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Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation

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JUDICIAL ABSTENTION AND EXCLUSIVE FEDERAL JURISDICTION: A RECONCILIATION

Federal judicial abstention made its debut nearly forty years ago[1] as a narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[2] The steady expansion[3] of this exception in the absence of express legislative sanction implicates complex separation of powers issues when a federal court is faced with a claim within its exclusive jurisdiction. This Note examines the conflict between judicial abstention and congressional enactments of exclusive federal jurisdiction and recommends judicial and legislative remedies to obviate this clash.

I

JUDICIAL ABSTENTION

The term "abstention" is ambiguous. The uncertainty that attends the concept has been generated by semantic as well as substantive confusion. Although some commentators have attempted to codify or systematize the doctrine,[4] courts' reluctance to acknowledge explicitly the gradual expansion of abstention has contributed significantly to the am-

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1 *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See also* Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

2 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). *See also* Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum).

3 *See* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4241, at 443 (1978) [hereinafter cited as WRIGHT, MILLER & COOPER]. *See generally* Schoenfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605 (1969). Several courts and commentators maintain that abstention has become so well ensconced in modern federal practice as to render the absolutist theory of federal jurisdiction obsolete. *See, e.g.,* Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 819 (9th Cir. 1975); Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 218 (3d ed. 1976).

4 *See, e.g.,* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48-50 (1969) [hereinafter cited as ALI STUDY]; C. WRIGHT, *supra* note 3, at 218-29; 17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4241, at 448-49; Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1111-33 (1974); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1147-87 (1974); Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75, 76-78 (1974); Note, *Abstention and Mandamus After Will v. Calvert Fire Insurance Co.*, 64 CORNELL L. REV. 566, 567-68 (1979); Note, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 971 n.1 (1979); Note, *Federal Court Stays And Dismissals In Deference To Parallel State Court Proceedings: The Impact of* Colorado River, 44 U. CHI. L. REV. 641, 648-51 (1977); 49 MISS. L.J. 951, 953-58 (1978).

biguity. The absence of a functional definition of abstention not only prevents judicial formulation of operative standards but obscures the constitutional implications of the practice as well. Therefore, in order to address properly the constitutional issue of judicial abstention in cases of exclusive federal jurisdiction, it is first necessary to articulate the doctrine of abstention as it manifests itself in the case law.

As defined in this Note, judicial abstention is a sweeping description of the judicially created practice whereby a federal court, despite the plaintiff's proper invocation of federal jurisdiction, declines to proceed promptly with the action in light of a similar proceeding pending or yet to be filed in another forum.[5] The term often is confined to a much narrower scope;[6] this is due largely to the normative nature of efforts to define the doctrine. This Note, however, is concerned less with what abstention *should* be than with what abstention *is* as reflected in the cases. The breadth of the judicial practice thus necessitates an equally broad definition.

Judicial abstention generally manifests itself in the five "postural patterns" described below.[7] Abstention is predicated in each situation

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[5] Although the alternative forum may be another federal court, *see, e.g.,* Landis v. North Am. Co., 299 U.S. 248 (1936), the discussion here is limited to federal abstention in view of a pending or yet to be filed proceeding in state court.

[6] There are five "postural patterns" of abstention. *See* notes 7-85 and accompanying text *infra*. Each "postural pattern" is a distinguishable category of abstention, encompassing the procedural aspects of the case as well as the court's reasoning. Most observers either iguore one or more of the postural patterns of abstention, *see* notes 7-10 and accompanying text *infra*, or simply confine their descriptions of the doctrine to a subset of the postural patterns. *See, e.g.,* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-17 (1976) ("abstention" confined to three categories: circumvention of premature constitutional decisions, discouraging federal interference with important state policies, and refusal to enjoin pending state proceeding brought by state officials in good faith); ALI STUDY, *supra* note 4, at 48-51, 282-98 (commentary to § 1371) (abstention confined to the *Pullman* and *Burford* postural patterns; *see* notes 11-30 and accompanying text *infra*); C. WRIGHT, *supra* note 3, at 218 (abstention is invoked to (1) avoid federal constitutional decision where potentially dispositive state law question presented; (2) avoid needless confiict with state administration of state affairs; (3) allow state courts to resolve unsettled questions of state law; (4) ease federal court congestion); Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977) (abstention confined to cases involving circumvention of premature constitutional decision; *see generally* notes 11-20 and accompanying text *infra*). This apparent confusion, or disagreement, may underlie courts' reluctance to acknowledge the scope of judicial abstention.

[7] Sec note 6 *supra* for an explanation of "postural patterns." Although courts and commentators have expended much energy in their attempts to articulate and control the parameters of judicial abstention, they have virtually ignored the procedural methods by which abstention can be exercised. A familiarity with the procedural complexities is essential, however, to a thorough understanding of the doctrine itself. Although the procedural method employed in any particular case does not necessarily parallel the postural patteru of abstention presented, courts often tailor the procedural devices to conform to the particular postural pattern of abstention exercised. A federal judge can "abstain" in a given case by employing any one of three procedural devices. *Remittal* is used to direct the parties to file and litigate an action in another forum (usually state court) in lieu of the federal proceeding. For examples

on different policy grounds. The underlying justification for abstention in each particular case thus becomes the key to formulating a workable definition of the doctrine as well as reasonable standards for its exercise. Abstention has continued to thrive because it is supported, alternatively, by the two transcendent policies of federalism and pragmatism. The "conventional prototypes,"[8] the bedrock of judicial abstention, emerged from general principles of federalism; the concern for federal/state comity outweighs any interests favoring adjudication of the dispute in plaintiff's chosen federal forum. Aside from the conventional prototypes, however, the case law indicates that there are two other postural patterns of abstention: jurisdictional "abeyance" and the total relinquishment of federal jurisdiction as "wise judicial administration."[9] These two patterns arc justified instead by considerations of pragmatism; the presence of concurrent state court proceedings in such situations implicates the extra expense and misappropriation of judicial resources inherent in duplicative litigation.[10]

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of what is here denominated "remittal," see Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The federal court will formally retain jurisdiction of the cause in order to ensure the availability of an alternative forum in case the state court fails to adequately dispose of the controversy. *See, e.g.,* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 513 (1972); Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967); Harrison v. NAACP, 360 U.S. 167, 179 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501-02 (1941); Druker v. Sullivan, 458 F.2d 1272, 1277 (1st Cir. 1972).

A federal court generally will order *dismissal* when another tribunal can adjudicate more effectively the entire controversy in proceedings already pending in that forum; nevertheless, courts can also employ dismissal in the absence of pending proceedings. Dismissal is the least common procedural method of abstention because it involves complete renunciation of federal jurisdiction. The court categorically refuses to exercise its jurisdiction and effectively bars access to the federal forum. *See, e.g.,* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

A federal court, however, normally will *stay* or suspend rather than dismiss the federal action when related proceedings are pending in state court. Technically, the stay is only a temporary suspension of federal jurisdiction, whereas the dismissal totally relinquishes federal jurisdiction. *See, e.g.,* McGough v. First Arlington Nat'l Bank, 519 F.2d 552 (7th Cir. 1975) (district court's stay order vacated); PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973).

8 *See* notes 11-43 and accompanying text *infra*.

9 *See* notes 44-85 and accompanying text *infra*.

