FEDERAL COURT ABSTENTION AND THE HAGUE CHILD ABDUCTION CONVENTION

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The Hague Convention on the Civil Aspects of Child Abduction, implemented in the United States through the International Child Abduction Remedies Act, represents a global effort to stem the harmful practice of parents resorting to abduction across national borders to circumvent adverse custody rulings. The Abduction Convention is a mutual agreement to return wrongfully abducted children to their nations of habitual residence for all further custodial proceedings, thereby restoring the status quo prior to the abduction and removing a major incentive for this harmful practice. Congress expressly provided for original and concurrent federal jurisdiction over these petitions for return. In recent years, however, a number of federal district courts have been abstaining from hearing such claims where there is already a custody proceeding ongoing. This practice has the effect of forcing a plaintiff, usually a foreigner, to litigate these sensitive matters in a potentially hostile state forum. In this Note, Ion Hazzikostas argues that district courts have erred in their abstention in most such cases, to the detriment of the same children the Abduction Convention was enacted to protect. A more nuanced standard would better serve the interests of the Convention by removing needless barriers to return, while still limiting the potential for either party to gain an unfair advantage through jurisdictional manipulation.

INTRODUCTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction[1] (Hague Convention) was drafted in response to the serious and alarming problem of parents removing their children across international borders in an attempt to escape the jurisdictional reach of adverse custody rulings.[2] By way of illustration,

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[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Convention]. As of January 12, 2004, seventy-four countries have ratified (the original signatories) or acceded to (nations that joined later and must be accepted by other states on an individual basis) the Convention. Hague Conference on Private International Law, Status Sheet Convention #28, *at* http://www.hcch.net/e/status/abdshte.html (last visited Feb. 5, 2004).

[2] *See* Hague Convention, *supra* note 1, pmbl. (resolving to respond to "the harmful effects of [children's] wrongful removal or retention and to establish procedures to ensure their prompt return").

consider the following hypothetical scenario: A male American citizen is traveling overseas and meets a woman in France, with whom he forms a relationship. He agrees to settle with her in France, and they eventually marry. For a time, their marriage is quite blissful, and they have a child. At this juncture, their relations rapidly worsen, until they decide that they have irreconcilable differences and they separate. A French court grants a divorce and the former couple enters into a shared custody agreement.

Up until this point, this has been the story of millions of lives around the world. An unfortunate wrinkle is introduced, however, as the father then takes his child back to the United States in defiance of the custody order and without the mother's permission.[3] Upon returning to the United States, the father (here the "allegedly abducting parent") initiates a custody proceeding in state family court, seeking a U.S. court order that will legitimize his control over the child. Prior to 1980, the mother (here the "left-behind parent") would have found herself in the undesirable position of having rights pursuant to a French custody award without any means of enforcement beyond the reach of French jurisdiction. She could travel to the United States and appear in family court to attempt to obtain recognition of the French judgment or a new custody award, but this approach would come at great personal expense and would be unlikely to succeed, as most family court judges are loath to send overseas the children of American citizens.[4] The Hague Convention was designed as a solution to this predicament.

Simple in conception, the Hague Convention mainly is a procedural measure, which states that when a wrongful removal of a child across international boundaries has occurred, the child will be returned to his nation of habitual residence upon the filing of a peti-

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[3] In practice, the "abduction" might occur under the pretense of a short-term visit to the father's relatives back in the United States, to which the mother might assent, only later to receive notice that the father does not intend to return. Other times, removal may occur without any such knowledge or permission, potentially involving fraudulent travel documents to aid a clandestine escape.

[4] Prior to the implementation of the Hague Convention, and even today in the case of countries that are not parties to the Convention, parents whose children were abducted across international boundaries have been forced to resort to the extreme measure of re-abduction. *See* Thomas O. Harper, III, *The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction*, 9 EMORY INT'L L. REV. 257, 268 (1995). This extralegal solution was and is sufficiently common that some professional mercenaries are able to make a living performing re-abductions for hire. *See id.* at 269 (citing Jack Kelley, *The Man Behind the Disguise*, USA TODAY, Aug. 30, 1993, at A6) (discussing one Patrick Buckman, who claims to have recovered nearly one hundred children, at average fee of $80,000 each).

tion,[5] and that nation's courts will have jurisdiction over the substantive determination of proper custody.[6] In keeping with its procedural character, the Hague Convention provides for the immediate suspension of any and all ongoing substantive custody proceedings upon the filing of a return petition, pending the resolution of the Hague Convention claim.[7] The intended aim is to effect a return to the status quo ante, negating any legal advantage actual and would-be abductors might hope to derive from such actions,[8] and thereby safeguarding the best interests of the child.[9] Thus, to wrap up the scenario described above, in the years since the Hague Convention entered into force, the mother now can come to the United States and file a return petition, which, if granted, would remove her child from the American family court system and allow a French court to make a final custody determination.

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[5] As interpreted and applied pursuant to the Hague Convention, "habitual residence" is something of a creature unto itself. The term is defined in neither the Convention itself, nor the official Explanatory Report of the Convention. In practice, determination of habitual residence has implicated such factors as the duration of time the child has spent in his new country, how well settled he is, and the original understanding of both parents as to the permanence of the move. The flexibility inherent in the term can be both a strength, allowing judges to take the particularized facts of each case into account, and a weakness, resulting in seemingly illogical and inconsistent results. *Compare* Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1055–57 (E.D. Wash. 2001) (finding that period of twenty-seven consecutive months in Greece was insufficient to shift habitual residence from United States), *with* Falls v. Downie, 871 F. Supp. 100, 102 (D. Mass. 1994) (finding that child living in United States with father for seven months was now habitually resident in United States).

[6] *See* Elisa Pérez-Vera, *Explanatory Report*, *in* 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 426, ¶ 16 (1981) ("[T]he framework of the Convention . . . will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal."), http://www.hcch.net/e/conventions/expl28e.html (last visited Feb. 5, 2004).

[7] Hague Convention, *supra* note 1, art. 16. Rather than implicitly or explicitly sanctioning a race to judgment, the Convention's drafters made it clear that they wished return petitions to have absolute priority over determinations of custody on the merits.

[8] *See* Pérez-Vera, *supra* note 6, ¶ 16.

[9] *See* Hague Convention, *supra* note 1, pmbl. (stating that one main purpose of Convention is "to protect children internationally from the harmful effects of their wrongful removal or retention"). It is crucial to note that this mention of the child's welfare should not be conflated with the flexible best-interests analysis that underlies custody determinations themselves. The Hague Convention is not an exhortation for judges broadly to interpret and pursue the best interests of the children in return petitions under the Convention, as they might in ordinary custody suits. Rather, the Convention is binding legislative authority, setting forth precisely what judges must do in cases arising under it, in order to further the best interests of the children. It is in this particular sense, and this sense alone, that pursuit of the "best interests of the child" is an essential aspect of the Hague Convention.

The United States has implemented the Hague Convention through the International Child Abduction Remedies Act (ICARA),[10] which incorporates directly all provisions of the Hague Convention and recognizes the international intent that underlies its conception.[11] ICARA provides a federal civil action for enforcement of Hague Convention claims, and establishes concurrent federal and state jurisdiction over the adjudication of such return petitions.[12] In allocating this authority, Congress was especially mindful that issues of family law traditionally are placed wholly within the sphere of state competence, and thus was careful expressly to limit federal court jurisdiction to the narrow questions arising under the Hague Convention.[13] In spite of, or perhaps because of, this separation, many parents strongly prefer to litigate their ICARA claims in federal court—indeed, this Note assumes such a preference.[14] As a consequence, international abduction cases that end up in the United States often involve parallel litigation, with the left-behind parent filing an ICARA return petition in federal court, while a state custody suit—initiated by the allegedly abducting parent—already is proceeding in state family court.

Several federal district courts, faced with claims filed under such circumstances, have chosen to abstain from exercising jurisdiction,

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[10] Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601–11610 (2000)).

[11] § 11601(b) (recognizing "international character of the Convention" and noting that "provisions of [the International Child Abduction Remedies Act (ICARA)] are in addition to and not in lieu of the provisions of the Convention").

[12] § 11603(a)–(b).

[13] § 11601(b)(4). Despite strong eventual support for ICARA in both houses of Congress, the issue of potential encroachment upon the role of state courts in custody disputes was contentious. In particular, Senator Orrin Hatch expressed doubt about the appropriateness of federal jurisdiction over ICARA petitions. *See* 134 CONG. REC. 6383–84 (1988).

