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INTERSYSTEMIC REDUNDANCY AND FEDERAL COURT POWER: PROPOSING A ZERO TOLERANCE SOLUTION TO THE DUPLICATIVE LITIGATION PROBLEM

*Martin H. Redish**

I. INTRODUCTION

The modern law of federal jurisdiction has long suffered from a kind of doctrinal myopia which often plagues an area of law so dominated by judicial development.¹ Under such a structure, broad legal precepts are created only as an incident to the resolution of concrete factual disputes—disputes which often present only one specific legal question. Thus, courts often develop one narrow area of federal jurisdiction in one case, or at least one line of cases, while simultaneously developing another area of jurisdictional doctrine in an entirely separate decision or line of decisions. As a result, in developing one jurisdictional doctrine, the Supreme Court on occasion ignores a potential or actual conflict with a completely distinct doctrine. The product of such independently evolving doctrinal development, not surprisingly, is often a doctrinal synthesis that either defies common sense, ignores or undermines sound policies of federalism or litigation practice, or both.²

* Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University. The subject of this Article provided the basis for a speech before a conference of federal appellate judges, sponsored by the Federal Judicial Center at Stanford University in April, 1999. The author expresses his thanks to Kevin Finnerty of the class of 2001 at Northwestern University School of Law for his invaluable research assistance.

1 The modern law of federal jurisdiction is dominated by judge-made rules, even though there exists a wide-ranging statutory network of regulations of federal jurisdiction. See generally Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769 (1992).

2 See *id.* at 1769–71.

The paradigmatic illustration of this doctrinal pathology is the Supreme Court's current approach to the problem of "intersystemic redundancy"—a concededly pretentious way to describe a rather common, albeit serious, problem of judicial federalism: the conduct of concurrent and overlapping state and federal court civil litigation. I employ the more esoteric description, however, to make a point. The procedural burdens and inefficiencies to which duplicative litigation gives rise do not, in many important ways, fundamentally differ from numerous other litigation pathologies which we have universally refused to allow as a part of modern federal practice. The well established—indeed, in recent years often expanded—doctrines of res judicata, collateral estoppel, other-action-pending, supplemental jurisdiction, and injunction to protect or effectuate judgments have been adopted because they prevent wasteful and potentially harassing litigation redundancy.³ Moreover, all of these doctrines may—or, in some cases, must—operate intersystemically—that is, in situations involving a mixture of state and federal court litigation. Yet in the context of parallel inter-federal litigation, the often inescapable result of the synthesis of existing Supreme Court jurisdictional doctrines is that the very harms which our judicial systems have fought so hard to prevent in numerous parallel or at least analogous contexts⁴ are a frequent occurrence.⁵

This counterintuitive and often inefficient result flows not from a carefully considered legislative or judicial choice following a thorough examination of all relevant competing social, political, and constitutional considerations. It flows, rather, from a wholly coincidental and unintended combination of common law and statutory jurisdictional doctrines, each of which focuses myopically upon different jurisdictional galaxies far, far away from each other.⁶

When parallel, overlapping cases⁷ have been filed in state and federal courts, there are, quite obviously, two conceivable methods to avoid the virtually always absurd waste that would derive from conducting such duplicative litigations: Either the cases are combined in a single adjudication in the state court, or they are combined in a single litigation in federal court. In the federal action, then, the court may seek to avoid duplication either by enjoining the plaintiffs in the

3 See *infra* Part II.

4 See *infra* Part II.

5 See *infra* Part III.

6 See *infra* Part III.

7 Some level of confusion may exist over exactly how to define the concept of parallel, overlapping litigation. See *infra* Part IV.B.

state case from proceeding there or by staying the action before it in favor of the parallel state action.

Unfortunately, the standard approach employed in modern Supreme Court doctrine suggests that, ordinarily, not only will the federal court not be required to make such a choice, but, in most cases, the federal court will actually be denied the opportunity to avoid parallel duplicative inter-federal litigation, even if it desired to do so. This is due to the simultaneous results of the unduly truncated interpretations that the Supreme Court has uniformly given to the relevant exception to the Anti-Injunction Act⁸ and the doctrinal restrictions that the Court has placed on a federal court's ability to stay its proceedings in favor of parallel state litigation.⁹

This Article proposes an alternative jurisdictional structure—what I describe as the “zero tolerance” model, so named because it would begin with the premise that duplicative, intersystemic litigation is not to be tolerated. The model would require that in every instance the assertion of federal jurisdiction automatically precludes the continued conduct of the parallel state litigation, while the refusal of a federal court to enjoin such state litigation would automatically lead to the federal court's abstention. Certainly some criteria would have to be developed to decide which of the two alternative courses of action should be followed in a particular case in order to achieve the fairest and most efficient result.¹⁰ However, those interested primarily or exclusively in avoiding the burdens and inefficiencies caused by litigative duplication would presumably care little which of these two courses the federal court would choose. All that would matter would be that one of them would be chosen, at the exclusion of the other.

The first Section of this Article describes the widely recognized burdens and inefficiencies caused by intersystemic redundancy and the means that jurisdictional doctrines and statutes have generally been structured in order to avoid those burdens and inefficiencies. This description reveals that, in virtually every context, other than the simultaneous conduct of parallel state and federal actions, the law of judicial federalism has been fashioned primarily to avoid such negative consequences.¹¹ This fact renders truly mystifying the federal courts' readiness to accept such inefficiencies in the context of parallel state and federal court litigation.¹²

8 See *infra* Part III.B.

9 See *infra* Part III.B.

10 Later in this Article, I devote a section to a discussion of these criteria. See *infra* Part IV.A.

11 See *infra* Part II.

12 See *infra* Part II.

The second Section explores the two independently fashioned jurisdictional doctrines that have led to these inefficiencies: the so-called *Colorado River* abstention doctrine¹³ and the artificially narrow interpretation of the "in-aid-of-jurisdiction" exception to the Anti-Injunction Statute.¹⁴ The Section that follows puts forth the essential elements of the zero sum model. One aspect of that model, it should be recalled, authorizes—indeed, under certain circumstances, requires—a federal court to abstain from the exercise of its legislatively vested jurisdiction.¹⁵ Because in the past I have strongly criticized the federal judiciary's unauthorized rejection of its statutory jurisdiction,¹⁶ the Section seeks to reconcile my choice in favor of that model with the inherent structural flaws that I have discerned in the abstention doctrines.¹⁷ The final Section considers the specific criteria that the federal court should employ in deciding which of the two exclusive options it should choose.¹⁸

II. BALANCING THE HARMS AND BENEFITS OF DUPLICATIVE LITIGATION

Though there are exceptions, the traditional approach to the simultaneous conduct of parallel and overlapping state and federal civil litigation is that the two may readily coexist.¹⁹ It is, as one could argue, simply the logical outgrowth of our system of judicial federalism.²⁰ This assertion, however is at best only a partial truth.

To be sure, the nation's system of interactive judicial federalism necessarily contemplates—indeed, embraces—the concept of concurrent federal and state court jurisdiction.²¹ Exclusive federal jurisdiction over federal claims or federal issues is far and away the exception,

13 See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); see also *infra* Part III.A.

14 28 U.S.C. § 2283 (1994); see also *infra* Part III.B.

15 See *infra* Part III.C.

16 See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 47–85 (1991).

17 See *infra* Part IV.

18 See *infra* Part IV.

19 See, e.g., *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976); see also *infra* Part III.A.

20 See, e.g., *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (discussing presumption of concurrent jurisdiction of state and federal courts).