10 Generally, commentators fail to recognize judicial abeyance as a form of abstention. *See, e.g.,* Bezanson, *supra* note 4, at 1111-33; Shapiro, *supra* note 4, at 76-77; Note, *supra* note 4, 46 U. CHI. L. REV. at 971 n.1; Note, *supra* note 4, 44 U. CHI. L. REV. at 648-51; 55 NOTRE DAME LAW. 601, 605 (1980). Those who subsume either jurisdictional abeyanco or jurisdictional relinquishment as "wise judicial administration," or both, under the abstention doctrine do so begrudgingly or cursorily, *see, e.g.,* C. WRIGHT, *supra* note 3, at 227-29; Ashman, Alfini & Shapiro, *Federal Abstention: New Perspectives on its Current Vitality*, 46 MISS. L.J. 629, 631-32, 652 (1975); McMillan, *Abstention—The Judiciary's Self-Inflicted Wound*, 56 N.C. L. REV. 527, 527 n.2 (1978), and generally characterize these postural patterns as unwarranted palliation of crowded federal dockets. *See, e.g.,* C. WRIGHT, *supra* note 3, at 227-29; Ashman, Alfini & Shapiro, *supra*, at 630. Relieving crowded federal dockets, however, is only one aspeet of the policy of pragmatism. This Note suggests that the two postural patterns generated by

A. *Conventional Prototypes*

1. *Circumvention of Premature Constitutional Decisions*

In *Railroad Commission v. Pullman Co.*,[11] the Supreme Court formally recognized judicial abstention as a means of avoiding premature constitutional litigation. The Texas Railroad Commission had issued an order prohibiting railroads from operating sleeping cars not supervised by Pullman conductors. Pullman conductors were white, and porters were black. Thus, the Commission's order effectively prevented blacks from operating these cars. The Pullman Company, other railroads, and Pullman porters brought an action in federal court, contending that the Commission's order was unauthorized by Texas law as well as violative of the fourteenth amendment and commerce clause of the United States Constitution. The Supreme Court determined that a question of state law existed concerning the propriety of the Commission's assumption of authority.[12] If the Commission lacked such authority, the order would have been beyond its jurisdiction and thus invalid under state law, rendering the federal constitutional issue moot. Consequently, the Court remitted[13] the parties to state court to obtain a ruling on the state law issue.[14]

Pullman's notion that a federal court should postpone[15] exercising jurisdiction when determination of an unsettled issue of state law by a state court might avoid or modify a federal constitutional question endures[16] despite judicial and academic criticism.[17] This postural patteru

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general considerations of pragmatism are properly part and parcel of judicial abstention as exercised today and are substantiated not merely by "crowded federal dockets" but by broader considerations as well. Duplicative litigation implicates the state court system and the parties involved as well as the interests of the federal court. Abstention in such circumstances may be predicated on preserving the litigants' limited time and resources and the efficiency of the respective court systems. *See generally* notes 48-54 and accompanying text *infra*.

11 312 U.S. 496 (1941).

12 *Id.* at 501.

13 *See* note 7 *supra* (definition of remittal).

14 312 U.S. at 501-02.

15 Although the federal court retains jurisdiction during the course of the state action, return to federal court is not certain. In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419 (1964), for example, the Court held that

> if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in [the United States Supreme Court]—he has elected to forgo his right to return to the District Court.

In other words, to preserve his right to return to federal court, a litigant must clearly indicate that he is entering state court for adjudication of the state law issue in light of the constitutional claim, rather than for adjudication of the federal constitutional claim itself. *Id.* at 419-22. *See also* Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364, 366 (1957).

16 *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Fornaris v. Ridge Tool

of abstention not only serves the policies of federalism by deferring to state courts on uncertain matters of local law, but also precludes a federal constitutional decision that a proper interpretation of local law would render unnecessary. Nevertheless, neither an opportunity to avoid a constitutional claim nor the doubtful nature of state law alone justifies abstention.[18] Remittal is not automatic[19] and is available only when the state law issue is uncertain and subject to an interpretation that will eliminate or significantly change the posture of the federal constitutional question.[20]

2. *Discouraging Federal Interference with Important State Policies*

The second conventional prototype of judicial abstention, also founded upon considerations of federalism,[21] arises from the reluctance of federal courts to intrude in matters of state domestic policy. In *Burford v. Sun Oil Co.*,[22] the Supreme Court upheld the district court's dis-

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Co., 400 U.S. 41 (1970) (per curiam); Harrison v. NAACP, 360 U.S. 167 (1959); *cf.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (abstention appropriate where state court interpretation of relevant state law might moot or change the federal constitutional issue); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 825-26 (1959) (trial judge should stay action if federal constitutional issue is "intermingled with unsettled questions of state law"). *See generally* 17 WRIGHT, MILLER & COOPER, *supra* note 3, §§ 4242-4243, at 449-82.

17 *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 432-37 (1964) (Douglas, J., concurring); Harrison v. NAACP, 360 U.S. 167, 180 (1959) (Douglas, J., dissenting); Druker v. Sullivan, 458 F.2d 1272, 1274 & n.4 (1st Cir. 1972); ALI STUDY, *supra* note 4, at 283-84 (commentary to § 1371); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER]; Field, *supra* note 6, at 591-92; Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 488-89 (1959); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine In An Activist Era*, 80 HARV. L. REV. 604, 622 (1967). Professor Field suggests that the delay, expense, and frustration that litigants encounter under the *Pullman* pattern of abstention are unjustifiable and recommends that *Pullman* be displaced by a certification procedure. Field, *supra*, at 592, 605-09; *see* Kurland, *supra*, at 489-90. *See generally* Lehman Bros. v. Schein, 416 U.S. 386 (1974); 17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4248, at 519-32 (discussing certification to state court), 525 n.29 (citing state certification statutes).

18 *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976); Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Meredith v. City of Winter Haven, 320 U.S. 228, 236-37 (1943); Druker v. Sullivan, 458 F.2d 1272, 1274 (1st Cir. 1972).

19 Baggett v. Bullitt, 377 U.S. 360, 375 (1964); NAACP v. Bennett, 360 U.S. 471 (1959) (per curiam).

20 Zwickler v. Koota, 389 U.S. 241, 251 n.14 (1967); Harman v. Forssenius, 380 U.S. 528, 534-35 (1965).

21 *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) ("The justification for [abstention under these circumstances] lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State."). *See generally* Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959).

22 319 U.S. 315 (1943).

missal[23] of an action concerning a drilling permit issued by a state regulatory commission.[24] The state legislature had established a special system of state court review of the commission's orders. The Supreme Court concluded, therefore, that the exercise of federal jurisdiction effectively would usurp the state's power of administrative review and regulation of the local oil industry and deemed dismissal of the federal actions appropriate under the circumstances.[25]

Cases within the *Burford* pattern of abstention generally involve areas of traditional state power[26] where the exercise of federal jurisdiction would generate needless friction with a state's administration of its own affairs.[27] As with the *Pullman* doctrine,[28] however, abstention under the *Burford* pattern should not be automatic.[29] Abstention is warranted only if the state policy is of "substantial public import"[30] to the state, or of such uncertain nature that federal disposition of the issue would disrupt state efforts to establish a clear policy in the area of dispute.

3. *Refusal to Enjoin Pending State Proceedings*

The third conventional prototype of judicial abstention also rests on principles of federalism and reflects the federal policy that generally forbids enjoinder of pending state court proceedings. In *Younger v. Harris*,[31] the Supreme Court held that a federal court, in the absence of exceptional justifications, should refuse to enjoin a pending state criminal proceeding prosecuted by state officials in good faith. Harris, indicted in state court for violating the California Criminal Syndicalism Act,[32] filed suit in federal court for an injunction restraining the District

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23 *See* note 7 *supra* (definition of dismissal).

24 319 U.S. at 334.

25 *Id.* at 327-34.

26 *See, e.g.,* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (per curiam) (water rights); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (eminent domain); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (intrastate railroad regulation); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228 (1st Cir. 1979) (automobile insurance rates).

27 *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228 (1st Cir. 1979); C. WRIGHT, *supra* note 3, at 222.

28 *See* notes 11-20 and accompanying text *supra*.

29 *See* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959) ("Abdication of the obligation to decide cases can be justified under [abstention] only in the exceptional circumstances where the order to the parties to repair to the state court *would clearly serve an important countervailing interest*." (emphasis added)). *See also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976).

30 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); *cf.* Zablocki v. Redhail, 434 U.S. 374, 379-80 n.5 (1978) ("[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.").

31 401 U.S. 37 (1971).

32 CAL. PENAL CODE §§ 11400, 11401 (West 1970) (amended 1976).

Attorney from prosecuting him, alleging that the state statute violated his right of free expression under the first and fourteenth amendments of the United States Constitution.[33] A three-judge district court concluded that the state statute was unconstitutional and issued an injunction restraining further state prosecution.[34] The Supreme Court reversed the district court's ruling on the grounds that it contravened the longstanding policy against federal court interference with state court proceedings.[35] The Court explained that a court of equity should not restrain a criminal prosecution when the plaintiff has an adequate remedy at law unless the plaintiff would suffer "irreparable injury"[36] absent such relief. Moreover, the Court declared, the policy against such interference is augmented by underlying principles of comity and federalism.[37] Although federal courts should not hesitate to vindicate federal rights, they should do so in ways that will not interfere with legitimate state activities.[38]

Although *Younger* and its companion cases[39] "left open almost as many questions as they resolved,"[40] abstention usually will be exercised

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33 Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971). More specifically, Harris alleged that the pending prosecution and the prospective enforcement of the state statute constituted a deprivation of his constitutional rights under color of the statute, within the meaning of 42 U.S.C. § 1983. 281 F. Supp. at 509.