[14] There are numerous reasons why the left-behind parent might choose to bring her ICARA claim in federal court, rather than raise it within the ongoing state custody proceeding, including, but not limited to, concern about outsider bias in state court, counsel's greater familiarity with federal procedure, and unwillingness to allow the allegedly abducting parent to dictate the forum in which the matter will be adjudicated. Regardless, Congress was clear in its grant of concurrent jurisdiction that ICARA claims need not be brought in the same forum as any custody proceedings. Finally, as a procedural matter, the left-behind parent cannot simply remove the entire suit to federal court, because removal only is permitted in cases in which there would have been original federal jurisdiction over the initial claim. *See* 28 U.S.C. § 1441(a) (2000). As per *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830–31 (2002), a federal defense or counterclaim does not create subject matter jurisdiction where it did not otherwise exist on the basis of the original complaint. *See also* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

under either *Younger v. Harris*[15] or *Colorado River Water Conservation District v. United States*.[16] This has had the effect of forcing these plaintiffs, who are the alleged victims of international child abduction, to seek redress for their federally created causes of action in state courts. At the same time, Congress's chosen scheme of concurrent jurisdiction opens the door to potential forum shopping, which is abusive of both judicial resources and the best interests of the children involved in such proceedings.[17] Balancing these concerns is a delicate matter, and even where courts agree about the appropriateness, or lack thereof, of these forms of abstention, their holdings rest on widely varying, and even conflicting, grounds.[18] Courts faced with these questions for the first time thus find themselves confronted with a muddled and often internally inconsistent landscape of background law. This Note represents an effort to shed light on this murky picture, first by identifying the limited subset of ICARA parallel litigation cases in which abstention is warranted, and then by attempting to articulate a coherent legal framework that consistently will point to the cases that fall within this subset. As this Note demonstrates, by abstaining in such a way as to uphold consistently procedural fairness to ICARA litigants, courts simultaneously will honor the welfare-promoting principles of the Hague Convention.

Part I of this Note briefly summarizes the nature of both the *Younger* and *Colorado River* forms of abstention and the factors implicated by each. Part II attempts to establish a scheme for classifying the various types of "parallel proceedings" cases that may arise under ICARA. Since any hardship resulting from a district court's

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[15] 401 U.S. 37 (1971) (declining to exercise jurisdiction over federal suit seeking to enjoin state criminal proceedings). For a closer look at *Younger* abstention, see *infra* Part I.A.

[16] 424 U.S. 800 (1976) (abstaining in interests of "wise judicial administration" in cases in which there are parallel state proceedings). Part I.B, *infra*, examines the *Colorado River* doctrine in greater detail.

[17] In particular, a left-behind parent may pursue state custody litigation, but if she begins to feel that she is unlikely to prevail, she may then attempt to force the case into the federal system by bringing an ICARA petition there. *See* Linda J. Silberman, *Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEXAS INT'L L.J. 41, 57 (2003) (arguing that ICARA's scheme of concurrent jurisdiction allows for such "hijack[ing]" and other "types of forum shopping that were never anticipated when ICARA was enacted"). Forum shopping is especially odious in the ICARA context, due to the potential harm wrought upon children by protracted litigation. *See infra* notes 116–19 and accompanying text.

[18] For an example of one such source of confusion, compare *Cerit v. Cerit*, 188 F. Supp. 2d 1239 (D. Haw. 2002) (abstaining because left-behind parent had raised ICARA claim in state court), with *Bouvagnet v. Bouvagnet*, No. 01 C 4685, 2001 WL 1263497 (N.D. Ill. Oct. 22, 2001) (abstaining in part because left-behind parent had *not* raised ICARA claim in state court). *See also infra* notes 107–09 and accompanying text.

decision to abstain from hearing an ICARA claim necessarily must fall upon the shoulders of the left-behind parent,[19] it follows that improper abstention will be an unfairness to her. Accordingly, it is useful to view the range of possibilities through the eyes of the left-behind parent. Part II of this Note undertakes this exploration by laying out a spectrum of possible degrees to which the left-behind parent previously has availed herself of the state court system. Part III considers the applicability of both forms of abstention to each category within the above framework and concludes that *Younger* abstention has, at best, a limited place in dealing with claims under ICARA, due to the minimal implication of state comity concerns,[20] while the *Colorado River* standard offers a greater degree of flexibility that is appropriate to the nuances of this context.[21] This latter test offers the potential to uphold the spirit of the Hague Convention and the demands of justice while safeguarding against excessive waste of judicial resources by allowing district courts to abstain in the interest of "wise judicial administration."[22] In order to function best within the context of the Hague Convention, however, courts should apply the *Colorado River* doctrine with a focus on guarding against forum shopping, and there must be clear guidelines for evaluating litigants' potentially abusive behavior.

I
FORMS OF ABSTENTION

Nearly two centuries ago, Chief Justice Marshall spoke of the duty incumbent upon the federal judiciary: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[23] This stark command, however, is the product of a different era, far removed from the modern reality of a federal judiciary that is overwhelmed by the number of litigants pouring through the

[19] By definition, a left-behind parent has traveled to the United States in pursuit of her child, generally at her own expense. She likely has left her job behind in doing so and concurrently is accruing significant additional expenses in the form of lawyers' fees and probably accommodations as well. If a district court abstains from the adjudication of her return petition, any time and resources she has invested in that claim are wasted. As the litigation is prolonged, the hardship inherent in these circumstances may become prohibitive, inducing the left-behind parent either to abandon her efforts or to accept a highly unfavorable settlement. In addition, there is the possibility that the remaining state forum will not be as well-suited to the vindication of her federal rights. For more on this last point, see *infra* note 146 and accompanying text.

[20] *See infra* notes 128–31 and accompanying text.

[21] *See infra* notes 140–41 and accompanying text.

[22] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

[23] Cohens v. Virginia, 19 U.S. 264, 404 (1821).

courthouse gates.[24] Given the strain upon judicial resources, some cases will be seen as more deserving of the courts' attention than others, while other cases still simply may be presented "in the wrong court or at the wrong time."[25] In response to such suits, federal courts have fashioned and refined several means of deferring or declining their exercise of jurisdiction.

The *Younger* and *Colorado River* doctrines both are products of this thinking. Despite having divergent theoretical underpinnings, each approach depends upon the presence of some ongoing state proceeding in which the federal claim in question could be raised.[26] In considering arguments for and against abstention in the ICARA context, however, virtually every court that has dealt with the issue has fallen victim to oversimplification, reducing the two doctrines to mechanical checklists. This approach ignores the complex and nuanced foundations of each doctrine, an understanding of which is necessary for a thorough analysis of the doctrines' applicability.

A. Younger *Abstention*

Younger abstention first emerged in the context of a district court motion for the stay of a state criminal prosecution.[27] John Harris was being prosecuted under a California syndicalism statute, the constitutionality of which he wished to challenge. Rather than raising his claims as a defense in the existing state proceedings, he sought to have

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[24] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 9–10 (1995) (describing "[h]uge burdens" now upon federal courts, with caseload growing at pace that far outstrips creation of new judgeships), *available at* http://www.uscourts.gov/lrp/CVRPGTOC.HTM.

[25] David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547 (1985) (justifying courts' right to decline to exercise jurisdiction, grounded in principles of equity, federalism, separation of powers, or simply judicial administration).

[26] *See infra* notes 32, 54 and accompanying text.

[27] *See* Younger v. Harris, 401 U.S. 37, 38–39 (1971). This case, and the doctrine it spawned, arose against the backdrop of the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), which bars federal court injunctions of ongoing state proceedings, "except as expressly authorized by Act of Congress." The federal claim in *Younger* was brought under 42 U.S.C. § 1983, which has been held to be a congressional exception to the Anti-Injunction Act. *See* Mitchum v. Foster, 407 U.S. 225 (1972). However, parties brought suit under § 1983 with increasing frequency, limiting the practical implications of the Anti-Injunction Act. In this context, *Younger* can be viewed as a judicial solution to this conflict, transposing aspects of congressional intent to reinforce the Anti-Injunction Act. *See* Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, *in* CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS, at 338 (ALI-ABA Course of Study, SH063 ALI-ABA 221, 2003). The place of congressional intent in the statutory roots of the *Younger* doctrine is of particular relevance when considering Congress's aims in enacting ICARA. *See infra* Part III.A.

a federal court enjoin further prosecution and invalidate the law on First Amendment grounds.[28] The district court found in Harris's favor on both questions,[29] but the Supreme Court vacated the ruling.[30] In holding that the district court had exercised jurisdiction improperly, the Court cited little direct authority, instead invoking "longstanding judicial policy."[31] The key principle underlying *Younger* is that of "comity," which the Court defined as "a proper respect for state functions, [and] a recognition of the fact that the entire country is made up of a Union of separate state governments."[32] The Court made clear that it was interpreting an equitable doctrine, such that federal court intervention would require some "extraordinary circumstances" that implicated a sufficient injustice to overcome state comity concerns.[33]

While *Younger* originated in a criminal context, and while criminal proceedings generally are viewed as implicating an especially strong state interest,[34] the Court has extended the doctrine into some areas within the civil sphere.[35] In such cases, the Court has required that the state actually be a party to the action,[36] but *Younger* abstention nevertheless may be warranted where important state interests

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[28] *Younger*, 401 U.S. at 38–39. In the aftermath of the new First Amendment jurisprudence promulgated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), the California statute in question was most likely, in fact, unconstitutional, and the *Younger* Court suggested as much in passing. *See Younger*, 401 U.S. at 40–41 (noting that *Whitney v. California*, 274 U.S. 357 (1927), which served as basis for state's justification of its law, explicitly had been overruled by *Brandenburg*).

[29] *Younger*, 401 U.S. at 40.

[30] *Id.* at 40–41.

[31] *Id.* at 40.

[32] *Id.* at 44.

