 (S.D.N.Y. Dec. 29, 2009)	Federal question / U.S. party	Did not abstain	Dictum
Rodriguez v. City of New York, No. 09-cv-3642, 2009 WL 2569164 (S.D.N.Y. Aug. 19, 2009)	Federal question / U.S. party	Did not abstain	

Table 3: Seventh Circuit Cases Cited

Case	Outcome	Notes
Huon v. Johnson & Bell, Ltd., 657 F.3d 641 (7th Cir. 2011)	Reversed abstention	
Adkins v. VIM Recycling, Inc., 644 F.3d 483 (7th Cir. 2011)	Reversed abstention	
Montaño v. City of Chicago, 375 F.3d 593 (7th Cir. 2004)	Reversed abstention	
Admin. Comm. v. Gauf, 188 F.3d 767 (7th Cir. 1999)	Reversed abstention	
Sverdrup Corp. v. Edwardsville Cmty. Unit Sch. Dist. No. 7, 125 F.3d 546 (7th Cir. 1997)	Reversed abstention	
Bozek v. Bank of Am., N.A., 682 F. App'x 507 (7th Cir. 2017)	Affirmed abstention	
Freed v. J.P. Morgan Chase Bank, N.A., 756 F.3d 1013 (7th Cir. 2014)	Affirmed abstention	
Beck v. Dobrowski, 559 F.3d 680 (7th Cir. 2009)	Affirmed abstention	
Ingalls v. AES Corp., 311 F. App'x 911 (7th Cir. 2008)	Affirmed abstention	
Tyrer v. City of South Beloit, 516 F.3d 659 (7th Cir. 2008)	Affirmed abstention	
Tyrer v. City of South Beloit, 456 F.3d 744 (7th Cir. 2006)	Affirmed abstention	
Clark v. Lacy, 376 F.3d 682 (7th Cir. 2004)	Affirmed abstention	
CIGNA HealthCare of St. Louis, Inc. v. Kaiser, 294 F.3d 849 (7th Cir. 2002)	Affirmed abstention	
1st Am. Metals, Inc. v. Gough, 34 F. App'x 494 (7th Cir. 2002)	Affirmed abstention	

Hearne v. Bd. of Educ., 185 F.3d 770 (7th Cir. 1999)	Affirmed abstention	
Selmon v. Portsmouth Drive Condo. Ass'n, 89 F.3d 406 (7th Cir. 1996)	Affirmed abstention	

Table 4: Northern District of Illinois Cases Cited

Case	Jurisdictional Basis	Outcome	Notes
Restoration Servs., LLC v. R&R Boardwalk, LLC, No. 17-cv-1890, 2017 WL 5478304 (N.D. Ill. Nov. 15, 2017)	Diversity	Abstained	
Cramblett v. Midwest Sperm Bank, LLC, 230 F. Supp. 3d 865 (N.D. Ill. 2017)	Diversity	Abstained	
Freed v. Friedman, 215 F. Supp. 3d 642 (N.D. Ill. 2016)	Diversity	Abstained	
Alvarado v. U.S. Bank Nat'l Ass'n, No. 15-cv-7111, 2016 WL 3964051 (N.D. Ill. July 21, 2016)	Diversity	Abstained	
BCI Acrylic Bath Sys., Inc. v. Chameleon Power, Inc., No. 16-cv-68, 2016 WL 2987006 (N.D. Ill. May 24, 2016)	Diversity	Abstained	
Knight v. DJK Real Estate Grp., LLC, No. 15-cv-5960, 2016 WL 427614 (N.D. Ill. Feb. 4, 2016)	Diversity	Abstained	
Allstate Ins. Co. v. A.O. Smith Corp., No. 15-cv-6574, 2015 WL 6445529 (N.D. Ill. Oct. 23, 2015)	Diversity	Abstained	
Freed v. Weiss, 974 F. Supp. 2d 1135 (N.D. Ill. 2013)	Diversity	Abstained	
Commercial Forged Prods. v. Best Swivel Joints, L.P., No. 12-cv-10250, 2013 WL 5163760 (N.D. Ill. Sept. 13, 2013)	Diversity	Abstained	
Williams v. Quantum Servicing Corp., No. 11-cv-9106, 2013 WL 271669 (N.D. Ill. Jan. 23, 2013)	Diversity	Abstained	
Charles v. Bank of Am., N.A., No. 11-cv-8217, 2012 WL 6093903 (N.D. Ill. Dec. 5, 2012)	Diversity	Abstained	