34 *Id.* at 517.

35 401 U.S. at 41. The Court's disposition of the case did not necessitate consideration of the applicability of the federal anti-injunction statute, 28 U.S.C. § 2283 (1979), which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." "Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention," the Court stated, "we have no occasion to consider whether 28 U.S.C. § 2283 . . . would in and of itself be controlling under the circumstances of this case." 401 U.S. at 54. The Court decided this question one year later in Mitchum v. Foster, 407 U.S. 225 (1972), holding that "§ 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [the anti-injunction statute]." *Id.* at 243.

36 401 U.S. at 46.

37 The concepts of federalism and comity are embodied in

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44.

38 *Id.*

39 Byre v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

40 17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4251, at 542-43 (footnote omitted). For an excellent overview of *Younger* and its progeny, see *id.* §§ 4251-4255.

In Steffel v. Thompson, 415 U.S. 452 (1974), the Court held that federal declaratory relief is not precluded, regardless of whether injunctive relief may be appropriate, when a state prosecution under a disputed state criminal statute has been threatened but is not pend-

under the third conventional prototype unless the federal plaintiff demonstrates bad faith and harassment on the part of state officials[41] or the statute in question is flagrantly and patently unconstitutional on its face.[42] Moreover, abstention is not warranted in the absence of a pending prosecution[43] because the relevant principles of comity, federalism, and equity are not implicated.

B. *Federal Abeyance in Light of Concurrent State Proceedings*

In addition to the conventional prototypes and traditional descriptions of abstention,[44] the cases clearly demonstrate that a fourth postural pattern of abstention exists: the abeyance or suspension of a federal action pending final determination of a concurrent proceeding between the parties in state court. Abeyance is always effectuated by the stay[45] and rests primarily on *pragmatic* considerations rather than on the deep-rooted notions of federalism that underlie the conventional prototypes.

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ing. *Id.* at 475. In its next Term, a closely divided Court in Hicks v. Miranda, 422 U.S. 332 (1975), held that "where state criminal proceedings are begun against the federal plaintiffs *after* the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." *Id.* at 349 (first emphasis added). Consequently, as one authority has noted,

> the dividing line between Younger and Steffel continues to turn on the pendency of a state proceeding, but the commencement of the federal action is no longer the critical date in determining whether a state action is pending. Instead the federal court is to make that determination when it is ready to commence proceedings of substance on the merits.

17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4253, at 565.

Younger later was extended from the criminal to the civil context in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In *Huffman*, state officials had obtained an injunction in state court to close down Pursue's theatre under the Ohio public nuisance statute, OHIO REV. CODE ANN. § 3767.01-.99 (Page 1980). Pursue did not appeal the state court decision, but immediately filed an action in federal court challenging the statute. The district court permanently enjoined execution of a portion of the state court judgment on constitutional grounds. On appeal, the Supreme Court remanded the action so that the district court could consider the case in light of the *Younger* decision. The Court reiterated the importance of federalism considerations and explained that Pursue should have exhausted its state appellate remedies before seeking federal relief. 420 U.S. at 609.

The *Huffman* Court confined its holding to the type of civil action presented there ("a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. . . . [T]he [state] proceeding is both in aid of and closely related to criminal statutes . . . ." *Id.* at 604). *Id.* at 607. Subsequently, however, the Court extended *Younger* to include other civil proceedings involving the state. *See* Moore v. Sims, 442 U.S. 415 (1979) (temporary custody of abused children); Trainor v. Hernandez, 431 U.S. 434 (1977) (writ of attachment to protect fiscal integrity of public assistance programs); Juidice v. Vail, 430 U.S. 327 (1977) (civil contempt).

41 Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975); Younger v. Harris, 401 U.S. 37, 54 (1971).

42 Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975); Younger v. Harris, 401 U.S. 37, 56 (1971) (Stewart, J., concurring).

43 Steffel v. Thompson, 415 U.S. 452, 475 (1974); *see* note 40 *supra*.

44 *See* note 6 *supra*.

45 *See* note 7 *supra* (definition of stay).

The judge stays the action, in other words, because he believes it is sensible to do so.

In *PPG Industries, Inc. v. Continental Oil Co.*,[46] for example, PPG filed an action against Conoco in federal district court for a declaratory judgment and injunctive relief. Previously, Conoco had filed a declaratory judgment action in state court against PPG and another party; the state action embraced the same issues as the federal suit. The district court stayed the federal action, and the Fifth Circuit affirmed, predicating its decision on such considerations of practical prudence[47] as judicial economy and concern for the litigants' time and resources.[48]

Various practical considerations support abeyance. In the absence of abeyance, the waste of judicial resources is inevitable, because the action concluded first will be given preclusive effect in the suit still in progress.[49] The inevitability that some facet of res judicata will arise, either claim or issue preclusion, often provokes a race to the courthouse[50] and may create needless friction between the state and federal systems.[51] Furthermore, duplicative proceedings invite undesirable procedural tactics and maneuvers,[52] generate unnecessary expenditures, and increase the caseload of already overburdened federal dockets.[53]

A federal court should not, however, exercise its power of abeyance in deference to concurrent state proceedings indiscriminately. It should require the parties to litigate the issues in a forum capable of resolving the major controversy.[54] The federal forum may be the preferred choice

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46 478 F.2d 674 (5th Cir. 1973).

47 *Id.* at 680 ("[T]he increasingly crowded dockets of the federal courts have magnified the importance of this *practical consideration*." (emphasis added)). *See also* Thompson v. Boyle, 417 F.2d 1041 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949); Butler v. Judge of United States Dist. Court, 116 F.2d 1013 (9th Cir. 1941); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 991 (1950).

48 PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 680 (5th Cir. 1973).

49 *See* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 685 (1960); Note, *supra* note 47, at 983.

50 *See* Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 820 (9th Cir. 1975); PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 680 (5th Cir. 1973); Note, *supra* note 49, 60 COLUM. L. REV. at 688; Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281, 1281 n.7 (1978).

51 *See* Note, *supra* note 49, 60 COLUM. L. REV. at 688; Note, *supra* note 4, 44 U. CHI. L. REV. at 641.

52 Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 194 (2d Cir.) (dissenting opinion), *cert. denied*, 350 U.S. 825 (1955); Note, *supra* note 47, at 983.

53 *See* Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 820 (9th Cir. 1975); Kurland, *supra* note 17, at 492; Note, *supra* note 4, 44 U. CHI. L. REV. at 641.

54 Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 810 (S.D.N.Y. 1970), *aff'd per curiam*, 452 F.2d 662 (2d Cir. 1971); Kahan v. Rosenstiel, 285 F. Supp. 61, 62 (D. Del. 1968).

if the parties or issues differ significantly between the actions[55] or if the absence of certain procedural devices in the state court—for example, liberal federal discovery—would affect significantly the outcome of the litigation.[56] If the state court is otherwise competent to adjudicate the issues, the federal parties are parties to the state proceeding (or could be by joinder), and there is no critical procedural disparity involved, the federal judge properly may stay the federal suit or certain issues therein pending state court litigation.[57]

Although the Supreme Court has not explicitly recognized jurisdictional abeyance as an expansion of conventional abstention, it recently endorsed the procedural device that effectuates jurisdictional abeyance.[58] In *Will v. Calvert Fire Insurance Co.*,[59] the Court acknowledged the discretionary power of a district court to stay federal proceedings in deference to a related contemporaneous state action.[60] The suit initially arose in state court because Calvert had attempted to rescind an agreement to join a reinsurance pool operated by American Mutual Reinsurance Company. American Mutual sued in Illinois state court, seeking to bind Calvert to the reinsurance pool agreement. Calvert filed a federal complaint, which included allegations of federal securities violations, against American Mutual on the same day that it answered and filed a counterclaim to American Mutual's state court complaint.[61] Judge Will of the district court subsequently stayed federal proceedings pending the

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55 *See* Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976); Lecor, Inc. v. United States Dist. Court, 502 F.2d 104, 106 (9th Cir. 1974); Cunningham v. Ford Motor Co., 413 F. Supp. 1101, 1106 (D.S.C. 1976); Abdin v. Goodbody & Co., 339 F. Supp. 1311, 1313 (E.D. Wis. 1972).