[33] *See id.* at 53–54. The Court appears to be looking for the threat of some irreparable injury, such as prosecutorial "bad faith [or] harassment," or the hypothetical case of a statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph." *Id.* at 53 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). There is nothing, however, in the *Younger* opinion to suggest that, in laying out such a significant hurdle for claimants to surmount, the Court was considering any situations other than federal injunctive relief against state criminal prosecution.

[34] *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) ("States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity.").

[35] *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (deeming *Younger* abstention appropriate in case of constitutional challenge to $11 billion civil verdict); Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986) (applying *Younger* abstention in case of First Amendment challenge to sex discrimination civil suit by fired teacher); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (upholding abstention where party sought injunction of pending state attorney disciplinary proceedings).

[36] *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (holding that *Younger* applies where "[t]he State is a party to the . . . proceeding, and the proceeding is both in aid of and closely related to criminal statutes," though not necessarily directly criminal in nature). *But see* New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (*NOPSI*), 491 U.S.

are at stake.[37] Despite the evolution and expansion of the doctrine since its initial promulgation, however, *Younger* abstention remains a discretionary tool to be exercised infrequently—it is decidedly the exception to the norm.[38]

Most courts grappling with the issue of *Younger* abstention in the ICARA context have turned to the three-prong test articulated by the Court in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*,[39] which requires (1) an ongoing state judicial proceeding that (2) implicates important state interests and (3) offers an adequate opportunity for parties to raise constitutional challenges.[40] Stripping down the *Younger* doctrine to this simple formulation, especially in a civil context, gives it a breadth that is decidedly at odds with its history of carefully restrained application. In particular, the requirement that the implicated state interests merely be "important" understates the required threshold and risks, misleading courts into applying the test without being mindful of its origins.[41] The greater the disconnect between any ongoing parallel proceedings and state criminal law, the more unusual any application of *Younger* abstention becomes.

350, 367–68 (1989) (holding that *Younger* abstention is inappropriate where state interest is limited to pending review of legislative or executive action).

[37] *See Pennzoil*, 481 U.S. at 11 (finding *Younger* applicable where "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government"). The majority was clear that it did not, however, intend for *Younger* to be applied in the broader context of civil cases generally. *See id.* at 14 n.12.

[38] *See NOPSI*, 491 U.S. at 359 (recognizing that while Court has carved out permissible areas for abstention, such cases remain "the exception, not the rule"). Despite the federalism considerations implicit in the *Younger* doctrine, the Court's recent "neo-federalism" has not had any noticeable effect on the weight given to state comity for abstention purposes. The Rehnquist Court has concerned itself primarily with the limits of congressional power vis-à-vis the states, and where the underlying allocation of jurisdictional authority is proper and constitutional, the scope of proper judicial deference under *Younger* has remained roughly unchanged over the past decade. *See* Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375, 411–18 (2003) (noting courts' continued adherence to classic *Younger* analysis).

[39] 457 U.S. 423 (1982).

[40] *Id.* at 432.

[41] The threshold of "important state interests" is applied by the courts in numerous other contexts. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 552 (1997) (O'Connor, J., dissenting) (describing First Amendment jurisprudence to effect that "important state interests" could trump religious free exercise rights). In these other applications, the words frequently imply a lower threshold than that required by *Younger* and its progeny. Had the *Middlesex* Court adopted less ambiguous language, fewer judges might have made the classic error of reading the same language the same way in very different contexts.

B. Colorado River *Abstention*

The particulars of the *Colorado River* case turn on a complicated set of facts that revolve around water rights in the southwestern United States.[42] Colorado had instituted a system of internal adjudication of water rights, in response to which the federal government brought suit in district court seeking to establish its rights to certain tributaries within the state.[43] One of the prior rightholders named in the government's suit initiated a proceeding in Colorado state court, using the McCarran Amendment[44] to join the United States as a defendant.[45] This raised the question of how the district court should deal with this parallel, substantively congruent action. The district court granted a motion to dismiss, citing abstention doctrines in an unreported oral opinion, but the Tenth Circuit reversed, finding abstention inappropriate.[46]

Grouping the *Colorado River* doctrine into the category formally known as "abstention" is something of a misnomer.[47] In reversing the Tenth Circuit and upholding the district court's dismissal of the case, the Supreme Court specifically held that "the dismissal cannot be supported under [the abstention] doctrine in any of its forms."[48] Nevertheless, the Court found that in certain cases, concerns of "wise judicial administration" may be sufficient to trump the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[49] Like *Younger*, *Colorado River* is an equitable, discretionary doctrine, but the parallel ends there. While formal theories of

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[42] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 802–03 (1976).

[43] *Id.* at 804–05.

[44] 43 U.S.C. § 666 (2000). The McCarran Amendment is a limited waiver of immunity, rendering the United States amenable to joinder as a defendant in suits involving water rights in which the United States may possess an interest.

[45] *Colorado River*, 424 U.S. at 806.

[46] *Id.*

[47] *See* Lops v. Lops, 140 F.3d 927, 942 n.21 (11th Cir. 1998) (noting that "the *Colorado River* doctrine is not a traditional form of abstention"). For the sake of consistency and convenience, however, this Note nevertheless follows the common practice of referring to the doctrine as a type of "abstention."

[48] *Colorado River*, 424 U.S. at 813. Note that while the original *Colorado River* case resulted in a dismissal of the federal case, current practice strongly favors the issuance of a stay rather than outright dismissal. *See* Bd. of Educ. of Valley View v. Bosworth, 713 F.2d 1316, 1322 (7th Cir. 1983) (stating that where court declines to exercise jurisdiction because of pendency of parallel state proceedings, it should stay rather than dismiss). The general concern is that some issues may remain unresolved after the state proceedings conclude, and a dismissal would force the plaintiff to refile and potentially face new statute-of-limitations difficulties resulting from the passage of time. *See id.*; *see also* Rogers v. Desiderio, 58 F.3d 299, 302 (7th Cir. 1995) (explaining that it is "sensible to stay proceedings until an earlier-filed state case has reached a conclusion, and then (but only then) to dismiss the suit outright on grounds of claim preclusion").

[49] *Colorado River*, 424 U.S. at 817.

abstention derive their authority from principles of federalism,[50] the primary thrust of *Colorado River* is to afford federal courts the discretion to decline to exercise their jurisdiction where an undue waste of judicial resources otherwise would result.[51]

The Supreme Court initially considered four factors, to be evaluated in unison, regarding the appropriateness of declining to exercise jurisdiction: (1) whether a court already has assumed jurisdiction over some property; (2) the inconvenience of the federal forum; (3) the risk of piecemeal litigation; and (4) the order in which jurisdiction was obtained by each forum.[52] The Court subsequently expanded this list in *Moses H. Cone Memorial Hospital v. Mercury Construction*[53] to include (5) whether federal or state law will be applied, and (6) the adequacy (or lack thereof) of the state court proceedings in the protection of the parties' federal rights.[54] The flexibility inherent in the words "wise judicial administration" has left significant room for further interpretation, including the enumeration of additional factors.[55] Particularly noteworthy is the Ninth Circuit's inclusion of forum-shopping concerns as a factor for consideration.[56] The multiplicity of factors that may be taken into account, however, should not be taken to suggest any relaxation of the overall *Colorado River* standard. In all its applications, the Court has been clear to emphasize the point that *Colorado River* abstention is warranted only by "exceptional" circumstances and "the clearest of justifications."[57]

While this approach undoubtedly presents a high hurdle to clear before a court may decline to exercise jurisdiction, the inherent flexi-

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[50] *See* Shapiro, *supra* note 25, at 547 (noting federalism concerns at core of traditional abstention theories).

[51] It has been suggested that some concerns of this sort may have been a motivating factor in *Younger* as well. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1224 (5th ed. 2003) (observing that "it would be unworkable if every [state] prosecution could be interrupted by suit for a federal injunction at any stage in the proceedings"). This point should not be taken as suggesting that judicial efficiency should be an actual component of proper *Younger* analysis, but rather as noting that *Younger* abstention makes practical sense from this perspective.

[52] *See Colorado River*, 424 U.S. at 818.

[53] 460 U.S. 1 (1983).

[54] *See id.* at 23–27.

[55] *See id.* at 16 (urging need for lower courts to engage in "careful balancing of the important factors as they apply in a given case" and recognizing that "[t]he weight to be given to any one factor may vary greatly . . . depending on the particular setting"); Fox v. Maulding, 16 F.3d 1079, 1082 (10th Cir. 1994) (describing Court's list of *Colorado River* factors as "nonexclusive").

[56] *See* Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1370–71 (9th Cir. 1990). For discussion of the particular relevance of forum shopping in the ICARA context, see *infra* text accompanying notes 148–50.