21 I explored this issue in detail in Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

rather than the rule.²² Similarly, under its diversity jurisdiction, a federal court will often adjudicate claims arising under state law.²³ All that these jurisdictional principles establish, however, is that, in the adjudication of an individual case, a court of one sovereign will often possess the power to adjudicate claims or issues that arise under the law of the other sovereign. They in no way lead to the inescapable conclusion that we should unhesitatingly accept the simultaneous conduct of parallel litigation at the two levels of judicial sovereignty. Indeed, in virtually no other area of judicial federalism does our system accept jurisdictional rules that tolerate the burdens and waste of inter-systemic redundancy.

The modern doctrine of supplemental jurisdiction evolved primarily out of the fear that to require the separate litigation of state and federal claims that arise out of a common nucleus of operative fact would burden both the system and the litigants by requiring wasteful duplication of witnesses, evidence, and litigation procedure.²⁴ The modern law of claim preclusion, premised largely on the sharing of a common transactional basis,²⁵ is on occasion also measured in terms of overlapping evidence.²⁶ The goal of this doctrine is clearly to

22 See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962) (referring to "the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law").

23 See 28 U.S.C. § 1332 (1994).

24 See *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 172-73 (1997) (stating that in deciding whether or not to assert supplemental jurisdiction, district courts should attempt to "serve the principles of economy, convenience, fairness and comity"); *Quillen v. American Tobacco Co.*, 874 F. Supp. 1285, 1297 (M.D. Ala. 1995) (asserting supplemental jurisdiction where interests of judicial economy would be served).

25 See *RESTATEMENT (SECOND) OF JUDGMENTS* § 24(1) (1982).

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Id. Numerous courts have employed the *Restatement's* transactional analysis. See, e.g., *Manego v. Orleans Bd. of Trade*, 773 F.2d 1 (1st Cir. 1985); 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.* 1182, 1203 (1985) (describing purposes of res judicata to include the avoidance of unnecessary and burdensome litigation and to conserve judicial resources).

26 See CHARLES ALAN WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1410.

prevent the burdens, waste, and potential harassment that flow from redundant litigation.²⁷

In a similar vein, the modern trend in the law of issue preclusion has been characterized by a dramatic expansion. No longer does the classic doctrine of mutuality of estoppel prevent application of issue preclusion principles, even in situations in which a nonparty to the earlier proceeding seeks to utilize issue preclusion offensively against a prior defendant.²⁸ Moreover, it is now accepted that issue preclusion will apply in subsequent litigation to facts found in administrative or arbitration proceedings, despite the general lack of formalized procedures in such actions.²⁹ These preclusionary doctrines have been expanded, because the nation's judicial systems simply cannot afford the luxury of tolerating the waste and inefficiency of duplicative litigation.

Even absent a final judgment, a sub-branch of *res judicata* was created for the very purpose of avoiding wasteful redundant litigation. Under the so-called "other-action-pending" doctrine, a defendant may raise the defense that a second action is merely repetitious, involving the same claims and parties. If accepted, the defense leads to abatement of the second action.³⁰

A number of years ago, Professor Richard Freer persuasively warned of the harms caused by duplicative litigation.³¹ He raised the

27 See, e.g., *In re Schimmels*, 127 F.3d 875, 885 (9th Cir. 1997) (stating that *res judicata* is designed to avoid duplicative litigation).

28 See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

29 See, e.g., *University of Tenn. v. Elliott*, 478 U.S. 788 (1986) (holding that federal common law rules of preclusion incorporate state issue preclusion rules in a federal suit brought after a state administrative adjudication arising from the same facts).

30 See RESTATEMENT (SECOND) OF JUDGMENTS § 16 (1982). Individual states have enacted statutes effectively creating the defense of other action pending. See, e.g., 735 ILL. COMP. STAT. 5/2-619(a) (West 1992) ("Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds . . . (3) That there is another action pending between the same parties for the same cause.") The provision was designed to avoid duplicative litigation. See *A.E. Staley Mfg. Co. v. Swift & Co.*, 419 N.E.2d 23, 27 (Ill. 1980).

It should be noted that the other action pending doctrine traditionally applies when both suits are in the same jurisdiction. When one suit is federal and the other suit is state, the doctrine almost certainly has been supplanted by the doctrine of *Colorado River* abstention, at least from the perspective of the federal court. See *W.E. O'Neil Constr. Co. v. National Union Fire Ins. Co.*, 721 F. Supp. 984, 989 (N.D. Ill. 1989); see also *infra* Part III.A.

31 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 (1989); see also James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1064 (1994) ("Many of the costs of duplicative litigation are self-

simple but compelling point that "[c]ourts are a public resource, providing publicly financed resolution of private disputes. We pay for them, and we have a right to insist that their services not be squandered."³² Because "[t]he duplication of effort is a major cause of the protraction of time needed to resolve cases,"³³ Professor Freer concluded that "multiplicity is a harm to society's legitimate interest in judicial efficiency."³⁴ These inefficiencies have been dramatically exacerbated by the litigation explosion of the last generation.³⁵

Moreover, as another commentator has perceptively noted, "[d]uplication . . . smacks of an indefensible gamesmanship, jeopardizing public faith in the judicial system."³⁶ The concern is that plaintiffs may simultaneously file a second suit purely for strategic reasons, providing them with unfair advantages or causing harassment to the defendants.³⁷ Similarly, defendants' filing of reactive suits, while perhaps "slightly more palatable," nevertheless suffers from "the same aura of gamesmanship [that] surrounds reactive suits."³⁸

Thus, it is inaccurate to suggest that incurring the burdens and waste caused by duplicative state and federal litigations should necessarily be considered simply a cost of doing judicial business, flowing inexorably from the choice in favor of an interactive federal system. To the contrary, such duplication causes significant harm, both to the system and individual litigants. For these reasons, the system's general tolerance of the simultaneous conduct of parallel state and federal court litigation stands in stark contrast to a policy approaching a level of zero tolerance of interfederal duplication in most other procedural contexts.

evident. It is patently wasteful."); Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 123 (1998) ("[I]t is wasteful of both litigant and court resources for two courts to simultaneously conduct proceedings directed toward resolution of the same dispute.").

32 Freer, *supra* note 31, at 832.

33 *Id.* at 832-33.

34 *Id.* at 832. It should be noted that Professor Freer was speaking in a somewhat different context from that focused upon here. He spoke of the harms caused by duplicative litigation as support for an expansion of the use of the joinder devices contained in the Federal Rules of Civil Procedure. See generally *id.* However, this critique of duplicative litigation is equally applicable here.

35 See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (2d ed. 1996).

36 Rehnquist, *supra* note 31, at 1064 (footnote omitted).

37 See *id.* at 1064-65.

38 *Id.* 1065.

If one were to seek rationales to support the continued tolerance of intersystemic duplicative litigation, one could point to two conceivable arguments. First, rejection of duplicative litigation necessarily implies that one of the cases must cease, inevitably leading to the denial of one plaintiff's choice of forum. Because the system has traditionally placed great value on such a choice,³⁹ the argument proceeds, we should hesitate to adopt a procedural or jurisdictional structure that interferes with its exercise. Second, in the intersystemic context the rejection of duplicative litigation could conceivably result in termination of the state case, thereby threatening the interests of judicial federalism. Neither of these arguments, however, justifies tolerance of the burdens and waste of duplicative litigation.

As to the first argument, it would be inaccurate to suggest that the judicial system has universally given preference to a plaintiff's choice of forum over all potentially competing social or political interests. Would-be plaintiffs may be forced to litigate their claims in a number of well accepted procedural contexts. For example, a prospective plaintiff may be required to litigate her claims in a forum and at a time not of her choice by the potential defendant's resort to the Declaratory Judgment Act,⁴⁰ which allows a mirror-imaged prospective action.⁴¹ Moreover, a potential plaintiff may be forced to litigate his claim in the context of a class action pursuant to Federal Rule of Civil Procedure 23(b)(1) and 23(b)(2), which do not permit a class member to opt out of the class.⁴² In addition, a stakeholder concerned about the possibility of either multiple liability or multiple litigation may resort to either statutory⁴³ or rule interpleader,⁴⁴ both of which may require a potential plaintiff to litigate in a forum and at a time not of his choice.