56 *See* Note, *supra* note 49, 60 COLUM. L. REV. at 705-06; Note, *supra* note 47, at 984.

57 *See, e.g.*, Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949), in which the Second Circuit affirmed the district court's decision to stay a federal shareholders' derivative suit pending determination of a similar state court action. *See also* Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942); Weiner v. Shearson, Hammill & Co., 521 F.2d 817 (9th Cir. 1975); Thompson v. Boyle, 417 F.2d 1041, 1042 (5th Cir. 1969) ("[T]he ends of sound administration of justice are more likely to be served than obviated" by abeyance in certain circumstances.), *cert. denied*, 397 U.S. 972 (1970); Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964). *But see* Wright, *supra* note 16, at 826.

58 *See* note 45 and accompanying text *supra*. In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (plurality opinion), the Court sanctioned the discretionary stay order, *see* note 60 *infra*, but did not explicitly recognize the propriety of abeyance as an exercise of judicial abstention. In fact, the plurality never mentioned abstention. The decision is thus indicative of courts' reluctance to acknowledge the actual scope of abstention as well as the nebulousness of the doctrine as traditionally defined.

59 437 U.S. 655 (1978) (plurality opinion).

60 Justice Rehnquist, writing for the plurality, explained that "a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of that court." *Id.* at 665.

61 Calvert's answer and state court counterclaim essentially alleged common law fraud and securities law violations. The federal suit also involved securities law violations as well as other allegations asserted in the state court defense. *Id.* at 658-59. Among the securities violations alleged was a violation of the Securities Exchange Act of 1934. Section 27 of that

outcome of the state suit against Calvert.[62] The Seventh Circuit responded with a writ of mandamus directing Judge Will to vacate the stay and proceed with the federal securities claims.[63] The Supreme Court granted certiorari,[64] but only to consider the propriety of the use of mandamus in the case,[65] and later reversed in a five to four plurality decision.[66]

Speaking for the plurality, Justice Rehnquist noted that congressional expansion of federal jurisdiction has led to increasing overlap between state and federal claims; thus, federal courts may properly defer to state courts in certain situations to avoid federal/state judicial friction and duplicative litigation.[67] Because of the context in which the Court considered the controversy, however, the plurality was generally silent with respect to guidelines for the exercise of such discretion.[68] More notably, although the case involved an exclusively federal claim, the plurality abnegated the opportunity to discuss the effect of exclusive jurisdiction upon this growing area of judicial abstention.[69]

C. *Relinquishment of Federal Jurisdiction as "Wise Judicial Administration"*

Although courts generally have failed to acknowledge the breadth of abstention practice, the Supreme Court has attempted to enunciate the parameters of judicial abstention. In *Colorado River Water Conservation District v. United States*,[70] the United States filed suit in federal court to obtain adjudication of the government's rights to certain state waters. A Colorado statute divided the state into seven judicial "water divisions" in order to effectuate the prompt and comprehensive disposition of such claims.[71] When the United States filed the *Colorado River* action, it was

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act, 15 U.S.C. § 78aa (1976), grants federal district courts exclusive jurisdiction to enforce the Act.

62 *See* Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 794 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978) (plurality opinion).

63 560 F.2d at 797.

64 Will v. Calvert Fire Ins. Co., 434 U.S. 1008 (1978).

65 437 U.S. at 658.

66 Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

67 *Id.* at 663.

68 The Court was concerned with the Seventh Circuit's issuance of a writ of mandamus to vacate Judge Will's stay order. *See generally* Note, *supra* note 4, 64 CORNELL L. REV. Justice Rehnquist concluded that a writ of mandamus would be authorized only if Calvert could show a " 'clear and indisputable' right" to have its claims adjudicated in federal court. 437 U.S. at 662. The stay order was a discretionary decision; a "clear and indisputable" right could not conceivably coexist with such discretionary power. Therefore, the writ could not issue.

69 *See generally* note 61 *supra*; notes 93-122 and accompanying text *infra*. For further analysis of *Will* as it relates to exclusive federal jurisdiction, see notes 111-14 and accompanying text *infra*.

70 424 U.S. 800 (1976).

71 COLO. REV. STAT. § 37-92-101 (1973).

concurrently involved in water rights litigation in several such state divisions.[72] After the federal suit was initiated, a party to a related state proceeding joined the United States to the state action under the McCarran Amendment.[73] The district court subsequently dismissed[74] the federal action in light of the state proceeding already in progress and to which the United States had just been made a party. The court of appeals reversed the order as an inappropriate exercise of judicial abstention,[75] but the Supreme Court held that the district court's decision to dismiss was proper.[76] The Court recognized that "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions . . . . These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' "[77]

Although the Court explicitly refused to recognize the dismissal as abstention,[78] its decision evinces another postural pattern of judicial abstention unlike the conventional prototypes. The Court emphasized the federal courts' obligation to exercise their jurisdiction[79] and explained that the circumstances permitting dismissal of a federal action for reasons of "wise judicial administration" are even "more limited" than

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72 424 U.S. at 806.

73 43 U.S.C. § 666 (1976). The McCarran Amendment provides for joinder of the United States as defendant in suits for the adjudication of water rights:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Id.

74 *See* note 7 *supra* (definition of dismissal).

75 United States v. Akin, 504 F.2d 115 (10th Cir. 1974), *rev'd sub nom.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

76 424 U.S. at 820.

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

78 Justice Brennan, writing for the majority, explicitly maintained that the propriety of dismissal under such circumstances cannot be justified under the abstention doctrine "in any of its forms." 424 U.S. at 813. Justice Brennan confined his definition of "the doctrine of abstention" to the conventional prototypes. *Id.* at 814-17. *See generally* notes 11-43 and accompanying text *supra*. Thus, the majority's characterization of *Colorado River* is predictable. The Court preferred to confine the term "abstention" to the limited set of particular examples (the conventional prototypes) that rest on grounds of federalism rather than using the term to convey a more comprehensive description of the general judicial practice itself, which rests on grounds of both federalism and pragmatism. *See generally* notes 5-10 and accompanying text *supra*.

79 424 U.S. at 817.

those appropriate for judicial abstention in its traditional forms.[80] A federal court presented with a claim related to concurrent state proceedings may, therefore, dismiss the federal action only if special circumstances[81] override the heavy obligation to exercise jurisdiction.

Colorado River thus establishes a fifth postural pattern of judicial abstention under which a federal court may, when presented with a federal claim, totally relinquish its jurisdiction in deference to a pending state action in order to avoid duplication of judicial effort and ensure that the controversy is adjudicated in the forum most likely to make a comprehensive decision.[82] Although its theoretical basis is the pragmatism of "wise judicial administration," *Colorado River* is a hybrid of the *Burford* prototype[83] and jurisdictional abeyance.[84] Although jurisdictional abeyance is based on pragmatic considerations, it does not involve dismissal.[85] On the other hand, the *Burford* prototype frequently does involve dismissal—but its underlying justification is federalism, not pragmatism. This may explain the *Colorado River* Court's limited endorsement of pragmatic dismissal to situations more restricted in scope than those in which judicial abstention is justified by considerations of federal/state comity.

II

EXCLUSIVE FEDERAL JURISDICTION

Certain areas of statutory law are accompanied by a legislative policy judgment that affirmative claims for relief arising from such statu-

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80 *Id.* at 818.

81 The Court found such special circumstances in *Colorado River*. First, the policy behind the McCarran Amendment is to avoid piecemeal litigation of water rights in the river system. In addition, the federal action was relatively incipient, the state proceedings were of an extensive nature, and the government was participating in other such state actions. *See id.* at 819-20.

82 The Seventh Circuit recently reaffirmed *Colorado River* in Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 600 F.2d 1228, 1233 (7th Cir. 1979).

83 *See generally* notes 21-30 and accompanying text *supra*.

84 *See generally* notes 44-69 and accompanying text *supra*.