[57] *Colorado River*, 424 U.S. at 818–19.

bility of the standard is a great strength, especially when buttressed by the Court's reminder that "the decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case."[58] This foundation may make the *Colorado River* doctrine especially well suited to dealing with issues arising in the context of ICARA claims, striking a balance in favor of allowing plaintiffs to choose the forum in which to assert their federally created right, while allowing courts to thwart attempts to manipulate the judicial system for personal advantage.[59]

II
TYPES OF PARALLEL PROCEEDINGS

It is an error of oversimplification to lump together all situations in which an ICARA claim is brought in federal district court while a custody proceeding is ongoing in state court into the single category of "parallel proceedings." In understanding and analyzing the procedural posture in such cases, judges should be particularly mindful of the stage of advancement of the state proceedings and, perhaps most crucially, of the actions of the left-behind parent prior to her initiation of the federal ICARA claim. Depending on these variations, the core concerns of comity and judicial administrability may be implicated greatly, minimally, or not at all.[60] Courts that fail to note these differences severely handicap themselves in weighing adequately the competing interests at stake in the particular cases that come before them.

This Part attempts to lay out a spectrum within which we may consider the prefiling actions of left-behind parents in ICARA cases.[61] At the outset, circumstances are such that any form of abstention clearly would be inapplicable. Moving further along this spectrum, however, the factors advocating abstention grow increasingly stronger until a tipping point of sorts is reached.[62] This framework has the

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[58] *Cone*, 460 U.S. at 16.

[59] *See infra* Part III.B.

[60] Specifically, the greater the extent to which the left-behind parent has availed herself of the state courts, the more wasteful of judicial resources abandonment of those proceedings in favor of a fresh federal claim would be.

[61] For the purposes of the discussion that follows in this Part, this Note assumes that the left-behind parent prefers to litigate her ICARA claim in federal court. *See supra* note 14. In light of the scheme of concurrent jurisdiction established in ICARA, she is of course free to raise the issue as a plaintiff in state court, or as a counterclaim while defending on the merits regarding custody. However, that possibility eliminates any question of the proper scope of federal jurisdiction, and thus lies beyond the scope of this Note.

[62] Part III, *infra*, offers an analysis and discussion of precisely where this transition occurs, as well as consideration of how courts should deal with cases on the margin.

potential to illuminate the distinctions between the various fact patterns that are possible within the ICARA context, drawing particular attention to the differences that may be dispositive as to the question whether abstention is appropriate. In analyzing each category, this Part focuses on policy implications—procedural fairness to the left-behind parent and conservation of judicial resources—and leaves specific doctrinal analysis under *Younger* and *Colorado River* for Part III.

A. Left-Behind Parent Goes Directly to District Court

This initial category of cases would be the simplest that a district court might consider. Here, the allegedly abducting parent initiates a custody action in a state court, but the left-behind parent chooses not to submit herself to the jurisdiction of that court at all, instead proceeding directly to federal court to assert her ICARA claim. In this context, it is difficult to imagine any argument in favor of abstention, because if the district court declined to exercise jurisdiction, it would have the effect of forcing the left-behind parent into state court through no action of her own. Such a result would run counter to fundamental principles underlying our jurisdictional scheme, which reflect a strong preference for allowing a plaintiff to choose the forum in which to bring her suit.[63] Additionally, this would have the effect of undermining clear congressional intent to establish concurrent jurisdiction under ICARA.[64]

There is, unsurprisingly, no instance of any district court abstaining in a case that fits this pattern. However, it is useful to consider this category as a default position of sorts, in which the left-behind parent has not taken any action that might compromise her right to bring an ICARA claim in a district court. Given that no judge seriously would consider abstention under these circumstances, any basis for abstaining must be justifiable in terms of some actions the left-behind parent has taken prior to entering federal court—in other words, we must be able to say that because she has chosen to avail herself of a state forum to a particular extent, she has thereby forfeited her right of access to federal court.[65]

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[63] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

[64] 42 U.S.C. § 11603(a) (2000) (providing for state and federal "concurrent original jurisdiction of actions arising under the Convention"). Federal court deference to ongoing state proceedings in which the left-behind parent has not even appeared effectively would eliminate parents' ability to bring ICARA claims in federal court, penalizing them for factors beyond their control.

[65] For the sake of consistency and clarity, this Note will follow the convention of referring to the plaintiff (here, the left-behind parent who is filing the ICARA claim) as female

B. Left-Behind Parent Has Appeared Before State Court on the Merits of the Custody Claim

The next category contemplates a situation where the left-behind parent has submitted herself to the jurisdiction of the state court in order to contest the alleged abductor's custody claim. However, for the purposes of this category, at no point did she raise any issues relating to ICARA or the Hague Convention during the course of the state proceedings, by way of defense, counterclaim, or otherwise. A central factor in considering this class of cases is the extent to which the left-behind parent has defended her rights in state court, as well as the degree to which the case has advanced. The longer a state court has spent hearing arguments, the greater the extent to which state interests may be implicated by the ongoing proceedings. Additionally, when a party waits until a late stage of the custody proceedings to file an ICARA claim in federal court, this inevitably entails an increased waste of judicial resources, as well as a heightened risk of forum shopping.[66]

1. Early Stage of the State Proceedings

This is perhaps the most common class of parallel proceedings, wherein the left-behind parent has submitted herself to the jurisdiction of the state court, but the custody proceedings have progressed only minimally when she files her ICARA petition in federal court.[67] It is an understandable and almost instinctive reaction to respond to notice of a suit by appearing before the court in question, especially in a case involving the possible abduction of one's child. Refusal to do so generally will result in a default judgment in favor of the allegedly abducting parent, and this may not be a risk that the left-behind parent is willing to take.

There also exists the possibility that this situation may arise due to a simple lack of information. Petitions for return under the Hague Convention are a relatively uncommon occurrence, and thus family lawyers may lack specific knowledge about filing ICARA petitions, or

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and the defendant (the allegedly abducting parent) as male, except in the specific context of a case where the actual facts are otherwise.

[66] An ICARA claim used to interrupt a state custody suit that is already at an advanced stage may only have been brought once the left-behind parent came to believe that she would not prevail on the merits in the state court proceeding. *See supra* note 17 and accompanying text.

[67] *See, e.g.*, Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685, 688, 692 (E.D. Va. 2002) (involving parallel proceedings in which left-behind parent did not raise her ICARA claim in context of custody suit, and availed herself of federal court system fairly promptly).

even awareness of their existence in the first place.[68] Accordingly, a parent, arriving from overseas in pursuit of her child and taking the reasonable step of consulting a family lawyer, may be advised that defending on the merits in state court is the best course of action. The left-behind parent subsequently may learn of the remedies available to her under ICARA and the Hague Convention, and only then choose to file her ICARA claim in a federal district court.[69]

A typical example that fits this model is *Silverman v. Silverman*,[70] in which the left-behind parent filed his ICARA claim in federal court not long after his first appearance in state court on the issue of custody.[71] His only further action in the state proceedings was to seek a dismissal for lack of subject matter jurisdiction.[72] The district court initially abstained under *Younger*, on the ground that the ongoing state court proceedings appeared to "afford [the left-behind parent] adequate opportunity to litigate his Petition under the Hague Convention."[73] The Eighth Circuit later reversed for different reasons,[74] but the district court's opinion highlights a key issue raised by this type of fact pattern: A left-behind parent certainly *can* bring her ICARA claim in state court, as expressly provided by the statutory language, but does the fact that she has chosen to appear before the state court (and do little more) *require* her to do so?

At this early point in the proceedings, the state has invested only a minimum of resources in the adjudication of the dispute. Additionally, there are several reasonable, alternative explanations for the left-behind parent's actions that are not inconsistent with a desire to preserve the full extent of her rights under ICARA.[75] Accordingly, in terms of underlying policy considerations, it would be quite a stretch

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[68] *See* Silberman, *supra* note 17, at 59 n.121 ("[M]any state matrimonial lawyers are still unfamiliar with the Hague Convention; thus they will often initiate a traditional custody case and overlook the possibility of filing a Hague return application.").

[69] *See id.*

[70] No. 00-2274, slip op. (D. Minn. Nov. 13, 2000) (*Silverman I*), *rev'd*, 267 F.3d 788 (8th Cir. 2001) (*Silverman II*).

[71] Silverman v. Silverman, No. 00-2274, 2002 WL 971808, at *3 (D. Minn. May 9, 2002) (*Silverman III*). In this case, the left-behind parent was served in a state custody suit on August 10, 2000, and filed his ICARA claim in district court on October 10, 2000. The left-behind parent's response time actually was even shorter than these dates would indicate—on August 24, 2000, two weeks after initially being served, he filed a return request, pursuant to the Hague Convention, with the National Center for Missing and Exploited Children, which is the designated U.S. agency in charge of processing such applications. *Silverman II*, 267 F.3d at 790.

[72] *Silverman III*, 2002 WL 971808, at *3–*4.

[73] *Silverman I*, No. 00-2274, at 6.

[74] *Silverman II*, 267 F.3d at 792 (finding that *Younger* abstention is inapplicable in cases involving mandatory relief).

[75] *See supra* text accompanying notes 67–69.

to infer from these actions that the left-behind parent should be consigned to the state forum for the resolution of all related issues.