The second argument is no more persuasive. Although no one can doubt that the interests of judicial federalism receive great weight in the modern Supreme Court,⁴⁵ a zero tolerance approach to dupli-

39 In ruling on motions to transfer venue pursuant to 28 U.S.C. § 1404(a) (1994), the federal courts have generally begun their analysis with the presumption in favor of the plaintiff's choice of forum. *See, e.g.*, *Central Sports Army Club v. Arena Assoc., Inc.*, 952 F. Supp. 181 (S.D.N.Y. 1997); *McKinney v. Southern Pacific Co.*, 147 F. Supp. 954 (S.D. Tex. 1957).

40 28 U.S.C. § 1404(a) (1994).

41 *See* MARTIN H. REDISH & SUSANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* 712 (3d ed. 1998).

42 *See* FED. R. CIV. P. 23.

43 *See* 28 U.S.C. § 1335 (1994).

44 *See* FED. R. CIV. P. 22.

45 This fact is best illustrated by the judicial creation and expansion of the doctrine of "Our Federalism," pursuant to which a federal court is, under most circum-

cative intersystemic litigation, as a theoretical matter at least, need never result in the cessation of a state case. At its most basic level, the zero tolerance model is satisfied as long as only one proceeding, rather than two, provides the basis of litigation. A zero tolerance approach is wholly agnostic to the issue of whether the case that ceases is the state or federal proceeding. If one deems the interests of judicial federalism to be paramount, then the model could be satisfied simply by requiring *Colorado River* abstention in every case.

Such a result would, however, be both unfortunate and unwise. As the Supreme Court has recognized on more than one occasion,⁴⁶ the balance of competing interests may often favor the exercise of federal jurisdiction. Indeed, the very fact that Congress adopted three express exceptions to the Anti-Injunction Statute⁴⁷ demonstrates recognition of the fact that the interest in allowing all state civil litigation to proceed uninterrupted by federal judicial interference is not sacrosanct.

In point of fact, the systemic tolerance of such duplication flows not from any kind of conscious choice on the part of either judge or legislator. Rather, such tolerance represents the coincidental and collateral impact of two wholly distinct jurisdictional doctrines, one concerning the Anti-Injunction Statute and the other concerning the scope of judge-made abstention. The following Section seeks both to explore the development of those doctrines separately and to explain how the modern tolerance of duplicative interfederal litigation grows out of a synthesis of those two distinct doctrines.

III. THE EVOLUTION OF THE MODERN TOLERANCE OF DUPLICATIVE LITIGATION

The simple but unfortunate reality is that our system tolerates parallel overlapping state and federal litigation, because the system has generally prevented the federal courts from taking any action to stop it. A federal court in which one of the parallel actions has been filed usually cannot avoid duplication by enjoining the parties from pursuing the state action because of the bar imposed by the Anti-Injunction Act.⁴⁸ Yet the federal court is, in most instances, also pre-

stances, prohibited from enjoining or otherwise interfering with ongoing state proceedings. *See, e.g.,* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); *Younger v. Harris*, 401 U.S. 37 (1971).

46 *See, e.g.,* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *see also infra* Part III.B.

47 28 U.S.C. § 2283 (1994); *see also infra* Part III.B.

48 *See id.*; *see also infra* Part III.B.

vented from avoiding the burdens of duplicative litigation by abstaining in the action brought before it because of the restrictions imposed by the *Colorado River* abstention doctrine.⁴⁹ The end result, in most cases, is that the two actions must be litigated simultaneously in two separate courts in two distinct jurisdictions, often with the inescapable consequence of the wasteful duplication of effort.

The federal judiciary should carefully reconsider and ultimately reject this approach. As a fundamental matter, such duplication can never be justified, regardless of what countervailing arguments in favor of simultaneous concurrent litigation one might fashion in the abstract. As more careful analysis will demonstrate, not even the strongest of the justifications that could be fashioned to support the maintenance of concurrent jurisdiction can rationalize such wasteful procedural efforts. Examination of the distinct Anti-Injunction Statute and *Colorado River* rationales, however, reveals a disparity in the relative force behind the two distinct justifications. While the severe restrictions imposed on *Colorado River* abstention at the very least have an arguable basis in considerations of social policy if not congressional intent, there exists neither a textual nor a compelling policy justification to support the Supreme Court's artificially narrow construction of a federal court's power to enjoin parallel state litigation.

A. *Colorado River Abstention*

In *Colorado River Water Conservation District v. United States*,⁵⁰ the Supreme Court held that, in most cases, a federal court may not ignore its "virtually unflagging obligation . . . to exercise the jurisdiction given them"⁵¹ by abstaining in favor of a parallel state court action. But despite the Court's muscle-flexing language, it declined to impose a complete bar to federal abstention in the face of parallel state litigation. The federal court may abstain under such circumstances, however, only in the presence of "exceptional" circumstances.⁵²

The task of operationalizing this phrase has proven to be a difficult one for the lower federal courts,⁵³ in part because the Supreme Court itself has been exasperatingly unclear in explaining exactly what

49 See *infra* Part III.A.

50 424 U.S. 800 (1976).

51 *Id.* at 817.

52 *Id.* at 818.

53 Compare *Trent v. Dial Med.*, 33 F.3d 217 (3d Cir. 1994), and *Arkwright-Boston Mfr. Mut. Ins. Co. v. City of New York*, 762 F.2d 205 (2d Cir. 1985) (deferring to parallel state multi-party actions), with *Ryan v. Johnson*, 115 F.3d 193 (3d Cir. 1997) (refusing to stay federal action in favor of parallel state proceeding).

it meant.⁵⁴ In the years immediately following *Colorado River*, it appeared that the exceptionality requirement would operate only as a hollow restriction on federal courts' power to abstain, in part because in *Colorado River* itself the Court found abstention appropriate.⁵⁵ More recently, the Court toughened the requirements for federal abstention in the face of a parallel state litigation.⁵⁶ As a result, today a federal court's ability to abstain in favor of a parallel state litigation is rather limited.⁵⁷ This is particularly true in situations in which federal law provides the basis for the litigation.⁵⁸

B. Anti-Injunction Statute

Although, in most situations, a federal court may not abstain in favor of parallel state litigation, in most cases neither may it enjoin that state litigation. Under the current version of the Anti-Injunction Statute,⁵⁹ a federal court may not enjoin an ongoing state litigation except in three circumstances: (1) where injunction is "expressly authorized" by an act of Congress, (2) where injunction is necessary "in aid of [the federal court's] jurisdiction," and (3) where injunction is necessary "to protect or effectuate [the federal court's] judgment."⁶⁰

54 Compare *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (suggesting broad power of district courts to abstain in favor of parallel state actions under *Colorado River*, at least under certain circumstances), with *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (holding that *Colorado River* narrowly confines district court discretion to abstain in favor of parallel state proceeding).

For a stinging attack on *Colorado River* abstention, see Linda Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986). Professor Mullenix refers to this form of abstention as "an invidious encroachment on the constitutional and statutory rights of federal litigants." *Id.* at 101. She characterizes *Colorado River* abstention as "merely a doctrine of judicial convenience that has no place in American jurisprudence." *Id.*

55 See, e.g., *Will*, 437 U.S. at 655 (authorizing abstention in favor of parallel state action).

56 See *Moses H. Cone*, 460 U.S. 1 (1983).

57 See, e.g., *Ryan v. Johnson*, 115 F.3d 193 (3d Cir. 1997); *Elmendorf Grafica, Inc. v. D.S. America (East), Inc.*, 48 F.3d 46 (1st Cir. 1995); *Burns v. Watler*, 931 F.2d 140 (1st Cir. 1991).