85 Although it has been argued that a stay is, in effect, a dismissal because of the possible preclusive effects of the state decision, *see* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 834 (9th Cir. 1963); 17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4247, at 517-18; Note, *supra* note 4, 44 U. CHI. L. REV. at 662 n.143; 55 NOTRE DAME LAW. 601, 606 n.35 (1980), the procedural distinction between the two is clear. The dismissal is a complete renunciation of federal jurisdiction, but a stay ensures formal retention of federal jurisdiction so that the federal court can monitor subsequent developments and reserve the right to make the ultimate decision. *See* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 835 (9th Cir. 1963) (dissenting opinion); Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 459 F. Supp. 859, 863-64 (N.D. Ill. 1978) (mem.), *aff'd*, 600 F.2d 1228 (7th Cir. 1979).

tory rights are to be brought exclusively in the federal courts.[86] Although a state court may consider an exclusively federal matter if it is raised collaterally in a state proceeding,[87] exclusive federal jurisdiction generally is indicative of a congressional determination that the protected interests extend beyond the individual parties to the suit.[88] The grant of exclusive federal jurisdiction may be an attempt to ensure uniform vindication of federal laws[89] or the availability of federal procedural rules,[90] to develop and maintain federal expertise in such areas,[91] or to eschew state court incompetence or prejudice[92] with respect to controversies under such statutes. The type of jurisdiction (exclusive or concurrent) that Congress selects for a particular area may betoken the weight it accords these interests. If so, judicial abstention in the face of an exclusive jurisdictional grant is a serious challenge to Congress's pre-

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86 *See, e.g.,* 15 U.S.C.A. § 15 (West Supp. 1981) (antitrust) (implied exclusive jurisdiction); 15 U.S.C. § 78aa (1976) (securities); 18 U.S.C. § 3231 (1976) (crimes against the United States); 28 U.S.C. § 1333 (1976) (admiralty); 28 U.S.C. § 1334 (1976) (bankruptcy); 28 U.S.C.A. § 1337 (West Supp. 1981) (antitrust) (implied exclusive jurisdiction); 28 U.S.C. § 1338 (1976) (patents and copyrights); 28 U.S.C. § 1351 (Supp. III 1979) (actions against mission members, consuls, or vice consuls of foreign states).

The jurisdictional grant covering private actions under both the Sherman and Clayton antitrust acts provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may* sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . ." 15 U.S.C.A. § 15 (West Supp. 1981) (emphasis added). Courts, however, have determined that such jurisdiction is exclusively federal. *E.g.,* Freeman v. Bee Mach. Co., 319 U.S. 448, 451 n.6 (1943); Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920) (dictum); Klein v. American Luggage Works, Inc., 206 F. Supp. 924, 935 (D. Del. 1962), *rev'd on other grounds*, 323 F.2d 787 (3d Cir. 1963); *see* Redish & Meunch, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 316-18 (1976) (arguing that legislative history of Sherman Act indicates that Congress did not intend exclusive federal jurisdiction); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 & n.13 (1957) (same).

87 *See* McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 555 n.1 (7th Cir. 1975). *See generally* Note, *supra* note 86, at 510.

88 Congress's power to grant exclusive federal jurisdiction was declared constitutional in The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-30 (1866). For discussions and critiques of exclusive jurisdiction, see Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 347-48 (1978); Note, *supra* note 86.

89 Will v. Calvert Fire Ins. Co., 437 U.S. 655, 670 (1978) (Brennan, J., dissenting); Cooper, *State Law of Patent Exploitation*, 56 MINN. L. REV. 313, 315 (1972); Note, *supra* note 4, 64 CORNELL L. REV. at 590; Note, *supra* note 50, 91 HARV. L. REV. at 1281-82; Note, *supra* note 86, at 511; Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1365 (1967).

90 Note, *supra* note 4, 64 CORNELL L. REV. at 590; Note, *supra* note 50, 91 HARV. L. REV. at 1282; Note, *supra* note 89, 53 VA. L. REV. at 1365.

91 Will v. Calvert Fire Ins. Co., 437 U.S. 655, 670 (1978) (Brennan, J., dissenting); Cooper, *supra* note 89, at 315; Note, *supra* note 4, 64 CORNELL L. REV. at 590; Note, *supra* note 50, 91 HARV. L. REV. at 1282; Note, *supra* note 86, at 512; Note, *supra* note 89, 53 VA. L. REV. at 1365.

92 Note, *supra* note 4, 64 CORNELL L. REV. at 590; Note, *supra* note 50, 91 HARV. L. REV. at 1282; Note, *supra* note 86, at 512.

viously uncontroverted prerogative to allocate jurisdiction in the lower federal courts.

A. *Effects on Judicial Abstention*

1. *Generally*

The power of a federal court to exercise judicial abstention when the federal action involves a claim within the court's exclusive jurisdiction is an open question.[93] Some observers maintain that the exclusive nature of federal jurisdiction totally disengages the power of judicial abstention regardless of the complexity or peculiarity of the particular facts in any given situation.[94] Some courts have refused to stay federal proceedings in deference to legislative jurisdictional policy[95] or simply because the state court would be unable to grant affirmative relief on an exclusively federal matter.[96]

In *Mach-Tronics, Inc. v. Zirpoli*,[97] Ampex Corporation sued Mach-Tronics in state court, alleging unfair competition, breach of confidentiality, and wrongful appropriation of trade secrets. As an affirmative defense, Mach-Tronics asserted that Ampex had violated federal antitrust laws.[98] Two months later, Mach-Tronics sued Ampex in federal district court alleging federal antitrust violations. The district court stayed the federal claim pending the outcome of the state action. The Ninth Circuit ordered the district court to vacate its stay, stating that judicial abstention would "fly in the face"[99] of congressional jurisdictional policy.[100]

Other courts that have refused to exercise judicial abstention in

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93 Key v. Wise, 629 F.2d 1049, 1060 (5th Cir. 1980), *cert. denied*, 102 S. Ct. 682 (1981) (Brennan, Marshall, and Blackmun, JJ., dissenting).

94 *See, e.g.*, Wellington Computer Graphics, Inc. v. Modell, 315 F. Supp. 24, 27-28 (S.D.N.Y. 1970); 55 NOTRE DAME LAW. 601, 613 (1980); 24 VILL. L. REV. 815, 825 (1978-1979).

95 *E.g.*, Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 834 (9th Cir. 1963); Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); Wellington Computer Graphics, Inc. v. Modell, 315 F. Supp. 24, 27 (S.D.N.Y. 1970).

96 *E.g.*, McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 555 (7th Cir. 1975); Lecor, Inc. v. United States Dist. Court, 502 F.2d 104, 106 (9th Cir. 1974); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 811 (S.D.N.Y. 1970), *aff'd per curiam*, 452 F.2d 662 (2d Cir. 1971); Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72, 74 (S.D.N.Y. 1962). *See also* notes 54-57 and accompanying text *supra*.

As defined in this Note, an "exclusively federal" matter is an issue that, if made the basis of a claim for affirmative relief under a statute granting exclusive jurisdiction to the federal courts, would be within the federal courts' exclusive jurisdiction.

97 316 F.2d 820 (9th Cir. 1963).

98 15 U.S.C.A. § 15 (West Supp. 1981) grants implied exclusive federal jurisdiction for controversies arising under the antitrust provisions. *See* note 86 *supra*.

99 316 F.2d at 833.

100 The court found support for such reasoning in Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), an earlier decision involving similar

matters involving grants of exclusive jurisdiction have taken a less reverential and more expedient approach to the problem. These courts simply regard the exclusive grant as an additional factor to be considered when the district court decides, in its discretion, whether or not to stay the federal suit.[101] The presence of an exclusively federal claim may be a determinative factor, however, if it appears that the presence of such a claim would severely hamper the state court's ability to adjudicate the controversy.[102]

Nevertheless, exclusive jurisdiction has not entirely stolen the thunder from judicial abstention. In *Klein v. Walston & Co.*,[103] the Second Circuit held that although the state court would be powerless to determine certain claims asserted in the federal action but not advanced in the state suit, the state court could "authoritatively determine the common law claims and perhaps also defenses . . . that may be dispositive of [the exclusively federal claim] as well."[104] Thus, the district court was correct in staying the federal action pending final determination of the state suit. Furthermore, "in these days of congested calendars the judge was amply justified in not allowing litigation . . . to occupy the energies

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facts, in which Judge Learned Hand had formulated the problem as one of congressional intent:

> [T]he inquiry comes down to whether, when Congress gave exclusive jurisdiction to the district court . . ., it only meant that the "person who shall be injured" must sue in the district court to recover damages; or whether it also meant that the district court must have unfettered power to decide the claim . . . .