Voga v. Frisbee, No. 11-cv-7160, 2012 BL 274213 (N.D. Ill. Oct. 19, 2012)	Diversity	Abstained	
Sterling Fed. Bank, F.S.B. v. Countrywide Fin. Corp., No. 11-cv-2012, 2012 WL 2368821 (N.D. Ill. June 21, 2012)	Diversity	Abstained	
Gu v. Bank of Am., No. 11-cv-6290, 2012 WL 414805 (N.D. Ill. Feb. 8, 2012)	Diversity	Abstained	
Merrill Lynch Commercial Fin., Corp. v. Trident Labs, Inc., No. 10-cv-5925, 2011 WL 2415159 (N.D. Ill. June 10, 2011)	Diversity	Abstained	
Bank of Am., N.A. v. Zahran, No. 10-cv-4461, 2011 WL 167241 (N.D. Ill. Jan. 19, 2011)	Diversity	Abstained	
Goldfein v. Brown, No. 10-cv-1955, 2010 WL 5146570 (N.D. Ill. Dec. 10, 2010)	Diversity	Abstained	
First Bank & Tr. Co. of Ill. v. Richardson, No. 08-cv-4987, 2010 WL 4136217 (N.D. Ill. Oct. 18, 2010)	Diversity	Abstained	
Indian Harbor Ins. Co. v. Republic Servs., Inc., No. 10-cv-3310, 2010 WL 3701308 (N.D. Ill. Sept. 10, 2010)	Diversity	Abstained	Alternative holding
Ritz of Chi., Ltd. v. Espinosa, No. 08-cv-50208, 2009 WL 1904401 (N.D. Ill. July 2, 2009)	Diversity	Abstained	
Corus Bank, N.A. v. De Guardiola, 593 F. Supp. 2d 991 (N.D. Ill. 2008)	Diversity	Abstained	
Allen & Co., LLC v. Sanford USD Med. Ctr., No. 08-cv-4596, 2008 WL 5387635 (N.D. Ill. Dec. 18, 2008)	Diversity	Abstained	
Young v. Schutz, No. 14-cv-2832, 2014 WL 6887500 (N.D. Ill. Dec. 8, 2014)	Diversity	Did not abstain	

Simons v. Ditto Trade, Inc., No. 14-cv-309, 2014 WL 6488338 (N.D. Ill. Nov. 19, 2014)	Diversity	Did not abstain	
Wells Fargo Bank, Nat'l Ass'n v. Leafs Hockey Club, Inc., No. 13-cv-2247, 2013 WL 5433789 (N.D. Ill. Sept. 30, 2013)	Diversity	Did not abstain	
Donnawell v. Hamburger, No. 12-cv-9074, 2013 WL 3243093 (N.D. Ill. June 25, 2013)	Diversity	Did not abstain	
Intetics Co. v. Adorama Camera, Inc., No. 11-cv-6385, 2012 WL 2061916 (N.D. Ill. June 4, 2012)	Diversity	Did not abstain	
Downey v. Keltz, No. 11-cv-1323, 2012 WL 280716 (N.D. Ill. Jan. 31, 2012)	Diversity	Did not abstain	
JLM Fin. Invs. 4 LLC v. Aktipis, No. 11-cv-2561, 2012 WL 74856 (N.D. Ill. Jan. 9, 2012)	Diversity	Did not abstain	
Scion Dwight Managing Member LLC v. Dwight Lofts Holdings, LLC, No. 10-cv-6118, 2011 WL 2020677 (N.D. Ill. May 24, 2011)	Diversity	Did not abstain	
Genworth Life Ins. Co. v. Davis, No. 10-cv-2031, 2011 BL 117218 (N.D. Ill. May 3, 2011)	Diversity	Did not abstain	
GE Bus. Servs. Inc. v. Galbut, No. 10-cv-5010, 2010 WL 5014224 (N.D. Ill. Dec. 1, 2010)	Diversity	Did not abstain	
Guar. Tr. Life Ins. Co. v. Am. Med. & Life Ins. Co., No. 10-cv-2125, 2010 WL 3721403 (N.D. Ill. Sept. 15, 2010)	Diversity	Did not abstain	
401 N. Wabash Venture, LLC v. Ascher Bros. Co., No. 10-cv-1962, 2010 WL 3699982 (N.D. Ill. Sept. 13, 2010)	Diversity	Did not abstain	
IFC Credit Corp. v. Sun State Capital Corp., No. 08-cv-6626, 2010 WL 1194230 (N.D. Ill. Mar. 18, 2010)	Diversity	Did not abstain	