58 In *Moses H. Cone*, the Supreme Court held that the presence of federal law issues is a factor to be considered weighing against abstention. See 460 U.S. at 26.

59 28 U.S.C. § 2283 (1994). The current version of the statute was codified most recently in 1948. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 311-12 (2d ed. 1990).

60 28 U.S.C. § 2283.

Although the Supreme Court has given the so-called "expressly authorized" exception an unjustifiably broad construction⁶¹ and construed the so-called "relitigation" exception in an appropriately flexible manner,⁶² in most contexts neither of these exceptions will be relevant to a situation in which parallel state and federal litigation exists.⁶³ In such situations, then, it is only the "in-aid-of-jurisdiction" exception that could have conceivable relevance. Due to the Supreme Court's dubiously narrow construction, however, this exception will usually fail to provide a federal court with power to enjoin parallel state litigation as a means of avoiding the burdens and inefficiencies of duplicative actions.

The Supreme Court in *Kline v. Burke Construction Co.*⁶⁴ long ago held that while a federal court exercising in rem jurisdiction could enjoin a state case that sought to interfere with the federal court's control over the res, where the jurisdiction involved was in personam, the Anti-Injunction Act barred the issuance of federal equitable relief against the state action. This was true, even though findings made in the state case would be binding between the same parties in the federal action, thereby effectively tying the federal court's hands.⁶⁵ While the Supreme Court's holding in *Kline* was made long before legislative adoption of the in-aid-of-jurisdiction exception,⁶⁶ the modern-day Supreme Court has apparently adhered to the in rem/in personam

61 See *Mitchum v. Foster*, 407 U.S. 225 (1972), where the Supreme Court held that the civil rights statute, 42 U.S.C. § 1983 (1994), is an "expressly authorized" exception to the Anti-Injunction Act, even though on its face the statute says nothing about a federal court's power to enjoin an ongoing state judicial proceeding. "The test," the Court held, "is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238. In effect, the Court in *Mitchum* created an oxymoronic "implied express" exception. For a detailed criticism of this decision, see REDISH, *supra* note 59, at 316-24.

62 See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

63 It should be noted that even in civil rights cases in which *Mitchum* dictates that the "expressly authorized" exception applies, most of the time the federal court's authority to enjoin ongoing state proceedings will be confined by the judge-made doctrine of "Our Federalism," adopted initially in *Younger v. Harris*, 401 U.S. 37 (1971).

64 260 U.S. 226 (1922).

65 The Court in *Kline* indicated that the federal court should apply principles of res judicata, "in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case." *Id.* at 230.

66 The in-aid-of-jurisdiction exception was included originally in the 1948 revision of the Anti-Injunction Act. See REDISH, *supra* note 59, at 312.

dichotomy in its interpretation of that exception.⁶⁷ This is so, even though the distinction between in rem and in personam cases has long been little more than a metaphysical relic of a very different epistemological age⁶⁸ and no longer plays a significant role, even in its originating context of personal jurisdiction.⁶⁹

In a variety of limited contexts, relatively recent lower federal court decisions have carved out tacit exceptions to the Supreme Court's seemingly total bar to the federal restraint of parallel state civil litigation.⁷⁰ As hard as these courts have on occasion strained to distinguish the Supreme Court's interpretation of the in-aid-of-jurisdiction exception,⁷¹ there exists no rational basis on which to separate these areas of the law from all of the others reached by the *Kline* rule. In any event, at most these decisions support a limited suspension of *Kline*. Thus, in the overwhelming majority of cases, a federal court is powerless to stop a parallel state litigation. When viewed in conjunction with the Supreme Court's seemingly restrictive view of a federal court's power to abstain in the face of such state litigation,⁷² the end result is that, in the large majority of relevant situations, the federal court will lack authority to put an end to the waste, burdens, and har-

67 See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977) ("Although the 'necessary in aid of' exception to § 2283 may be fairly read as incorporating this historical in rem exception . . . , the federal and state actions here are simply in personam. . . . We have never viewed parallel in personam actions as interfering with the jurisdiction of either court.").

68 See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950). In *Mullane*, the Court stated,

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. . . . [N]ew forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as in rem because personal service was not required, and at other times have held personal service of process not required because the action was in rem.

Id.

69 See *Shaffer v. Heitner*, 433 U.S. 186 (1977) (largely rejecting distinction, for jurisdictional purposes, between in rem and in personam cases, and holding that even assertions of traditional in rem jurisdiction must be measured by the modern minimum contacts test).

70 One such area concerns cases in which an order to compel arbitration has been sought in federal court. See, e.g., *TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292 (11th Cir. 1998). Not all courts have agreed, however, that the in-aid-of-jurisdiction exception applies in this context. See generally Sternlight, *supra* note 31.

71 See *supra* Part III.B.

72 See *supra* Part III.A.

assment normally associated with simultaneous intersystemic redundancy.

Almost as troubling as the end result is the process by which the Supreme Court has reached that result. At no point has the Court ever considered the problem of duplicative litigation from a holistic perspective. Instead, it has developed its Anti-Injunction Act interpretation—which, as already noted, borders on the bizarre in its own right—without regard to its abstention analysis, and it has developed its abstention analysis without any meaningful discussion of the relevance of its Anti-Injunction Act construction. Thus, the Court has developed its jurisdictional doctrine without significant regard for that doctrine's potentially harmful impact on the fairness and efficiency of modern litigation.⁷³

Not only is this conclusion inconsistent with the law's traditional disdain for the waste caused by duplicative litigation,⁷⁴ it is inconsistent with the Supreme Court's often-expressed disdain for any procedural mechanism that produces delay, inefficiencies, or waste. Thus, the Court has spoken of the harms caused by burdensome discovery in complex litigation.⁷⁵ Yet, in those contexts at least, one might reasonably assert that those burdens are justified by either the legitimate needs of the litigants or by the system's interest in policing illegal action. Duplicative intersystemic litigation, on the other hand, has no justification. Equally as important is the fact that it has been and continues to be tolerated, not because the Supreme Court—or any court for that matter—has found on the basis of reasoned logic or empirical observation that the benefits of duplicative litigation outweigh its harms, but rather because no one has found the opportunity to engage in such a carefully reasoned analysis. When such a holistic view is taken, it becomes readily apparent that there exists absolutely no legitimate reason to tolerate intersystemic duplicative litigation.

73 It is true that I have in the past argued that in interpreting statutes it is not appropriate for the courts to structure their interpretation in light of the courts' own normative considerations. Rather, the courts are bound by the intent of the legislature, as manifested in the statutory text. See REDISH, *supra* note 16, at 29–46. However, here the Court is surely not adopting an interpretation that flows inexorably from the plain meaning of the text. To the contrary, the Court's interpretation pays precious little heed to the relevant text. In any event, the assumption that Congress would want wasteful duplicative litigation to go unpoliced is dubious.

74 See *supra* Part II.

75 See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

IV. EXPLAINING THE ZERO TOLERANCE MODEL

A. *The Basic Elements of the Model*

As a replacement for the existing doctrinal framework, I propose a zero tolerance model—an approach that deems any and all intersystemic duplicative litigation to be unacceptable. Thus, whenever a federal district court is presented with a situation in which parallel state and federal civil litigation⁷⁶ exists, and appropriate motions for relief have been made by the litigants,⁷⁷ the court would be required either to stay its own proceedings pursuant to *Colorado River* abstention or enjoin the parties from continuing to proceed in the state action, pursuant to the in-aid-of-jurisdiction exception of the Anti-Injunction Act. The court would not have the option of refusing to employ one or the other of these two alternatives.