Id. at 188. Judge Hand chose the latter interpretation and directed the lower court to vacate the stay and proceed with the litigation. *Id.* at 189-90.

The Ninth Circuit was equally concerned about the absence of a jury in the state action:

> It would seem to us to be unthinkable that a federal court having exclusive jurisdiction of a treble damage antitrust suit would tie its own hands by a stay of this kind in order to permit a judge of a state court, without a jury, to make a determination which would rob the federal court of full power to determine all of the fact issues before it.

316 F.2d at 833.

101 *See* notes 54-57 and accompanying text *supra*. *See generally* notes 44-69 and accompanying text *supra*.

102 *See* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975) (securities—neither federal, state, nor parties' interests would be served by judicial abstention); Lecor, Inc. v. United States Dist. Court, 502 F.2d 104, 106 (9th Cir. 1974) (securities—federal court only forum where all issues with respect to all parties can be litigated); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 811 (S.D.N.Y. 1970), *aff'd per curiam*, 452 F.2d 662 (2d Cir. 1971) (securities—all claims could be more effectively adjudicated in federal court); Note, *supra* note 4, 44 U. CHI. L. REV. at 677-78 (categorical assumption that state forum is more appropriate may be rebutted in certain cases by presence of exclusive federal jurisdiction). *See also* Kahan v. Rosenstiel, 285 F. Supp. 61 (D. Del. 1968) (mem.) (securities); Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72 (S.D.N.Y. 1962) (copyright).

103 432 F.2d 936 (2d Cir. 1970) (per curiam).

104 *Id.* at 937.

of two courts at the same time."[105] In *Weber v. Consumers Digest, Inc.*,[106] the Seventh Circuit held that the district judge should have stayed[107] a federal antitrust suit because the federal plaintiff had asserted a counterclaim in the state dispute seeking the same recovery under state antitrust laws.[108] In *Weiner v. Shearson, Hammill & Co.*,[109] the plaintiff originally had sued in state court alleging breach of contract; the defendant answered and asserted a counterclaim in state court, in response to which the plaintiff alleged securities violations as both an affirmative defense and as grounds for a subsequent federal complaint. The Ninth Circuit held that "even if the state court finds itself precluded from giving affirmative relief under the [federal securities law]. . ., a stay would not necessarily be inappropriate."[110]

The closest the Supreme Court has come to settling this issue is its decision in *Will v. Calvert Fire Insurance Co.*[111] Curiously, the Court acknowledged the problem[112] but did not resolve it.[113] In a vehement dissent, however, Justice Brennan introduced the problem of res judicata with respect to state court decisions on matters within exclusive federal

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105 *Id. See also* Shareholders Management Co. v. Gregory, 449 F.2d 326 (9th Cir. 1971) (per curiam).

106 440 F.2d 729 (7th Cir. 1971).

107 The court concluded that dismissal was improper and that a stay was the appropriate procedural device. *See generally* notes 7 & 85 *supra*.

108 440 F.2d at 732.

109 521 F.2d 817 (9th Cir. 1975).

110 *Id.* at 822.

111 437 U.S. 655 (1978). For a discussion of the facts of *Will* and the ramifications of the decision on other aspects of judicial abstention, see notes 58-69 and accompanying text *supra*.

112 The plurality stated:

> Calvert contends that a district court is without power to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented. *Whether or not this is so*, [the district court] has not purported to stay consideration of Calvert's claim for damages under the Securities Exchange Act of 1934, which is the *only* issue which may not be concurrently resolved by both courts.

437 U.S. at 666 (first emphasis added).

113 Judge Will had formally stayed only the adjudication of the issues within the concurrent jurisdiction of the state and federal courts (all issues except for Calvert's securities claim); however, decision on the securities claim was *delayed* for over two and one-half years while the state action proceeded, and, at the time of the Supreme Court decision, the claim was still dormant. Justice Rehnquist treated the delay as a routine consequence of a crowded federal docket, 437 U.S. at 667, but Judge Will's subsequent decision after remand from the Seventh Circuit is more enlightening. *See* Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 459 F. Supp. 859 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979). In view of Calvert's never having contributed any funds to the pool, thereby eliminating any claim for damages, Judge Will maintained that Calvert's federal securities claim was a "contrived" and "reactive defensive maneuver" designed to vex the other party. *Id.* at 862, 863. Consequently, Judge Will decided to continue to stay all aspects of the federal dispute in order to "assure efficient justice to the litigants and to maintain the integrity of the two court systems." *Id.* at 862. The Seventh Circuit later affirmed the stay in Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 600 F.2d 1228 (7th Cir. 1979).

jurisdiction:[114] what effect should a federal court accord a state court decision involving an issue within the exclusive jurisdiction of the federal courts?

2. *Res Judicata*

The preclusive effect of a state court decision on matters within the exclusive jurisdiction of the federal courts is also an open question.[115] It is difficult to strike the perfect balance between the growing importance of finality and the intcrests that underlie grants of exclusive jurisdiction.[116] Several courts have implied that the latter interests are paramount by refusing to exercise judicial abstention[117] in exclusive jurisdiction cases because of the possible res judicata effect of the state court judgment. In *Lyons v. Westinghouse Electric Corp.*,[118] the Second Circuit vacated a stay order on grounds that the grant of exclusive jurisdiction to the district courts "should be taken to imply an immunity of their decisions from any prejudgment elsewhere . . . ."[119] Courts are, however, less reluctant to give preclusive effect to factual determinations

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114 *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674-76 (1978) (Brennan, J., dissenting) ("I confess to serious doubt that it is ever appropriate to accord res judicata effect to a state-court determination of a claim over which the federal courts have exclusive jurisdiction . . . ." *Id.* at 674.).

115 *Id.* at 674 (Brennan, J., dissenting); Key v. Wise, 629 F.2d 1049, 1062 (5th Cir. 1980), *cert. denied*, 102 S. Ct. 682 (1981) (Brennan, Marshall, and Blackmun, JJ., dissenting); 17 WRIGHT, MILLER & COOPER, *supra* note 3, § 4247, at 69 (Supp. 1981); 55 NOTRE DAME LAW. 601, 609 (1980). *See generally* Note, *supra* note 50, 91 HARV. L. REV.; Note, *supra* note 89, 53 VA. L. REV.

116 *See generally* Brown v. Felsen, 442 U.S. 127 (1979); Currie, *supra* note 88, at 325; Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 857-58 (1966); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952); Note, *supra* note 50, 91 HARV. L. REV. at 1281-82.

117 The res judicata problem is arguably irrelevant to the decision to exercise judicial abstention if the court presupposes the unassailability of the congressional policy judgment. If the court were to accord preclusive effect to the state court determination, for instance, such an action would presumably undermine legislative intent and thus violate the courts' policy of deference to Congress. On the other hand, if the court were to iguore the state proceedings, there would be no reason to delay the federal action since it would eventually have to proceed in full force. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 675-76 (1978) (Brennan, J., dissenting); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 832 (9th Cir. 1963).

118 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). *See also* Mach-Tronies, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963); Lewis v. Marine Midland Grace Trust Co., 63 F.R.D. 39 (S.D.N.Y. 1973); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970), *aff'd per curiam*, 452 F.2d 662 (2d Cir. 1971). *But see* Currie, *supra* note 88, at 348.

119 222 F.2d at 189. *See also* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674-75 (1978) (Brennan, J., dissenting); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (*England* involved a nonexclusive federal constitutional claim. The Court explained that "where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." *Id.* at 417); Propper v. Clark, 337 U.S. 472, 491 (1949); Note, *Exclusive Federal Court Jurisdiction and State Judgment Finality—The Dilemma Facing the Federal Courts*, 10 SETON HALL L. REV. 848, 867 (1980).

made in state proceedings.[120] In *Brown v. Felsen*,[121] for example, the Supreme Court refused to apply res judicata in a bankruptcy proceeding in light of the bankruptcy court's exclusive jurisdiction over the action. The Court noted, however, that "[i]f, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [federal law], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the [federal] court."[122]

The res judicata problem both exacerbates and illuminates the underlying dissonance between judicial abstention and the legislative prerogative to establish exclusive federal jurisdiction. A provocative problem of separation of powers, this conflict assumes even greater proportions in actual litigation.