Murphy Bros. Carnival Equip., LLC v. Corp. for Int'l Bus., No. 08-cv-4105, 2009 WL 3152827 (N.D. Ill. Sept. 28, 2009)	Diversity	Did not abstain	Dictum
Brink's Inc. v. Mahone, No. 08-cv-4711, 2008 WL 4543033 (N.D. Ill. Oct. 8, 2008)	Diversity	Did not abstain	
G4S Secure Integration LLC v. EX2 Tech., LLC, No. 17-cv-4277, 2017 BL 256705 (N.D. Ill. July 19, 2017)	Federal question / U.S. party	Abstained	
Kane v. Bank of Am., Nat'l Ass'n, No. 13-cv-8053, 2017 WL 2243055 (N.D. Ill. May 23, 2017)	Federal question / U.S. party	Abstained	
Suszka v. Fifth Third Bank, No. 16-cv-5868, 2017 WL 1397551 (N.D. Ill. Apr. 19, 2017)	Federal question / U.S. party	Abstained	
Beal Bank USA v. Swift, No. 16-cv-10729, 2017 WL 372325 (N.D. Ill. Jan. 26, 2017)	Federal question / U.S. party	Abstained	
Kinzy v. Howard & Howard, PLLC, No. 16-cv-8230, 2017 WL 168480 (N.D. Ill. Jan. 17, 2017)	Federal question / U.S. party	Abstained	
Bozek v. Bank of Am., N.A., No. 16-cv-3100, 2016 WL 6395509 (N.D. Ill. Oct. 28, 2016)	Federal question / U.S. party	Abstained	
Delaney v. Specialized Loan Servicing, LLC, No. 15-cv-5260, 2015 WL 7776902 (N.D. Ill. Dec. 3, 2015)	Federal question / U.S. party	Abstained	
Schuller v. Am.'s Wholesale Lender, No. 14-cv-4097, 2015 WL 5316413 (N.D. Ill. Sept. 9, 2015)	Federal question / U.S. party	Abstained	
Nieves v. Bank of Am., N.A., No. 14-cv-2300, 2015 WL 753977 (N.D. Ill. Feb. 20, 2015)	Federal question / U.S. party	Abstained	
Pellico v. Mork, No. 14-cv-226, 2014 WL 4948124 (N.D. Ill. Oct. 1, 2014)	Federal question / U.S. party	Abstained	
Smith v. Bank of Am., N.A., No. 14-cv-1041, 2014 WL 3938547 (N.D. Ill. Aug. 12, 2014)	Federal question / U.S. party	Abstained	

Lockhart v. HSBC Fin. Corp., No. 13-cv-9323, 2014 WL 4922356 (N.D. Ill. Sept. 30, 2014)	Federal question / U.S. party	Abstained	
Playboy Enters. Int'l, Inc. v. Play Beverages, LLC, No. 13-cv-826, 2013 WL 2151557 (N.D. Ill. May 15, 2013)	Federal question / U.S. party	Abstained	
Pirard v. Bank of Am., No. 12-cv-2901, 2013 WL 1154294 (N.D. Ill. Mar. 19, 2013)	Federal question / U.S. party	Abstained	
Petit v. Wash. Mut. Bank, F.A., No. 12-cv-318, 2012 WL 3437287 (N.D. Ill. Aug. 14, 2012)	Federal question / U.S. party	Abstained	
Amin v. 5757 N. Sheridan Rd. Condo Ass'n, No. 12-cv-446, 2012 WL 2049820 (N.D. Ill. June 6, 2012)	Federal question / U.S. party	Abstained	
Hartwig Transit, Inc. v. RBS Citizens, N.A., No. 10-cv-7448, 2011 WL 3651316 (N.D. Ill. Aug. 18, 2011)	Federal question / U.S. party	Abstained	
Shroats v. Customized Tech., Inc., No. 08-cv-5565, 2011 WL 2518917 (N.D. Ill. June 22, 2011)	Federal question / U.S. party	Abstained	
Huon v. Johnson & Bell, Ltd., No. 09-cv-7877, 2010 WL 3404967 (N.D. Ill. Aug. 26, 2010)	Federal question / U.S. party	Abstained	
Pieleanu v. Mortg. Elec. Registration Sys., Inc., No. 08-cv-7404, 2010 WL 1251445 (N.D. Ill. Mar. 24, 2010)	Federal question / U.S. party	Abstained	
Dupree v. Hill, No. 08-cv-4460, 2009 WL 1329155 (N.D. Ill. May 13, 2009)	Federal question / U.S. party	Abstained	
Stampley v. LVNV Funding, LLC, 583 F. Supp. 2d 960 (N.D. Ill. 2008)	Federal question / U.S. party	Abstained	
Jackson v. Safeguard Props., LLC, No. 16-cv-3281, 2017 WL 1209544 (N.D. Ill. Mar. 31, 2017)	Federal question / U.S. party	Did not abstain	