In a certain sense, the zero tolerance model could be analogized to a federal court's finding concerning the presence of federal patent jurisdiction.⁷⁸ The federal patent jurisdiction statute extends federal jurisdiction to all cases "arising under" the patent laws. In addition, the jurisdictional statute provides that in such cases federal jurisdiction is exclusive; state courts therefore lack jurisdiction in any case found to "arise under" the patent laws. Thus, a finding by a federal court that a case does, in fact, arise under the federal patent laws necessarily implies that a state court would lack jurisdiction in an identical case. On the other hand, in a case in which no other source of federal jurisdiction exists, a finding that the case does not arise under the patent laws simultaneously deprives the federal court of jurisdiction and supports the state court's assertion of jurisdiction in the same case. Similarly, under the zero tolerance model a federal court's refusal to stay its own proceedings automatically requires that court to enjoin the state action. On the other hand, a federal court's decision to stay its own proceedings necessarily implies that the parallel state action may continue.

⁷⁶ Criminal cases, as a category, may be excluded because of the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). See *supra* note 63.

⁷⁷ In order to trigger the zero tolerance model, presumably the litigants would need to cross-move, one party seeking a stay of the federal action and the other an injunction prohibiting the parties from pursuing the state action. However, since the conduct of parallel litigation does not rise to the level of a jurisdictional issue, it is likely that the zero tolerance model could not be implemented absent initiating action by the parties.

⁷⁸ See 28 U.S.C. § 1338(a) (1994).

B. Defining "Parallel" Litigation: Alternative Constructions

Not surprisingly, even if one were persuaded about the need to adopt the zero tolerance model, implementation of that model is not quite as simple as this brief description makes it sound. Before one can effectively employ the model, a number of important questions must be answered. Most important of these questions concerns the definition of "parallel" state and federal litigation. Obviously, if the state and federal actions are not deemed parallel, then the model is irrelevant. Where the cases are truly identical—in other words, where the litigants, the facts, and the issues are exactly the same—making a finding of parallelism will not be difficult. Much more common, however, will be situations in which the two cases overlap in terms of litigants and issues, but significant differences also exist—for example, where the parties are reversed, where the legal issues arising out of similar or identical fact situations are different, or where additional or different litigants are involved. How one chooses to define the concept of parallel litigation will determine whether the zero tolerance model is triggered.

There are three conceivable definitional approaches one may choose: the "res judicata" model, the "supplemental jurisdiction" model, or the "relitigation" model. Each of these approaches seeks to determine the presence of parallelism through the incorporation by reference of different bodies of preexisting law. While the three are similar in many important ways, they also differ in subtle but potentially significant respects.

Under the res judicata model, simultaneously litigated cases will be deemed parallel if, and only if, the resolution of one of the litigations would be deemed res judicata or collateral estoppel in the other. Because no form of res judicata may be used to bar a litigant (or one in privity with her) who has not yet had her day in court,⁷⁹ use of this approach would automatically preclude a finding of parallelism unless the litigant whose suit was halted as a result of the zero tolerance model was either a party to the parallel action or in privity with a litigant who was.

The same might not be true under the relitigation model. This model would incorporate by reference the judicial doctrine interpreting the relitigation exception to the Anti-Injunction Act, authorizing a federal court to enjoin an ongoing state litigation in order to protect

⁷⁹ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore never had an opportunity to be heard." (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))).

or effectuate a judgment issued by that federal court.⁸⁰ While that body of law naturally bears many similarities to the law of *res judicata*,⁸¹ it is at least arguable that the relitigation exception logically should be construed to include a broader sweep.

As an example, consider a case in which a federal court has issued an injunction against a defendant, which would necessarily affect that defendant's behavior towards individuals or entities other than the plaintiff in the federal court action. In other words, the situation involves a form of "indivisible inconsistency": the defendant's behavior subject to the restraint of the injunction automatically affects more than just the plaintiff to the federal action. By way of analogy, one might look to the requirements for a class action brought pursuant to Federal Rule of Civil Procedure 23(b)(1)(A), which authorizes such actions when, absent use of the class action device, the party opposing the class could be subjected to inconsistent standards of behavior.⁸² The advisory committee notes to the 1966 federal rule amendments give as examples a party seeking to assert riparian rights to engage in particular behavior or a fraternal benefit organization seeking to engage in a financial reorganization.⁸³ In these cases, it would, as a practical matter, be impossible for the party to act differently towards the individual members of the class. Either the riparian owner can engage in the challenged behavior or he cannot. He cannot act in one manner towards one plaintiff and in another manner towards another plaintiff. Either the fraternal benefit organization may reorganize or it may not. It cannot reorganize as to one of its members but not as to another.

A similar situation could occur in the relitigation context, where the plaintiff in the federal action requested a declaratory judgment⁸⁴ that his behavior towards a particular litigant was legal and permissible. If the behavior in question involves the same type of indivisibility that triggers Rule 23(b)(1)(A) class actions, then a second suit in state court seeking injunctive relief against the declaratory plaintiff's be-

80 The Act authorizes a federal injunction of a state court action "where necessary . . . to protect or effectuate its judgments." 28 U.S.C. § 2283 (1994).

81 See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970) (determining applicability of relitigation exception by first determining whether principles of *res judicata* controlled).

82 See FED. R. CIV. P. 23(b)(1)(A) (allowing class actions when the prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class").

83 See FED. R. CIV. P. 23 advisory committee's notes; *Supreme Tribe v. Cauble*, 255 U.S. 356 (1921).

84 See *Declaratory Judgment Act*, 28 U.S.C. § 2201 (1994).

havior—even one brought by a party different from and unrelated to the defendant in the federal action—would potentially threaten the viability and effectiveness of the federal court judgment. This is due to the fact that if the state court chose to issue the requested injunctive relief, and the behavior of the state court defendant were indivisible—i.e., as a practical matter the defendant would necessarily act in the same manner with regard to all affected parties—then the federal court's finding that that party's behavior was permitted would be inescapably undermined. By the very nature of the conduct involved, the state court defendant could not choose to obey the injunction vis-a-vis the state court plaintiff, yet simultaneously not be bound by it with regard to the federal declaratory defendant. Hence, one could quite reasonably conclude that the federal court must be empowered to enjoin continuation of the state action. This is so, even though neither res judicata nor collateral estoppel could be employed, because the plaintiff in the subsequent state action was not a party to the earlier federal action and therefore did not have her day in court.⁸⁵

An analogous situation occurred in the Fifth Circuit case, *Southwest Airlines Co. v. Texas International Airlines*,⁸⁶ a decision concerning the scope of res judicata. There in the initial action a public authority had sought unsuccessfully to enforce a law excluding an airline from the Dallas airport. The court had refused to order the exclusion of the airlines, because it deemed the law to be unconstitutional. In a subsequent separate action, private airlines sought to enforce the same law, arguing that they could not be bound by the initial decision because they had not been parties to the first action. If the court in the second action were to allow the suit, the finding in the first case that the law was unconstitutional could be undermined. At least as a practical matter, the law could not be unconstitutional as to the government but constitutional as to the private airlines. More importantly, an order excluding the airline from the Dallas airport would effectively destroy the finding of the first case that the airline had the right to stay at the airport. Yet to apply res judicata to bar the second suit would effectively have deprived the plaintiffs in the second suit—who had not been parties to the first action—of their day in court.

85 Recognition of this danger should caution both the litigants and the court to aggressively draw on one or more of the numerous multi-party joinder devices authorized in the Federal Rules of Civil Procedure, in order to avoid either unfairness to the future litigants or harm to the federal court's judgment. See FED. R. CIV. P. 18-24. See generally Freer, *supra* note 31 (urging more aggressive use of multi-party joinder devices). Effective use of such procedures would moot the delicate relitigation exception issues discussed in the text.

86 546 F.2d 84 (5th Cir. 1977).