2. *Late Stage of the State Proceedings*

Alternately, the left-behind parent may choose to allow the state custody suit to reach a relatively advanced stage before she attempts to assert her ICARA rights in federal court. Pursuant to Article 16 of the Hague Convention, upon the filing of a return petition, any ongoing custody proceedings must be suspended, pending resolution of the Hague claim.[76] This requirement applies regardless of how far along the state case may be, and neither the stage of advancement of such proceeding, nor the merits of either party's custody claim, factor into the determination as to the resolution of the ICARA claim.[77] Accordingly, it is possible for a left-behind parent to pursue custody in state courts and only turn to her remedies under ICARA as a last resort if it appears that the outcome of the custody proceeding will be unfavorable to her.[78]

This approach inevitably entails the potential for a great waste of judicial resources, as well as naked forum shopping. However, nothing at all prevents a left-behind parent from waiting until a late stage of the state proceeding to bring her ICARA claim in *state* court, should she so choose.[79] Given this reality, is there any basis for preventing a left-behind parent from choosing a federal forum when she finally decides to assert her federally created rights under ICARA?

The case of *Bouvagnet v. Bouvagnet*[80] is an example that fits this pattern—the left-behind parent waited more than a year after being

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[76] *See* Hague Convention, *supra* note 1, art. 16. Article 19 further emphasizes the distinction between the procedural nature of the Hague Convention and the substantive issues regarding custody. *Id.*, art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."); *see also supra* note 7 and accompanying text.

[77] *See* 42 U.S.C. § 11601(b)(4) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

[78] *See supra* note 17 and accompanying text.

[79] Of course, squandering the state court's time and resources in such a manner may arouse the ire of the presiding judge, and thus may be undesirable as a matter of trial strategy. This may be noteworthy as a factor in terms of considering whether and why a left-behind parent might receive more robust protection of her rights under ICARA in federal court than she would in state court.

[80] No. 01 C 4685, 2001 WL 1263497 (N.D. Ill. Oct. 22, 2001) (*Bouvagnet I*), *rev'd*, 2002 U.S. App. LEXIS 17661 (7th Cir. July 26, 2002) (*Bouvagnet II*), *withdrawn*, 2002 U.S. App. LEXIS 17954 (7th Cir. Aug. 29, 2002). The Seventh Circuit reversed, finding abstention inappropriate under both *Younger* and *Colorado River*, but at the time of the ruling the circuit court was unaware that the parties had entered into a valid settlement agreement

served in a state divorce and custody case before filing his return petition and claim under ICARA in federal court.[81] Though the district court in *Bouvagnet I* relied primarily on *Younger*, and declined to reach the applicability of *Colorado River* abstention, the language of the opinion was colored heavily by repeated mention of the extent to which the left-behind parent had delayed in pursuing his rights under ICARA.[82] While the Seventh Circuit in *Bouvagnet II* rightly noted numerous flaws in the lower court's *Younger* analysis, it entirely omitted any consideration of the time frame involved.[83] Essentially, the Seventh Circuit failed to draw any distinction regarding the length of time for which state custody proceedings had been pending, effectively collapsing this type of case into the same category as the previous set.[84]

3. *After State Custody Judgment*

Taking the left-behind parent's delay in filing an ICARA claim to an extreme, she actually may wait until after losing via final judgment in the state custody suit to pursue her Hague remedies in federal court.[85] This scenario implicates perhaps the greatest waste of judicial resources, as a successful ICARA claim would render meaningless the entire state proceeding. From the perspective of the left-behind parent, she has been afforded ample opportunity to seek return under the Hague Convention, and she instead elected to pursue the custody case to its conclusion.[86] In short, this category involves the same undesirable aspects discussed in the previous Section, but raises them to an even higher degree.

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days earlier. Upon this discovery, the opinion was withdrawn in response to a motion by the appellee. *See* 2002 U.S. App. LEXIS 17954, at *2.

[81] *Bouvagnet I*, 2001 WL 1263497, at *3.

[82] *See id.* (noting that case was "not a typical Hague Convention action brought swiftly by one parent to obtain the immediate return of the children").

[83] *See Bouvagnet II*, 2002 U.S. App. LEXIS 17661, at *21–*31.

[84] *See supra* Part II.B.1.

[85] For the purposes of this Section, it is assumed that the left-behind parent actually submitted herself to the jurisdiction of the state court, such that the judgment issued could be binding upon her. Had she elected instead to default in that suit, the situation would collapse into the discussion in Part II.A, *supra*, where the left-behind parent preserves all of her rights—a successful ICARA claim would allow the federal court to vacate the state custody decree. *See* Mozes v. Mozes, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001) (finding that *Rooker-Feldman* doctrine would not bar district court from overcoming state decrees standing in way of effectuating return to habitual residence); *see also* Silverman v. Silverman, 338 F.3d 886, 895 (8th Cir. 2003) (*Silverman IV*) (rejecting *Rooker-Feldman* doctrine in general ICARA context).

[86] One potential qualification is the possibility that she may not have been cognizant of her rights under ICARA, *see supra* note 68 and accompanying text, but this concern grows more and more remote as time passes after the commencement of the state suit.

Abstention is not an issue at all in this context, since there is no longer any active parallel proceeding. However, discussion of this category is included not only for the sake of completeness, but as an anchor for the entire subset of cases in which the left-behind parent appears in state court without raising ICARA issues.[87] In practical terms, it would be futile to apply some form of abstention in dealing with a party who delays in filing her ICARA claim to gain an advantage through forum shopping if she simply could wait until after the state suit is resolved and then file her claim without difficulty. If anything, such a system would create a perverse incentive, encouraging would-be forum-shoppers to wait even longer, consuming additional judicial resources while the child remains in limbo, before pursuing their remedies under ICARA.

Fortunately, the doctrine of res judicata offers a solution to this problem. The essence of claim preclusion rests on the notion that judgments are owed full faith and credit in other jurisdictions within the United States.[88] The application of the doctrine has expanded over the course of the last century, however, moving beyond the core notions of comity with which it began, to encompass the conservation of judicial resources and protection of litigants' right to repose.[89] The addition of these new policy concerns has had the effect of expanding the definition of "claim" for the purposes of res judicata to encompass all legal rights stemming from a single "transaction, or series of connected transactions."[90] A facet of this expansion that is particularly relevant in the ICARA context is the application of claim preclusion to bar compulsory counterclaims that were not raised in the first suit.[91] Despite the significant legal differences between an ICARA

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[87] *See supra* Parts II.B.1 and II.B.2.

[88] While state-to-state full faith and credit is constitutional in origin, U.S. CONST. art. IV, § 1, cl. 1, Congress expressly extended this requirement to the federal courts, *see* 28 U.S.C. § 1738 (2000) (guaranteeing federal full faith and credit to state judicial proceedings). When evaluating the proper treatment of state court judgments, federal courts are instructed to look at the statutes and common law concerning res judicata in that state. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982) ("Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.").

[89] *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84 (1984) (holding that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims").

[90] RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). These definitions should be "determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation." § 24(2).

[91] Many jurisdictions require defendants to assert any potential counterclaims that arise out of the same transaction. *See, e.g.*, FED. R. CIV. P. 13(a) (defining compulsory counterclaims as those that "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim"); CAL. CIV. PROC. CODE § 426.30 (1973) (providing that failure

petition and a custody determination, the two claims undeniably are the product of the same "transaction," and thus should fit comfortably within the scope of most compulsory counterclaim rules. Accordingly, actively litigating a custody suit to its conclusion without asserting any claim under ICARA would appear to create a bar to the later filing of such a claim.[92]

However, in *Holder v. Holder*,[93] under circumstances that fit the model described above,[94] the Ninth Circuit found that claim preclusion did not apply, and that a post–custody-judgment federal Hague petition was allowable.[95] Interestingly, the court reached this conclusion despite acknowledging that an ICARA claim would be compulsory under California law.[96] The court found that ICARA was a particularized exception to the general rule, as a result of its provision that "[f]ull faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of the child, pursuant to the Convention, in an action brought under [ICARA]."[97] The court inferred from this language that courts were not required to give full faith and credit to any judgments that were not "pursuant to the Hague Convention."[98] This analysis is misguided, ignoring the clear legislative history.[99]

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to raise any "related" counterclaim will bar later suit). Compulsory counterclaim rules generally require a standard of relation that roughly parallels the common-law test for claim preclusion. *See supra* note 90.

92 This bar would be equally applicable in state and federal court since the same relevant state law would govern in each instance. *See supra* note 88 and accompanying text.

93 305 F.3d 854 (9th Cir. 2002).

94 The only potentially significant distinction is that the same party initiated both the state custody suit and the federal ICARA petition. However, in this instance there is no difference in the legal analysis between failure to join a related claim and failure to make a compulsory counterclaim.

95 *See Holder*, 305 F.3d at 863–66 (discussing and rejecting claim of res judicata bar to ICARA suit).

96 *Id.* at 864.

97 42 U.S.C. § 11603(g) (2000).

98 *Holder*, 305 F.3d at 864–65.

99 The House Report on ICARA describes the impact of § 11603(g):

> [Section 11603(g)] means, for example, that if a court in one jurisdiction has ordered the return of a child and the child is located in another jurisdiction in the United States before that order has been executed, the order shall be given full effect in the second jurisdiction without the need to initiate a new return action there pursuant to the Convention and [ICARA].