3. Key v. Wise*: The Antithesis Surfaces*

The Fifth Circuit recently decided *Key v. Wise*,[123] which involved elements of abstention, exclusive federal jurisdiction, and res judicata. In that case, the plaintiffs filed a complaint against the Wises and the United States in federal district court for an adjudication of their rights in a certain tract of land in Mississippi. The plaintiffs originally predicated jurisdiction on diversity, but Congress subsequently enacted a statute conferring exclusive jurisdiction on the federal courts in such actions.[124] The district court noted that it had jurisdiction of the action and then proceeded to remit[125] the parties to state court for resolution of the controversy on the ground that the case involved unsettled and com-

120 *See, e.g.,* Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929); Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 600 F.2d 1228, 1236 n.18 (7th Cir. 1979); Vernitron Corp. v. Benjamin, 440 F.2d 105, 108 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971) ("The subsequent effect of collateral estoppel . . . should be welcomed to avoid the task of reconsidering issues which have already been settled by another competent tribunal."); Granader v. Public Bank, 417 F.2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970).

121 442 U.S. 127 (1979). Felsen, the debtor, had previously settled a collection suit brought against him in state court by a bank. The state court also rendered judgment against Felsen in favor of Brown, the guarantor of the bank loan that was the subject of the collection suit; the state court did not, however, indicate the basis for its decision. *Id.* at 128. Subsequently, Felsen filed a petition in bankruptcy and sought to have his debt to Brown discharged. Brown argued that the debt was not dischargeable because the guarantee had been the product of fraud, deceit, and malicious conversion on Felsen's part. *Id.* at 129. Felsen argued that res judicata barred "relitigation" of the nature of his debt to Brown. *Id.*

122 *Id.* at 139 n.10.

123 629 F.2d 1049 (5th Cir. 1980), *cert. denied*, 102 S. Ct. 682 (1981) (Brennan, Marshall, and Blackmun, JJ., dissenting).

124 See 28 U.S.C. § 1346(f) (1976), which provides that "[t]he district courts shall have exclusive original jurisdiction of civil actions . . . to quiet title to an estate or interest in real property in which an interest is claimed by the United States." The United States had an interest in the property because it had acquired perpetual easements from the Wises for the purpose of constructing a levee across the property. 629 F.2d at 1052.

125 *See* note 7 *supra* (discussion of remittal).

plex issues of state law.[126] The district court retained jurisdiction pending the outcome of the yet to be filed state suit. The plaintiffs' motion for reconsideration of the remittal was denied, and an appeal to the Fifth Circuit was dismissed without opinion.[127]

The Wises, defendants in the federal action, proceeded to file an action in state court in accordance with the district court's remittal. The Keys, now state court defendants, did not assert an affirmative cross-bill against the Wises and the United States because they feared such action would operate as a waiver of their right to return to the federal forum.[128] The state court, concluding that the case was not one of exclusive federal jurisdiction because the federal jurisdictional statute was inapplicable to the state proceedings, awarded title to the Wises.[129]

The Keys appealed to the Mississippi Supreme Court and also petitioned the Fifth Circuit for a writ of mandamus vacating the district court's remittal.[130] The Fifth Circuit refused to issue the writ, and the United States Supreme Court denied certiorari to review the Fifth Circuit's decision.[131] Subsequently, the Mississippi Supreme Court affirmed the lower court's decision against the Keys,[132] concluding that the state court had properly assumed jurisdiction of the case, and denied the Keys' request for a rehearing. Thereafter, the parties returned to the federal district court. Having retained jurisdiction pending the outcome of the state action, the district court proceeded to dismiss the Keys' exclusively federal action, giving the state action res judicata effect.[133] The Keys then appealed to the Fifth Circuit.

The Fifth Circuit characterized the appeal as a collateral attack on the state court judgment[134] and affirmed the decision of the district court. The court concluded that "[a]bstention in this case was clearly improper";[135] however, in view of the unsettled question of a district court's "*power*"[136] to abstain in the face of exclusive federal jurisdiction, the court was hesitant to rule that the mere impropriety of federal abstention affected the state court's jurisdiction. In addition, the court ex-

126 *See* 629 F.2d at 1053.

127 *See id.*

128 *Id.* at 1058. *See generally* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

129 The state court concluded that there was no issue of exclusive federal jurisdiction because the United States was not involved in the state action. *See* 629 F.2d at 1057. *See also* Key v. Wise, 341 So. 2d 1326, 1327 (Miss. 1977).

130 *See* 629 F.2d at 1054.

131 429 U.S. 1023 (1976).

132 Key v. Wise, 341 So. 2d 1326 (Miss. 1977).

133 629 F.2d at 1054.

134 *Id.* at 1058.

135 *Id.* at 1059.

136 *Id.* at 1060 (emphasis in original).

plained that the preclusive effect of state court decisions relating to exclusively federal issues is unclear. Noting that the parties had openly litigated the jurisdictional question in state court, and that the law to be applied to the controversy was entirely local (notwithstanding exclusive federal jurisdiction), the Fifth Circuit, Judge Brown dissenting, held that the state court judgment was final.

Thus, the plaintiffs, properly having filed an exclusively federal claim in federal court, were shuttled from court to court over a period of five years without ever having their affirmative claim to the land adjudicated in *any* court. The decision demonstrates the sober reality of the unresolved confiict between judicial abstention and legislative mandates of exclusive jurisdiction.[137] *Key v. Wise* is thus a glaring example of the need for judicial recognition of abstention's expansion and definitive standards for its exercise.

III

A RECONCILIATION

A. *Judicial Responsibility*

An effective solution to the separation of powers conflict between judicial abstention and congressionally mandated exclusive jurisdiction lies both in the ability of the judiciary to regnlate its own procedures and in the heretofore dormant legislative power to formulate statutory gnidelines for judicial activity in this area. Although the legislative proposals suggested below effectively would alleviate the complexities of judicial abstention in the context of exclusive federal jurisdiction, the judiciary too can act to retain responsibility for the formulation of operative guidelines.

The courts, which created abstention, should seek to regulate it as well. First, they must acknowledge the expansion of abstention and the theoretical underpinnings of the doctrine as it is exercised today.[138] Courts should no longer purport to limit the practice to the conventional prototypes when, in fact, the breadth of judicial abstention extends beyond them. Similarly, courts should recognize that abstention can be justified legitimately by considerations of pragmatism as well as federalism—concern for federal/state relations is a valid but not exclusive basis for judicial abstention. These theoretical underpinnings,

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137 The Fifth Circuit could have rectified the district court's abuse of authority by characterizing the appeal not as a *collateral* attack on the *state* court judgment for want of jurisdiction but as a *direct* attack on the *federal* court's decision to abstain. The essential point, however, is that similar decisions will continue to cause irreparable harm to innocent litigants unless clear guidelines for the exercise of abstention are set forth.

138 *See generally* notes 7-10 and accompanying text *supra*.

rather than the presence or absence of categorical fact patterns, should be the primary considerations in exercising abstention.

In formulating operative guidelines, the federal courts first should conclude that they are without authority to remit[139] or dismiss[140] any claim within their exclusive jurisdiction when there is *no* pending state action.[141] Abstention is unjustifiable under such circumstances. The pragmatic considerations that could support abstention are absent. There is no danger of duplicative proceedings, wasted judicial resources, or res judicata, because only one judicial proceeding exists. In fact, the pragmatic considerations that do arise favor a *denial* of abstention. Because jurisdiction is exclusively federal, the federal forum is the one that is most likely to make a comprehensive disposition of the action. Moreover, the initiation of such an action in state court would involve unnecessary expenditures, promote rather than avoid duplication of judicial effort, and create rather than prevent the problem of res judicata.[142] In addition, remittal or dismissal in the absence of a pending state proceeding generally would fail to promote federal/state relations. It is difficult to demonstrate an overriding state interest in an action that Congress has determined should be heard only in federal court. Although elements of federalism or comity might arise in isolated instances, they are offset by the legislative policies granting exclusive jurisdiction to the federal courts.