The Fifth Circuit sought to avoid this dilemma by employing a strained view of privity for purposes of *res judicata*. Under the theory of "virtual representation," the court reasoned that the private airlines were in privity with the public authority that had brought the initial suit because the interests of the two plaintiffs were identical.⁸⁷ Such a theory of privity is surely a risky one, because of its inherent vagueness and subjectivity. However, absent reliance on this safety valve, the court would have been faced with a significant dilemma. On the one hand, as already explained, unless the second plaintiff is held to be barred by the first suit, anomalous and incoherent results could occur. If one were to translate this situation into the context of intersystemic redundancy, we would have two suits filed, one in state court and one in federal court, where the risk of such incoherently inconsistent results would arise. On the other hand, absent contrived use of the specious "virtual representation" concept, preclusion of the second suit could violate the second plaintiff's due process right to his day in court.

Arguably, a similar problem would occur in the intersystemic redundancy analogue to the situation in which a second suit threatens the coherence of the result in an already decided action. Just as the Due Process Clause's guarantee of a party's right to his day in court precludes assertion of *res judicata* or collateral estoppel against him, so too might it arguably erect a constitutional barrier against a federal court's injunction against suit by a litigant who was not a party to the federal action. This might be so, even though the result is that the federal court's judgment is vulnerable to subsequent and inconsistent state court rulings. The due process analogy is significantly diluted, however, when one recognizes that the constitutional problem may be avoided in the event of two simultaneous actions simply by requiring the plaintiff in one of the actions to join as part of the other action.⁸⁸ This is an option that does not exist in situations to which the relitigation exception is arguably applicable, because in such cases by hypothesis the first action is already completed, rendering joinder of the two plaintiffs into one action impossible.

For purposes of the zero tolerance model, drawing an analogy to the logic of the relitigation exception would dictate that federal and state actions be deemed parallel whenever the challenged behavior

87 See *id.* at 97-101; see also *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975) (defining "virtual representation" as the precept that "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative").

88 See generally Freer, *supra* note 31 (arguing for broad view of joinder rules in order to avoid such anomalous and unfair results).

creates a risk of indivisible inconsistency, thereby giving rise to the possibility that resolution of one action would effectively restrict the options of the other court.

The supplemental jurisdiction model, on the other hand, incorporates by reference the body of doctrine concerning the circumstances required to trigger the federal court's power to exercise supplemental jurisdiction over dependent claims or parties that, standing alone, do not satisfy federal jurisdictional prerequisites. Prior to enactment of the Supplemental Jurisdiction Statute⁸⁹ in 1991, the Supreme Court struggled with this question. In certain lines of cases, the Court required that the independent and dependent claims arise out of the same "transaction or occurrence."⁹⁰ In others, the Court required that the two claims derive from "a common nucleus of operative fact,"⁹¹ though at no point did it provide any clear understanding of how far this concept actually reached.⁹² Rather than resolve these definitional uncertainties and doctrinal inconsistencies, drafters of the Supplemental Jurisdiction Statute, if anything, compounded these problems by eschewing all of the prior formulations in favor of the requirement that the claims be part of the same constitutional case for purposes of Article III of the Constitution.⁹³ Puzzlingly, the legislative history indicates that despite the linguistic alteration, Congress intended merely to incorporate prior common law doctrine on the issue.⁹⁴

If one were to decide to employ the supplemental jurisdiction alternative to implement the zero tolerance model, one presumably

89 28 U.S.C. § 1367 (1994).

90 See, e.g., *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

91 *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

92 For a detailed discussion, see LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION §§ 5.04–.06 201–14 (1998).

93 See 28 U.S.C. § 1367 (1994).

94 See Mullenix et al., *supra* note 93, at 209. The reason that the statutory drafters chose to tie supplemental jurisdiction to the outer reaches of a constitutional case is that long ago, the Supreme Court, in an opinion by Chief Justice Marshall, had rationalized the constitutionality of the extension of federal court jurisdiction over parties and claims that did not, standing alone, fall within the categories of cases enumerated in Article III, Section 2 of the Constitution by reasoning that Article III extended the federal judicial power to all "cases" arising under federal law, and that state law claims which arise in the course of the federal adjudication were part of the same case to which the federal judicial power had been extended. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

But while inclusion of the dependent claim within the concept of a constitutional case rationalizes the assertion of supplemental jurisdiction, it in no way automatically follows that this rationale provides the most helpful linguistic or doctrinal formulation of the standard.

could choose either the "evidentiary overlap" or "logical relationship" versions of that doctrine. Which version one would choose depends largely on what rationale one employs in adopting the zero tolerance model in the first place. If one is concerned that the zero tolerance model dangerously interferes with both litigant choice⁹⁵ and the interests of judicial federalism⁹⁶ and believes the model should be employed only as a safety valve in the most extreme situations in order to avoid blatantly wasteful duplication, then presumably one would adopt the "evidentiary overlap" version of the supplemental jurisdiction model. If, on the other hand, one concludes that neither litigant choice nor judicial federalism represents a significant concern⁹⁷ and believes that there is no excuse for the waste inherent in the conduct of two separate litigations over related issues, then presumably one would adopt the more flexible "logical relationship" standard.

C. *The Zero Tolerance Model and Appellate Review*

It has already been established that it is the federal district court that will make the determination of which forum's action will proceed and which will terminate.⁹⁸ An important question will arise, however, concerning the extent to which the district court's decision will be subject to effective appellate review in the federal courts of appeals. Under the traditional "final judgment" rule, embodied in the Judicial Code,⁹⁹ only "final" decisions of the district courts—i.e., those decisions which leave nothing for the trial court to do but to execute the judgment¹⁰⁰—arguably the federal court's decision would not be appealable, regardless of which way the federal court resolved the issue. If the federal court chose to issue an order enjoining the parties from proceeding in the state court action, the order would not qualify as final because much would remain to be done in the federal court action. If, on the other hand, the federal court chose to issue an order staying the federal proceeding in favor of the parallel state action, one might reason that the order is not final because it merely has the effect of staying, rather than dismissing, the federal action. Of course, the appeals court could—at least as a theoretical matter—review the district court's decision once either the federal proceeding was com-

95 See *infra* Part V.

96 See *id.*

97 See *id.*

98 See *id.* It should be noted, however, that this fact in no way precludes informal consultation with the state court prior to the federal court's rendering a final decision on the issue of abstention or injunction.

99 28 U.S.C. § 1291 (1994).

100 See *Catlin v. United States*, 324 U.S. 229 (1945).

pleted or once a final order of dismissal was issued. However, as a practical matter such review would be all but meaningless.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹⁰¹ the Supreme Court held that orders granting stays of federal actions in deference to parallel state actions are appealable for two reasons. First, though technically not final, the stay order put the litigants "effectively out of court,"¹⁰² and thus its effect was "precisely to surrender jurisdiction of a federal suit to a state court."¹⁰³ While the Court has acknowledged that "[t]hese standards do not reflect our oft-repeated definition of finality,"¹⁰⁴ they accurately reflect the practical definition of finality that the Court has often employed.¹⁰⁵ More importantly, the approach to appealability adopted in *Moses H. Cone* makes eminent sense. To require technical rather than practical finality would represent an anachronistic return to rigid formalism.

Second, the Court in *Moses H. Cone* held that the order was appealable under the so-called collateral order doctrine, pursuant to which an otherwise non-final order is appealable where the order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment."¹⁰⁶ A stay order in favor of a parallel state action, the Supreme Court reasoned, "presents an important issue separate from the merits" because it "amounts to a refusal to adjudicate" the case in federal court.¹⁰⁷ Moreover, such orders could not be reviewed on appeal from a final judgment in the federal action because the district court "would be bound, as a matter of res judicata, to honor the state court's judgment."¹⁰⁸

More complicated is the question of the appealability of a federal court's refusal to stay itself or to enjoin the parties from pursuing a parallel state action. Such orders do not end the federal action as

101 460 U.S. 1 (1983); see also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

102 *Moses H. Cone*, 460 U.S. at 11 n.11 (quoting *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962) (per curiam)).