H.R. REP. NO. 100-525, at 12 (1988). In other words, the provision exists to reinforce the importance that a return order under ICARA be effected with haste and to close the door on any possible delay or manipulation by the allegedly abducting parent. It is unreasonable to assume that Congress intended to create a singular exception to a large body of statutory and common law but declined to mention this intent in any way. Additionally, an amicus brief filed by the United States in *Holder* and cited by the dissent stated that "'[t]he

Additionally, the court appeared convinced that this result was compelled by its prior holding in *Mozes v. Mozes*,[100] which provided that a successful ICARA claim would allow a federal court to vacate a finalized prior state custody award.[101] If a successful ICARA claim gives the district court the power to set aside a custody order, the *Holder* court reasoned, then surely that court must have the authority to adjudicate the ICARA claim in the first place in order for this power to have any practical effect.[102] This reasoning is flawed in that it ignores the possibility that the power to vacate might still be exercised in the context of a collateral attack, where a custody award has been entered by default because the left-behind parent was not a party to the initial proceeding.[103] Taken as a whole, the court's reasoning in *Holder* fails adequately to justify departing from commonly accepted principles of res judicata, at great cost to judicial efficiency, in order to allow left-behind parents two bites at the custody apple. Where a final, binding judgment on the merits of the custody dispute has been entered by a state court, claim preclusion should operate to bar relitigation under the auspices of the Hague Convention.

C. *Left-Behind Parent Raises ICARA as Counterclaim in State Court, Then Goes to District Court*

Here, the left-behind parent has chosen to pursue her federal remedies under ICARA before the state court already hearing the custody dispute.[104] Subsequently, for whatever reason, she decides

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Hague Convention was not intended to allow the "left-behind parent" a second bite at the custody apple just because, after specifically electing to litigate custody in a forum that otherwise had jurisdiction, the parent suffered an adverse result.'" *Holder*, 305 F.3d at 875 (Thompson, J., dissenting) (quoting Brief of Amicus Curiae United States, *In re* Marriage of Holder, No. F036747, 2002 WL 443397 (Cal. Ct. App. Mar. 20, 2002) (unpublished decision)).

100 239 F.3d 1067 (9th Cir. 2001); *see Holder*, 305 F.3d at 865 ("Such a holding would also contravene our holding in *Mozes*.").

101 *Mozes*, 239 F.3d at 1085 n.55.

102 *Holder*, 305 F.3d at 865.

103 Giving preclusive effect to state custody judgments may thus be reconciled with the dictum in *Mozes*: A successful ICARA claim allows a left-behind parent to overcome an existing state custody award, but there are actions that she may take—e.g., litigating custody issues to their conclusion in state court—that would bar her from being able to pursue such a claim in the first place.

104 There may be varying implications depending on the manner in which the left-behind parent chooses to raise issues relating to ICARA in the state forum—either directly as a counterclaim, or by alluding to factual questions such as determination of habitual residence, foreign custody awards, or the nature of the abduction itself. The former option would seem to counsel more strongly in favor of abstention by creating an almost complete parallelism between the federal and state proceedings. *See infra* notes 119–25 and accompanying text (discussing crucial differences that otherwise exist between state custody proceedings and ICARA claims). In addition, looking ahead to a theoretical final resolution

that her interests would be better served by having a federal court resolve the issues raised by the Hague Convention. This action on her part eliminates, or at least seriously weakens, one of the main policy arguments weighing against abstention—the concern that, by abstaining, a district court is denying the left-behind parent the right to the forum of her choosing.

Although the left-behind parent initially was haled into the state forum for the custody litigation, she continues to retain a significant degree of control over where to raise her ICARA claim. By electing to litigate the issue in state court, the left-behind parent now has exercised this important right of choice, such that if the district court later closes its doors to the parent for her ICARA claim, that action is no longer harming the would-be plaintiff in the same way. Finally, as opposed to the previous categories, where the left-behind parent never raised any ICARA issues during the state proceeding,[105] here there is no possibility that she merely was unaware of her rights under the Hague Convention. Where we can state with confidence that the left-behind parent was apprised of the law and made her legal decisions with open eyes, it is difficult to see the unfairness in holding her to her choice of forum.

A typical example of this fact pattern is seen in *Cerit v. Cerit*,[106] where the district court chose to abstain under both *Younger* and *Colorado River*, and in doing so, relied very heavily on the fact that the left-behind parent "ha[d] selected the state court as the forum for bringing his ICARA petition."[107] Ironically, the court in *Bouvagnet I* drew a very different inference from the left-behind parent's decision *not* to raise his claim in state court, finding that in the context of *Younger* abstention, the failure to raise ICARA in the state proceeding left no way of knowing whether the state court provided an adequate forum for the vindication of federal rights.[108] This suggestion, namely that the left-behind parent's *failure* to raise her federal claims actually strengthened the case for abstention, runs counter to

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of the state suit, the two options would have different consequences in terms of the preclusive force of that judgment. Were the ICARA claim explicitly raised as a counterclaim, claim preclusion would seem unavoidable, while there would likely be more leeway—depending on the relevant state law—if only ICARA-related issues were raised. For discussion of claim preclusion in the ICARA context, see *supra* Part II.B.3.

105 *See supra* Parts II.B.1 and II.B.2.

106 188 F. Supp. 2d 1239 (D. Haw. 2002).

107 *Id.* at 1245.

108 Bouvagnet v. Bouvagnet, No. 01 C 4685, 2001 WL 1263497 (N.D. Ill. Oct. 22, 2001) (*Bouvagnet I*).

the framework established in the preceding sections of this Note and indeed makes little sense in light of general jurisdictional principles.[109]

D. Left-Behind Parent Raises Initial ICARA Claim in State Court, Then Goes to District Court

The next scenario takes the previous set of facts a step further by assuming that the left-behind parent is exercising her right to choose the forum in which her complaint will be heard, entirely free of any coercion. These actions beg the question: If the left-behind parent wanted to be in federal court, why did she not file her ICARA claim there in the first place? Any hypothesized unfairness resulting from district court abstention in this scenario stems from the plaintiff's own actions, and a plaintiff who is unhappy with the outcome has only herself to blame. Finally, allowing the plaintiff freely to refile her claim in federal court would amount to allowing her effectively to remove her own case to federal court, which would run counter to Congress's express intent in establishing the extent of federal court power within our system of concurrent jurisdiction.[110]

Surprisingly, however, when facts akin to this model arose in the case of *Lops v. Lops*,[111] the district court declined to apply *Colorado River* abstention, and the Eleventh Circuit affirmed this judgment.[112] On the face of the decision, it is difficult to square this holding with jurisdictional principles and concerns of efficient judicial administration, but there were exceptional facts at issue in *Lops* that appear to have swayed the court in favor of the left-behind parent.[113] It may be understandable that the court tended to be somewhat hostile to Mr. Lops, and that it would be especially cynical regarding a *Colorado River* argument alleging waste of judicial resources coming from a

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[109] *See supra* note 104.

[110] *See* 28 U.S.C. § 1441 (2000) (limiting power of removal to defendants in cases that could have been brought in federal court). The primary function of the option of removal is to reduce the likelihood that a party will be forced to litigate cases that implicate federal interests in state court, where he would prefer not to do so. This concern does not apply to plaintiffs, since they had a chance to choose their forum at the outset of the action. *See* Bradford Gram Swing, Comment, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583, 588 & nn.23–24 (1987) (discussing Judiciary Act of 1887, ch. 373, 24 Stat. 552, which abolished then-standing practice of allowing both plaintiffs and defendants to remove).

[111] 140 F.3d 927 (11th Cir. 1998).

[112] *Id.* at 929.

[113] *See id.* at 945 n.24 (noting hypocrisy in Mr. Lops's accusations of procedural abuse in light of his own forum shopping and "misrepresentations" towards that end). These proceedings did not commence until almost three years after the initial, allegedly wrongful removal of the children from Germany; this delay was entirely attributable to great lengths taken by Mr. Lops to conceal his whereabouts and those of the children. *Id.* at 933.

man whose own actions had resulted in a significant and needless expenditure of public resources.[114] *Lops* is best viewed as an outcome-driven opinion written by a court with no remaining patience for a man who had gone to extreme lengths to circumvent and abuse the legal system, rather than as an instance of pure and principled legal analysis. Therefore, the resulting holding may best be viewed narrowly, and as a product of the judicial discretion inherent in the *Colorado River* standard, for it otherwise would set a highly confusing precedent.

III

ADAPTING ABSTENTION TO THE ICARA FRAMEWORK

The interests of both justice and judicial administrability are well served by giving federal judges some means of dealing with forum shopping and other forms of procedural abuse. Aside from needlessly placing additional strain upon an already overburdened federal court system,[115] exploitation of the system of concurrent jurisdiction established under ICARA has the potential to wreak harm in a manner that directly conflicts with the core goals of the Hague Convention. This Part highlights the special considerations implicated by the Convention and by ICARA, then considers existing doctrines' suitability to dealing with the problem, and finally proposes a refined test that would allow judges better to evaluate the proper scope of their jurisdiction in this context.