Judicial guidelines for exercising abstention when parallel proceedings *are* pending in the state forum should be considered in conjunction with the following legislative proposal, which modifies the present removal statute[143] to provide for removal in cases of exclusive federal jurisdiction:

> A civil action brought in a state court may be removed to the district court of the United States embracing the place where such action is pending, by the state court sua sponte or by any defendant or plaintiff by or against whom a substantial claim or defense arising under a statute granting exclusive jurisdiction to the district courts is properly

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139 *See* note 7 *supra* (discussion of remittal).

140 *See id.* (discussion of dismissal).

141 Judicial recognition of the absence of such power would prevent the possibility of another *Key v. Wise*; courts would be unable to direct a federal plaintiff with an exclusively federal claim to the state system for a *de novo* disposition.

142 If the court gives preclusive effect to state court judgments, then the remittal or dismissal would not result in duplication of judicial effort where there is no pending state action. Giving such preclusive effect, however, would undermine Congress's intent to confer exclusive jurisdiction in the area. *See* notes 115-22 and accompanying text *supra*.

143 28 U.S.C. § 1441 (1976). Under current law, an exclusively federal action commenced in state court cannot be removed to federal court, because the state court lacks jurisdiction in the first instance. *See* Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).

asserted, if such removal is invoked within thirty days of service of the pleading under which such claim or defense arises.[144]

This removal proposal ensures the preeminence of the federal forum in actions involving matters within the exclusive jurisdiction of the federal system. Any party who deserves and desires the federal forum is accommodated. In addition, the state court may "remove" the action to federal court—in essence, the state court can exercise remittal when an exclusively federal claim is presented—when the parties might otherwise be attracted to the lingering opportunity of another "bite of the apple" in the federal court. Once removal is invoked, the federal court can exercise its exclusive jurisdiction over the federal claim and adjudicate the entire controversy.[145]

In the absence of the modified removal provision, federal courts would be forced to "balance" competing interests when confronted with a request for abstention in the context of an exclusively federal matter. In each situation, the court would have to consider, *inter alia*, the reasons behind the particular grant of exclusive jurisdiction, the implications of "implied" rather than explicit exclusive jurisdiction, the nature of the controversy,[146] and the interests of the state courts in adjudicating particular issues within their domain. The removal proposal reduces the need for such "balancing" tests, however, by generally ensuring federal adjudication of exclusively federal matters when appropriate.

Under this proposal, a federal district court will be able to abstain in the context of exclusive jurisdiction and pending state proceedings only if removal has been circumvented or delayed. In such cases, the district court should consider carefully the facts and determine if the plaintiff is employing procedural tactics to avail himself of alternative dispositions of the same claim. If a party really wants his rights adjudi-

144 The suggested extension of § 1441 to actions involving exclusive jurisdiction is based in part on the ALI's recommendation for removal in general federal question cases. *See* ALI STUDY, *supra* note 4, at 25-27 (§ 1312). *See also* Currie, *The Federal Courts and the American Law Institute Part II*, 36 U. CHI. L. REV. 268, 275-76 (1969); Note, *supra* note 50, 91 HARV. L. REV. at 1305-07. Professor Currie supports the ALI version but would allow either party to remove at any stage of the pleadings and would extend the provision to allow removal when any federal counterclaim is made. Currie, *supra*, at 275.

145 The federal court would have pendent jurisdiction over the related state claims. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). At first glance, the removal proposal might appear further to overburden the federal docket with actions that are otherwise amenable to state court adjudication. Further scrutiny, however, revcals that the proposal only effectuates the legislative prerogative to allocate federal jurisdiction. The removal proposal ensures that a federal court will hear an exclusively *federal* claim or defense. Furthermore, the requirement that such claim or defense be "substantial" should prevent any party from advancing a frivolous federal claim in order to have his more substantial state claim or defense adjudicated in federal court.

146 For example, in *Key v. Wise*, the merits of the initial fcderal action involved purely local questions of property law. This might militate in favor of abstention. *See* 629 F.2d at 1057.

cated in federal court, presumably he will remove when given the opportunity. Admittedly, the legislative policy judgment concerning exclusive federal jurisdiction is still present under these circumstances. Considerations of judicial pragmatism, however, as well as considerations that relate to the integrity of the judicial system and legislative allocation of jurisdiction within this system by virtue of the removal provision, offset this policy judgment. Neither Congress nor the courts should encourage procedural artifice by reserving a back-up forum for the most clever litigant.

B. *A Legislative Framework*

In the absence of or in conjunction with prompt judicial reform, Congress can preserve its own policy judgments by expanding the current removal provision, as noted above, and by legislating a few relatively simple conditions for the exercise of judicial abstention.[147] This Note suggests the following statutory framework as a model for legislative consideration. Section One would apply in the absence of pending state proceedings. Sections Two and Three would govern the exercise of judicial abstention when an exclusively federal matter is raised in a state proceeding. Taken together, these statutory proposals parallel the guidelines suggested for judicial self-regulation.

§ 1. No Pending State Action

> The district courts of the United States are without authority to remit or dismiss a claim the jurisdiction of which is by statute exclusive when there is no litigation on the claim concurrently pending in the state courts.

§ 2. Removal

> A civil action brought in a state court may be removed to the district court of the United States embracing the place where such action is pending, by the state court sua sponte or by any defendant or plaintiff by or against whom a substantial claim or defense arising under a statute granting exclusive jurisdiction to the district courts is properly asserted, if such removal is invoked within thirty days of service of the pleading under which such claim or defense arises.

§ 3. Pending State Action

> A district court of the United States presented with a claim arising under a statute granting exclusive jurisdiction to the district courts may, if an action adjudicating the claim or matters closely related thereto is concurrently pending in state court, request removal under

147 For general criticism of Congress's performance in allocating jurisdiction to the federal courts, see Tyler, *Congressional and Executive Expansion of Federal Jurisdiction*, 71 F.R.D. 229 (1976).

> [§ 2]. If the state court and the parties fail to remove the action in accordance with the district court's request, or the district court does not request removal, the district court may, in its discretion, stay federal proceedings pending final determination of the state dispute, or proceed to adjudicate the federal action.

Under this statutory model, the decision to remit or dismiss in the context of exclusive jurisdiction is not left to the judge's discretion when no state action is pending. Section One clearly deprives a federal court of *power* to employ these procedural devices in the face of exclusive jurisdiction.[148] At the same time, judicial abstention under the conventional prototypes is unaffected because, by definition, the conventional prototypes do not involve areas of exclusive federal jurisdiction.

Sections Two and Three virtually eliminate the problem of judicial abstention in exclusively federal cases even when there is a pending state claim. As discussed above,[149] Section Two, the removal provision, ensures the preeminence of the federal forum. Consequently, federal courts will invoke Section Three rarely. If an action should be adjudicated in the federal forum, it should reach the district court by removal. If a party who desires the federal forum delays for more than thirty days or otherwise fails to remove the state action under Section Two and then files a separate claim in federal district court, Section Three applies. If the district court does not exercise its option to request removal or if the state court and parties do not comply with the district court's request, then it may consider abstention. Here, as under the judicially regulated scheme,[150] the court should balance the policies underlying exclusive jurisdiction against the judicial interest in discouraging procedural maneuvering and promoting judicial economy.[151]

CONCLUSION

Judicial abstention is an important and effective device when used properly. Although the presence of exclusive jurisdiction elucidates the need for well-defined standards in this area, the Supreme Court has been reluctant to provide guidelines without legislative authorization. The federal courts should openly acknowledge their use of abstention in terms of the theoretical underpinnings—either federalism or pragmatism or both—that justify abstention in any particular case. This will facilitate the judiciary's task of redefining the parameters of abstention

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148 Any unauthorized decision to remit or dismiss the parties would be reviewable immediately by writ of mandamus. Although the availability of mandamus is severely limited, the writ is obtainable when a judge exceeds his statutorily defined power. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976).

149 *See* notes 144-46 and accompanying text *supra*.

150 *See* notes 138-45 and accompanying text *supra*.

151 *See* notes 145-47 and accompanying text *supra*.

in the form of operative guidelines for its exercise. Congress should also act to preserve its sovereiguty in the realm of jurisdictional allocation by liberalizing the removal provision and by forbidding abstention in all cases involving exclusive federal jurisdiction in the absence of concurrent state proceedings.

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