103 *Id.*

104 *Quackenbush*, 517 U.S. at 713.

105 See, e.g., *id.*; *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). See generally Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975).

106 *Moses H. Cone*, 460 U.S. at 11-12 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). This doctrine was established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

107 *Moses H. Cone*, 460 U.S. at 12.

108 *Id.*

either a technical or a practical matter. Moreover, because the orders could—at least as a theoretical matter—be reviewed on appeal after a final judgment has been entered, the collateral order doctrine would presumably not apply. One may seriously question the wisdom of such a conclusion. Which way a federal court rules under the either-or approach of the zero tolerance model may have enormous consequences for both court systems. Because the issue is of such importance, it is inadvisable to effectively dispense with the possibility of meaningful appellate review. Short of selective legislative revision, however,¹⁰⁹ there appears to exist no realistic possibility that an appellate court would grant review of a district court's refusal to stay itself in favor of a parallel state court action.

V. RESPONDING TO THE ANTICIPATED CRITICISMS OF THE ZERO TOLERANCE MODEL

Because no commentator, to my knowledge, has previously either suggested or even considered anything resembling the zero tolerance model, it is not surprising that to date no one has attempted to fashion a critique of, or response to, the model. It is incumbent on me, then, to formulate and respond to the conceivable criticisms.

In a certain sense, I have already anticipated some of those criticisms in the course of my description of the evolution of the widespread tolerance of duplicative intersystemic litigation that pervades our judicial system.¹¹⁰ One is a critique grounded in the judge-made doctrine of *Colorado River* abstention.¹¹¹ Pursuant to that doctrine, it should be recalled, a federal court's power to abstain in the presence of parallel state litigation has been severely limited, even if the necessary result is that duplicative state and federal actions will take place. Yet this judge-made doctrine is no more written in stone than any other judicially established doctrine; the same court that adopted it can just as easily reject it. Because the harms of duplicative litigation are so significant,¹¹² the Court could easily conclude that, in appropriate circumstances, termination of the parallel federal action is preferable either to the conduct of two separate litigations or to the termination of the state litigation. Indeed, under the terms of the zero tolerance model, a federal court would not have available the

109 Cf. Fed. R. Civ. P. 23(f) (authorizing interlocutory appeal of an order denying class certification).

110 See *supra* Part III.

111 See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

112 See *supra* Part II.

option of allowing parallel litigations; one or the other of the two cases would have to be terminated.

The fact that, under the zero tolerance model, one of the conceivable results is the termination of the federal action, despite the undisputed existence of subject matter jurisdiction in the federal court action, may give rise to an alternative criticism of the model. One could persuasively argue that, unless Congress has statutorily authorized a federal court to decline jurisdiction, for a federal court to refuse to exercise its statutorily vested jurisdiction would unconstitutionally usurp legislative power. Indeed, I have sought to fashion just such an argument,¹¹³ though how persuasive my argument was appears to have been the subject of debate.¹¹⁴

The simplest—if perhaps not the most intellectually satisfying—answer is that whatever the merits of this argument, it is not one which the Supreme Court has ever accepted.¹¹⁵ Thus, as a practical matter we must take the world of Supreme Court doctrine as we find it.

By way of analogy, in 1984 I voted for Walter Mondale for President of the United States. Yet after his all too convincing loss in the election I did not choose to ignore reality by stubbornly referring to him as “President Mondale.” Similarly, if, in fashioning my theories of federal jurisdiction, I were stubbornly to ignore relevant Supreme Court doctrine every time I found that doctrine to be unpersuasive, my analysis would soon lose any connection to reality and, as a result, make only limited contributions to the development of the law.

In light of the fact that the current Supreme Court continues to recognize a federal court’s power, under appropriate circumstances, to decline to exercise its statutorily vested jurisdiction, at least as a doctrinal matter, separation-of-powers considerations should not stand in the way of adoption of the zero tolerance model. If, on the other hand, one were to choose to proceed on a purely normative analysis of separation of powers considerations and, on that basis, find judge-made abstention doctrines to be unacceptable, all one would need to do is append to the zero tolerance model the stipulation that the model would have to be imposed statutorily by Congress, rather than by the Supreme Court in the course of fashioning jurisdictional doctrine.

113 See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); see also Redish, *supra* note 16.

114 It should be noted that respected commentators have vigorously differed with this view. See Rehnquist, *supra* note 31; David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

115 See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

Probably more controversial than its impact on federal jurisdiction is the possibly ominous effect that the zero tolerance model would have on state court power and the interests of judicial federalism. Under the zero tolerance model, in appropriate circumstances a federal court would have the authority to terminate an ongoing state court proceeding. As the existence of both the Anti-Injunction Act¹¹⁶ and the judge-made doctrine of "Our Federalism"¹¹⁷ demonstrate, this is a power that our traditions of judicial federalism have long frowned upon. Indeed, unless one were initially able to circumvent the limits of the Anti-Injunction Statute, one would not even have to face issues of political tradition; the zero tolerance model would be statutorily barred.

For reasons already discussed,¹¹⁸ however, there is no basis, in either statutory text or federalism policy, for the rigid and complete exclusion of federal court power to enjoin the continuation of parallel state proceedings when those proceedings give rise to waste and inefficiency on the one hand and simultaneously threaten the meaningful exercise of the federal court's jurisdiction on the other. The "in-aid-of-jurisdiction" exception appears textually well suited to the recognition of such federal judicial authority. Indeed, it is only through an artificially truncated and conceptually distorted construction that the Supreme Court has managed to avoid construing this exception to authorize federal injunctive power in the event of parallel state litigation. Under this broader—and more natural—interpretation, pursuant to the in-aid-of-jurisdiction exception a federal court would have the power to enjoin a parallel state action whenever the prior resolution of that state court action could tie the hands of the federal court, either through the required imposition of collateral estoppel or through the practical mooted of the federal court action.¹¹⁹

It should be emphasized that to assert that the federal court has power to enjoin a parallel state action does not necessarily mean that the court will actually exercise that power. As I have suggested in earlier writing,¹²⁰ in deciding whether to exercise its injunctive power a federal court would presumably engage in an intricate weighing process, considering the competing interests of both the two judicial sys-

116 28 U.S.C. § 2283 (1994); *see also supra* Part III.B.

117 *See, e.g.,* *Younger v. Harris*, 401 U.S. 37 (1971).

118 *See supra* Part II.

119 So construed, the in-aid-of-jurisdiction exception to the Anti-Injunction Act would parallel the interpretation currently given to the relitigation exception. *See supra* Part III.B.