Eclipse Gaming Sys., LLC v. Antonucci, No. 17-cv-196, 2017 WL 3071258 (N.D. Ill. July 18, 2017)	Federal question / U.S. party	Did not abstain	
United States v. First Am. Title Ins. Co., No. 16-cv-7008, 2016 WL 7374277 (N.D. Ill. Dec. 20, 2016)	Federal question / U.S. party	Did not abstain	
Filipek v. Oakton Cmty. Coll., No. 16-cv-2902, 2016 WL 7104281 (N.D. Ill. Dec. 6, 2016)	Federal question / U.S. party	Did not abstain	
Foster v. PHH Mortg., No. 15-cv-7650, 2016 WL 1392334 (N.D. Ill. Mar. 31, 2016)	Federal question / U.S. party	Did not abstain	
Squires-Cannon v. Forest Pres. Dist., No. 15-cv-6876, 2016 WL 561917 (N.D. Ill. Feb. 12, 2016)	Federal question / U.S. party	Did not abstain	
River Docks, Inc. v. Roy Strom Excavating & Grading Co., No. 15-cv-5709, 2016 WL 164421 (N.D. Ill. Jan. 13, 2016)	Federal question / U.S. party	Did not abstain	
Envirogen Techs., Inc. v. Maxim Constr. Corp., Inc., No. 14-cv-2090, 2015 WL 7273106 (N.D. Ill. Nov. 18, 2015)	Federal question / U.S. party	Did not abstain	
Muhammad v. Aurora Loan Servs., LLC, No. 13-cv-1915, 2015 WL 1538409 (N.D. Ill. Mar. 31, 2015)	Federal question / U.S. party	Did not abstain	
Taylor v. Cook Cty. Sheriff's Office, No. 13-cv-1856, 2015 WL 1428920 (N.D. Ill. Mar. 26, 2015)	Federal question / U.S. party	Did not abstain	
McKenney-Becker v. Safeguard Props., LLC, No. 14-cv-4514, 2015 WL 170520 (N.D. Ill. Jan. 13, 2015)	Federal question / U.S. party	Did not abstain	
Novak v. Levenfeld Pearlstein, No. 13-cv-8861, 2014 WL 4555581 (N.D. Ill. Sept. 15, 2014)	Federal question / U.S. party	Did not abstain ³²²	

³²² For simplicity, because the court in *Novak* abstained on a very “narrow subset” of claims, this decision is treated as the court not abstaining in full. *Novak v. Levenfeld Pearlstein*, No. 13-cv-8861, 2014 WL 4555581, at *6 (N.D. Ill. Sept. 15, 2014).

Jin Won Lee v. First Tek, Inc., No. 12-cv-4571, 2013 WL 1195714 (N.D. Ill. Mar. 20, 2013)	Federal question / U.S. party	Did not abstain	
Fitter v. Navisis Fin. Grp., LLC, No. 12-cv-7353, 2013 WL 673866 (N.D. Ill. Feb. 25, 2013)	Federal question / U.S. party	Did not abstain	
Vangsness v. Deutsche Bank Nat. Tr. Co., No. 12-cv-50003, 2012 WL 5989354 (N.D. Ill. Nov. 29, 2012)	Federal question / U.S. party	Did not abstain	
M.E. Fields, Inc. v. Nissan N. Am. Inc., Infiniti Div., No. 11-cv-4408, 2011 WL 6156848 (N.D. Ill. Dec. 8, 2011)	Federal question / U.S. party	Did not abstain	
Oakland Cty. Emp.'s Ret. Sys. v. Massaro, 702 F. Supp. 2d 1012 (N.D. Ill. 2010)	Federal question / U.S. party	Did not abstain	
Position Techs., Inc. v. Johnson, No. 10-cv-3614, 2010 WL 5135905 (N.D. Ill. Dec. 10, 2010)	Federal question / U.S. party	Did not abstain	
Snellback Props., L.L.C. v. Aetna Dev. Corp., No. 08-cv-7326, 2009 WL 1606945 (N.D. Ill. June 9, 2009)	Federal question / U.S. party	Did not abstain	