The Hague Convention was crafted with the best interests of the allegedly abducted child as a foremost consideration, and one of the guiding principles behind the Convention is the expedited resolution of return petitions, recognizing the harm caused by prolonged uncertainty regarding custody.[116] During the additional time required to dispose of duplicative proceedings, the children languish in custodial limbo, suffering additional harm by the day. Furthermore, a calculated district court filing of an ICARA claim greatly may burden the allegedly abducting parent, requiring him to hire additional counsel to defend against the claim, because family lawyers often lack knowledge

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114 *See id.* (discussing various efforts by Interpol, State Department, and Federal Parent Locator Service, aimed at discerning whereabouts of Mr. Lops and his children).

115 *See supra* note 24 and accompanying text.

116 *See* Hague Convention, *supra* note 1, art. 1 (stating primary purpose of Convention as "secur[ing] the *prompt* return of children wrongfully removed" (emphasis added)); *see also supra* note 9.

of federal procedure.[117] These sorts of tactics all may be used to force a settlement that is highly favorable to one party.

While high-pressure litigation is a pervasive, if at times unfortunate, element of our modern legal system, in the particular context of ICARA claims, allowing it to proceed unchecked entails a betrayal of the principles at the core of both international and congressional intent. Concurrent jurisdiction allows for easy access to the judicial system, facilitating the protection of the rights created under ICARA. However, if the system is to function in harmony with principles of judicial administrability and the substantive concerns underlying the Hague Convention, federal judges must be given the discretion to decline to exercise jurisdiction where doing so would run counter to those very principles. What remains, then, is the articulation of a clear standard that may be applied evenhandedly to curb procedural abuse.

A. Younger *Abstention is Inappropriate in the Hague Convention/ ICARA Context*

As outlined in Part I, the principles at the heart of the *Younger* doctrine revolve around comity—respectful deference to ongoing state proceedings, where federal interference would undermine vital state interests. Looking solely at the prevailing three-prong encapsulation of the doctrine articulated in *Middlesex*,[118] parallel proceedings in the ICARA context would seem to be a strong candidate for *Younger* abstention, especially in light of the Court's holding in *Moore v. Sims*[119] that domestic relations and child custody questions implicate a strong state interest.[120]

Claims brought pursuant to ICARA and the Hague Convention, however, entail unique considerations that severely limit the comity interest implicated. Those courts that have held the conditions of *Younger* to be fully satisfied have fallen into the trap of assuming that because the factual findings of a Hague Convention case generally will touch upon the sphere of domestic relations, there is automatically a strong state interest in the matter.[121] These courts manage to make this error even while acknowledging the inherent difference between

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[117] *See* Silberman, *supra* note 17, at 58 & n.109 (recognizing potential for abuse of ICARA's concurrent jurisdiction by savvy litigants).

[118] *See supra* notes 39–40 and accompanying text.

[119] 442 U.S. 415 (1979).

[120] *Id.* at 435.

[121] *See, e.g.*, Cerit v. Cerit, 188 F. Supp. 2d 1239, 1248 (D. Haw. 2002) (describing ICARA claim as implicating "strong interest in . . . child custody questions in particular"); Bouvagnet v. Bouvagnet, No. 01 C 4685, 2001 WL 1263497, at *4 (N.D. Ill. Oct. 22, 2001) (*Bouvagnet I*) (finding that ICARA petition will "unquestionably raise issues which involve domestic relations" (citation omitted)).

custody proceedings and a return application under ICARA.[122] As per Article 16 of the Hague Convention, pending custody suits are shelved immediately upon the filing of a claim of wrongful removal,[123] with absolute priority given to the quasi-jurisdictional issue of determining which forum is appropriate for an on-the-merits adjudication of the custody dispute.[124] The sole issue in a Hague Convention petition is whether the child should be removed across national boundaries for jurisdictional purposes—a concern that transcends any state interest in the child.[125]

Furthermore, *Younger* abstention is predicated on the assumption that federal interruption of an ongoing state proceeding is an undesirable occurrence, offensive to state sovereignty, and only justifiable by a compelling federal interest.[126] As another student author has argued,[127] however, ICARA presents a special case in that the explicit language of the Hague Convention provides for precisely the outcome with which *Younger* was crafted to deal.[128] Once a valid return petition is filed under the Hague Convention and ICARA, any ongoing custody proceedings are suspended, regardless of the forum in which the ICARA claim is brought—if the state custody suit is doomed regardless, how strongly can state interests truly be invested in preserving it?[129]

Congressional intent and action as expressed through the legislative history and text of ICARA are of great significance due to *Younger*'s place as part of federal common law. To the extent that

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122 *See Cerit*, 188 F. Supp. 2d at 1248 (abstaining under *Younger* despite recognizing that "an ICARA petition is not the same as a custody proceeding").

123 Hague Convention, *supra* note 1, art. 16; *see also supra* text accompanying note 7.

124 *See* Hague Convention, *supra* note 1, arts. 17, 19 (drawing sharp distinction between ruling under Hague Convention and "determination on the merits of any custody issue").

125 *See* Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685, 693 (E.D. Va. 2002) (finding that *Younger* does not apply to federal ICARA petition in face of ongoing state custody proceedings on grounds that nature of Hague Convention bars implication of any important state interests); Silberman, *supra* note 17, at 58–59 (distinguishing federal interest in ICARA due to "United States' treaty obligation under international law").

126 *See supra* note 33 and accompanying text.

127 Carl Rowan Metz, Comment, *Application of the* Younger *Abstention Doctrine to International Child Abduction Claims*, 69 U. CHI. L. REV. 1929 (2002). Metz rightly argues that courts have erred in applying *Younger* abstention when faced with parallel Hague Convention claims, but is too quick to declare that "[f]ederal court abstention in cases brought under ICARA is inappropriate." *Id.* at 1954. This Note takes the analysis a step further by considering and adapting a solution that preserves procedural fairness while remaining consistent with the Hague Convention itself. *See infra* Part III.B.

128 *See* Hague Convention, *supra* note 1, art. 16 (providing for interruption of ongoing state custody proceeding).

129 *See* Metz, *supra* note 127, at 1948–52 (arguing that text of, and intent behind, ICARA and Hague Convention limit extent to which state comity is implicated by parallel proceedings).

federal common law still exists in the aftermath of *Erie Railroad Co. v. Tompkins*,[130] it does so interstitially, allowing the judiciary to fill gaps where Congress has declined to legislate.[131] For a court to apply *Younger* abstention in such a way as to thwart express congressional action amounts to an unconstitutional judicial usurpation of legislative authority.[132] For these reasons, if there is a solution to the procedural loopholes inherent in ICARA's grant of concurrent jurisdiction, it does not lie with *Younger*.

B. Colorado River*'s Discretionary Approach Allows for the Protection of Federal Rights Under ICARA, While Allowing Judges to Check Procedural Abuses*

Where *Younger* fails due to its rigidity and the fact that it was crafted for a decidedly different sort of case, *Colorado River*'s strength lies in its flexibility, which allows for its adaptation to the ICARA context. By focusing on guarding against the waste of judicial resources, judges can identify those cases in which a litigant's actions evince a manipulative intent that cuts against both basic tenets of procedural fairness and the Hague Convention's mandate for expeditious resolution. *Colorado River* thus offers a potential solution, and while the Court has laid out threshold requirements before the doctrine rightly may be applied, cases of parallel ICARA litigation survive this scrutiny.

The first question to be answered before a court appropriately may delve into the heart of *Colorado River* analysis is whether the proceedings are truly "parallel."[133] This examination is trivial where an ICARA claim or directly related issues already have been raised by the left-behind parent in the state court proceeding, creating a virtu-

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130 304 U.S. 64 (1938).

131 *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1170 (1986) ("[F]ederal common law . . . should be interstitial . . . . Federal common law fits most easily when it supplements federal constitutional or statutory provisions.").

132 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is subject to the paramount authority of Congress." (citation omitted)). The importance of judicial deference to unambiguous legislative enactments lies at the core of our constitutional system of separation of powers. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: The "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 764 (1989) ("Short of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to . . . circumvent . . . policy choices made by the majoritarian branches."). Additionally, the procedural nature of federal court abstention further counsels against allowing the doctrine to undermine substantive enactments. *Cf.* Rules Enabling Act, 28 U.S.C. § 2072(b) (2000) (providing that Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right").

133 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13 (1983).

ally complete overlap among the issues that each court is being asked to consider. Where only custody questions explicitly have been litigated below, however, *Colorado River* appears to falter at the outset—its vitality hinges upon the construction of the word "parallel."[134]

However, the test generally has not been construed as entailing a requirement of complete congruence (else its scope would be so narrowed as to render the doctrine impotent)—rather, being "substantially similar" will suffice.[135] Thus, even where ICARA is not raised explicitly, this requirement still may be met, even keeping in mind the formal distinction between state domestic law proceedings and remedies pursuant to an international treaty obligation. Determination of custody frequently entails a significant overlap with the substantive questions that might arise under an ICARA claim, such as ascertaining the "home state" of the child (which is distinct from habitual residence, but similar) and determining whether jurisdiction is proper (or whether an overseas court should make the custody determination).[136] Though the details of the legal analysis may differ, resolution of such issues will entail much the same factfinding in either forum. Nevertheless, the question of parallelism remains a close call in such instances. Particularly in the context of ICARA claims, however, the underlying aim of *Colorado River*—promoting "wise judicial administrability"—suggests a flexible standard with regard to this first question, perhaps imposing a somewhat higher threshold on subsequent factors to compensate for the uncertainty of parallelism. Judicial administrability and fairness are served best by allowing courts fully to consider the multiple relevant factors under the *Colorado River* doctrine, thus preserving the courts' ability to remedy egregious forum shopping where they encounter it.