120 *See* MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 331–36 (2d ed. 1990).

tems and the litigants. Under the zero tolerance model, however, an important added consideration would be the recognition that the federal court's failure to enjoin the parties from proceeding in the state court action would automatically have the effect of depriving the federal court of its own jurisdiction over the matter.¹²¹

Even if one were able to circumvent the restrictions imposed by the Anti-Injunction Act, one would still have to deal with the constraints flowing from the judge-made doctrines of comity and federalism. This is because in cases in which the Anti-Injunction Act does not provide a bar to federal injunctive power, the Supreme Court has stated on numerous occasions,¹²² considerations of judicial federalism nevertheless caution against anything but the narrowest federal court power to enjoin ongoing state judicial actions.¹²³

One may seriously question the wisdom of this doctrine.¹²⁴ For the most part, it is premised on notions of parity between state and federal judges as interpreters of federal law and protectors of federal rights that is wholly unjustified when one takes into account both historical and institutional factors.¹²⁵ As a general matter, federal judges may be relied upon to provide more uniform and sophisticated interpretations of federal law than will state judges.¹²⁶ In the context of duplicative litigation, however, a presumed superiority of federal

121 See *supra* Part IV.

122 See, e.g., *Moore v. Sims*, 442 U.S. 415 (1979).

123 For example, the Supreme Court has held that 42 U.S.C. § 1983 (1994), the federal civil rights law, is an expressly authorized exception to the Anti-Injunction Act. See *Mitchum v. Foster*, 407 U.S. 225 (1972). Yet, it is in cases brought pursuant to § 1983 that the Court has imposed judge-made limits under principles of federalism and comity. See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

124 For detailed critiques of the political and constitutional policies underlying judge-made principles of comity and judicial federalism, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), and MARTIN H. REDISH, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

125 See Neuborne, *supra* note 125; Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

126 I do not mean to suggest that this issue is free from controversy. On the contrary, a number of respected scholars have supported the concept of parity. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). I have chosen not to discuss this issue in detail in this Article for two reasons. First, I have examined the issue in a number of other writings. See, e.g., Redish, *supra* note 125. Second, for reasons about to be discussed, the issue of parity is probably not of significant relevance to the application of the zero tolerance model.

judges as interpreters of federal law will often be irrelevant. In many cases of duplicative litigation, both state and federal suits will involve only issues of substantive state law (where jurisdiction in the federal court suit is premised exclusively on diversity grounds), or while the federal suit involves federal law the parallel state case will involve parallel state causes of action arising out of the identical factual situation. Thus, in these situations federal court superiority in interpreting federal law would have no logical relevance to the federal court's decision to enjoin the parallel state suit.

To focus on the parity issue, however, largely misses the point of the zero tolerance model. The reason the model vests in the federal court the power to enjoin a parallel state court action is not that we can be sure, *ex ante*, that the federal court would be a preferable forum for the adjudication of the overlapping substantive issues involved in the two cases. To the contrary, the model is wholly agnostic on that issue. Rather, the model may be triggered, regardless of whether the federal or state court would be a better adjudicator of those overlapping issues of law. Thus, the model proceeds under a "veil of ignorance" as to that issue.

The zero tolerance model is triggered simply by a finding that there exist simultaneous, parallel, or overlapping suits in state and federal court. Its goal is not to preference one court system over another, but instead to avoid having two different judicial systems simultaneously expending time, effort, and resources on what effectively amounts to the same litigation. In certain instances, this will mean that the federal court suit will be stopped; in others, the state court suit will end. While that choice quite probably should be premised, in part, on considerations of relative forum expertise,¹²⁷ it is conceivable that other factors—for example, an overriding concern with comity considerations—could be employed in implementing the model.

The key insight of the zero tolerance model is that wasteful duplicative litigation is not to be tolerated. Thus, in its most basic form the model dictates no more than that the proceeding in one of the two forums must be terminated.

Of course, if the zero tolerance model is designed to be system-neutral, one may reasonably question why it is the federal court, rather than the state court, that gets to decide which of the two proceedings must prematurely terminate. If one were to press for an affirmative rationale for the choice of the federal court over the state

127 Such a view would be consistent with positions I have taken in the past. See REDISH, *supra* note 59; REDISH, *supra* note 16; REDISH, *supra* note 1; REDISH, *supra* note 21.

court as exclusive implementer of the zero tolerance model, I suppose the best one would be that it was the federal government that won the Civil War.

That the federal court has the final say as to which suit will proceed, it should be noted, does not necessarily imply that in making its choice the federal court should completely ignore the views and wishes of the state court that is adjudicating the parallel suit. To the contrary, before making a decision as to the forum, it would be both appropriate and advisable for federal judges to contact their state court counterparts and, in consultation with the parties, seek an informal resolution of the jurisdictional conflict.¹²⁸ Ultimately, however, since as a practical matter only one judicial system can have the final say as to the implementation of the zero tolerance model, the nation's political and constitutional history dictate that it is the federal judicial system that should retain that power.

VI. CONCLUSION

In fashioning what I have chosen to label the zero tolerance model, I have consciously left unresolved several important questions. I have done so because I consider such issues to be secondary to the fundamental issue, and to focus on such controversial questions at this point would threaten to cloud that issue. The basic point is that duplicative litigation is wasteful, burdensome, inefficient, and often harassing. Hence, the duplicative litigation that plagues our multi-level judicial structure must be avoided, at all costs. No consideration of litigant choice or judicial federalism should be allowed to outweigh this overriding interest.

What I have left largely unresolved are the specific standards for determining whether it will be the federal action or the state action that will terminate in favor of the other. Presumably, one would have available three broad options in fashioning these standards: (1) a rebuttable presumption in favor of the federal forum, (2) a rebuttable presumption in favor of the state forum, or (3) a neutral, case-by-case form of systemic and/or litigant "interest analysis." Such an analysis would likely consider a number of different and possibly competing factors, such as the source of the controlling substantive law, the existence of related litigation in the same forum, and which action was

128 This would be a proper application of Judge Schwarzer's suggested method of informal state-federal judicial interaction. See William W. Schwarzer et. al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1734-35 (1992).

filed first.¹²⁹ Which of these three alternatives one chooses would likely be most influenced by one's underlying normative approach to issues of judicial federalism. I leave the choice among those options for more detailed debate at a later time, to underscore that I would be willing to accept any one of them, in preference to the structure that governs today.

The one remaining issue concerns the most appropriate method of incorporating the zero tolerance model into modern jurisdictional jurisprudence. From one perspective, it would seem reasonable that the judiciary itself, rather than Congress, should implement the model, because the problems that the model seeks to remedy are, for the most part, the product of judicial decision. It is a combination of the Supreme Court's decisions fashioning *Colorado River* abstention on the one hand,¹³⁰ and characterizing the in-aid-of-jurisdiction exception to the Anti-Injunction Act in an artificially narrow manner¹³¹ on the other hand, that has led to the current tolerance of intersystemic duplicative litigation. Hence, the judiciary itself should be able, through judicial decision making, to adopt a doctrinal approach that seeks to resolve problems of its own making.

Whether the lower federal courts could choose to adopt the zero tolerance model on their own or instead would have to wait for explicit adoption by the Supreme Court is another matter. Arguably, there exists sufficient flexibility under both the Supreme Court's abstention and Anti-Injunction Act decisions to permit the lower courts some level of maneuverability.¹³² Ultimately, however, the zero tolerance model could not continue to exist unless the Supreme Court were to provide it at least tacit acceptance.

Perhaps the most significant difficulty with judicial implementation of the zero tolerance model would be the separation-of-powers considerations to which I have pointed in the past concerning the institutional validity of judge-made abstention principles in the face of legislative direction to exercise jurisdiction. If one were to accept my

129 My personal preference would be for an approach similar to the one I have previously suggested for determining whether a federal court should invoke its power to enjoin parallel state litigation under the "in-aid-of-jurisdiction" exception to the Anti-Injunction Act. See REDISH, *supra* note 59, at 331-36. Alternatively, one might choose to employ the six-factor analysis which the Supreme Court described initially in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and expanded subsequently in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

130 See *supra* Part III.A.

131 See *supra* Part III.B.

132 See *supra* Part IV.

critique of judge-made abstention, presumably one would conclude that congressional action is necessary to implement the model. However, the Court itself has remained largely unconvinced by the separation-of-powers critique in fashioning existing abstention doctrines,¹³³ so at least under current doctrinal standards there would be no need for legislative authorization.

While these issues of implementation are no doubt important, they pale in comparison to the importance of the basic issue itself, namely, the need for a zero tolerance model in the first place. Once that conclusion has been generally accepted, resolution of the remaining questions should follow with relative ease.

133 See *supra* Part IV.