Apart from the particular concerns weighing in favor of or against abstention, "wise judicial administration" requires that there be little doubt that the state suit will resolve all relevant issues.[137] Again, in cases where ICARA already has been raised in the state proceedings, this condition easily is met. In fact, in such a situation,

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[134] *See, e.g.*, Bouvagnet v. Bouvagnet, No. 01-3928, 2002 U.S. App. LEXIS 17661, at *23-*24 (7th Cir. July 26, 2002) (*Bouvagnet II*), *withdrawn*, 2002 U.S. App. LEXIS 17954 (7th Cir. Aug. 29, 2002) (finding *Colorado River* inapplicable due to lack of parallel proceedings).

[135] Holder v. Holder, 305 F.3d 854, 867 (9th Cir. 2002) (citing Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989)).

[136] *See id.* at 868.

[137] *See Cone*, 460 U.S. at 15, 28 (noting that "substantial doubt" about ability of state court proceedings to resolve all issues precludes any valid stay or dismissal under *Colorado River*).

this consideration strongly favors deference to the state forum, which has the power to resolve both the ICARA claim and underlying custody issues, should the return petition fail, whereas an unsuccessful ICARA claim in federal court still would require a return to state court for the remaining adjudication. A restrictive reading of this requirement would, however, seem to bar *Colorado River*'s applicability in any cases where the left-behind parent has not raised any ICARA claim in the state court.[138] However, considering that the left-behind parent already has made the choice to pursue available remedies under ICARA, it is not a major leap to infer that she will proceed to do so in state court should the doors of federal court be closed to her. Several courts adopt such a view of the *Colorado River* parallelism test, considering claims and issues that may have been or might still be raised in the state suit, as well as those that actually were raised.[139] This interpretation of the issue-resolution aspect of the doctrine is well suited to the context of ICARA claims, which may be raised at any stage of state custody proceedings, and is in keeping with the pragmatic, discretionary nature of *Colorado River*.

The core concepts of the *Colorado River* doctrine also frequently are encapsulated into a straightforward list of factors, but this approach fares better than the simplification of *Younger*, due to the greater level of detail with which each part of the test is articulated and, crucially, the Court's caution that the standard is no mere "mechanical checklist."[140] Each of the factors on this nonexclusive list is to be accorded variable weight according to the particular circumstances surrounding a given case.[141]

Within the given context of an ICARA claim, most of the *Colorado River* factors are not prone to variation: (1) in rem jurisdiction is never an issue in these cases; (3) piecemeal litigation specifi-

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[138] *See Holder*, 305 F.3d at 869–70 (declining to apply *Colorado River* on ground that resolution of custody issues alone could still leave possibility of unresolved right to subsequent ICARA claim). The Ninth Circuit relied heavily on the fact that no ICARA claim actually had been brought in state court, arguing that to base its decision on the mere fact that an ICARA claim "*could* have been raised" would unduly limit the scope of the Hague Convention. *Id.* at 870. However, it does not follow that simply because a court finds that the state proceedings can resolve all issues, *Colorado River* abstention then becomes mandatory. Rather, such a finding would allow for further nuanced consideration of procedural equities in a given case and a determination of whether such "exceptional circumstances" exist as to warrant abstention. *Id.* at 867.

[139] *See, e.g.*, Rosser v. Chrysler Corp., 864 F.2d 1299, 1308 (7th Cir. 1988); Telesco v. Telesco Fuel & Masons' Materials, Inc., 765 F.2d 356, 359 (2d Cir. 1985).

[140] *Cone*, 460 U.S. at 16.

[141] For an enumeration and discussion of the factors taken into account under modern *Colorado River* jurisprudence, see *supra* text accompanying notes 42–59. The following discussion will employ the numbering scheme for the factors that was laid out by the Court and employed earlier in this Note, *supra* text accompanying notes 52–54.

cally is contemplated by the Hague Convention and ICARA, and its likelihood thus does not counsel in favor of abstention;[142] (4) it is a given fact that jurisdiction has been exercised first by the state court, else there would be little if any basis for any form of abstention, and this favors deference to the state forum;[143] and (5) ICARA and federal law provide the rules of decision, which suggests that the federal forum may be more appropriate. Taken as a whole, these four factors are roughly neutral as to the question of abstention. As to the forum convenience factor, it may counsel either for or against declining to exercise jurisdiction, depending on the location of the parties and the children involved, and their respective distances from each of the possible forums.[144] Regarding the sixth factor—adequacy of the state forum for the vindication of federal rights—there are valid arguments on both sides: On the one hand, the determination of issues such as habitual residence and possible harm defenses implicate issues that state family courts may have expertise in handling; on the other, family courts are accustomed to having substantive determinations of the best interests of the child as their paramount concern, and this inappropriately may color their consideration of what should be a discrete set of issues.[145] This divide implicates deeper questions of federal-state parity (the overall competence of state courts in vindicating federal rights), and the net outcome is unclear.[146] This leaves the final factor—forum shopping[147]—as the proper locus for detailed analysis by a federal court faced with parallel proceedings in the ICARA context.

Courts have a duty not only to be mindful of principles of "wise judicial administration," but also to interpret ICARA and the Hague

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142 *See supra* notes 7, 128 and accompanying text.

143 *See supra* Part II.A.

144 *See, e.g.*, Holder v. Holder, 305 F.3d 854, 871 (9th Cir. 2002) (finding Washington federal court more convenient than California state court where allegedly abducting parent and children were in Washington); Lops v. Lops, 140 F.3d 927, 943 (11th Cir. 1998) (preferring Georgia federal court to South Carolina state court where children and allegedly abducting parent were in Georgia).

145 *See* Robert J. Levy, *Memoir of an Academic Lawyer: Hague Convention Theory Confronts Practice*, 29 FAM. L.Q. 171, 175 (1995). These limitations inherent in state family court adjudication may have contributed to the need for the Hague Convention in the first place. *See supra* note 4 and accompanying text.

146 The issue of parity among federal and state courts in their ability to handle federal claims has been the subject of considerable scholarly discussion and debate. *Compare* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124–27 (1977) (arguing that federal courts' prestige, independence, and history of defending rights make them especially amenable to federal claims), *with* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 16–17 (1985) (arguing that federal system of lifetime appointment does not make judges less political, but merely less accountable).

147 *See* Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1371 (9th Cir. 1990).

Convention in a manner that accords with the fundamental purposes behind them. Expedited resolution of any possible abduction questions is of paramount importance, and children should not be subjected to ongoing harm while their parents rifle through their respective bags of procedural tricks. Rather than formulaically applying judicial standards crafted under different circumstances, or allowing distaste for a party's actions to result in unprincipled adjudication,[148] courts should address such conduct directly, within a flexible application of the *Colorado River* doctrine. In particular, in weighing the likelihood of forum shopping by ICARA litigants, federal courts should consider: (1) the extent to which claims or issues under ICARA have been raised in the state suit;[149] (2) the stage of advancement of the ongoing state proceedings;[150] and (3) whether the ICARA claim appears vexatious or reactive in nature.[151]

The framework laid out in Part II is instructive in considering the extent to which the left-behind parent may be attempting to engage in abusive procedural manipulation. Applying the above three-prong test to this spectrum of facts, the first consideration is whether the left-behind parent directly has raised ICARA in the state custody proceedings. If she has done so, she has by all outward indications chosen the forum in which she intends to litigate.[152] If she later decides that federal court would suit her better, that constitutes classic forum shopping, which courts should discourage through abstention. At the other end of the spectrum, where the left-behind parent has not appeared before the state court at all, much less raised ICARA issues there,[153] she has chosen *not* to litigate in state court, and she should not be forced to do so against her will.

This leaves those cases where the left-behind parent has appeared in state court without explicitly raising ICARA claims[154] as a gray area in which further analysis is required. Taken together, the second

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148 *See, e.g.*, *Lops*, 140 F.3d 927; *see also supra* notes 111–16 and accompanying text.

149 For discussion of the effect of the presence of ICARA issues in the state suit on the appropriateness and strength of *Colorado River* abstention, see *supra* text accompanying notes 133–34 and 137–38.

150 *See supra* Part II.B. The longer the left-behind parent has spent litigating in state court, the more time she has had to weigh her legal options, and the more appropriate it becomes to impute an intent to litigate in that forum.

151 The Court has indicated approval of this consideration in weighing the appropriateness of *Colorado River* abstention: "The reasoning . . . that the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River* [ ] has considerable merit." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 18 n.20 (1983).

152 *See supra* Parts II.C and II.D.

153 *See supra* Part II.A.

154 *See supra* Part II.B.

and third forum-shopping factors (advancement of state proceedings and possibility of a vexatious claim) provide the proper guide for determining the appropriateness of abstention in such cases. The nature of ICARA and the Hague Convention,[155] concerns about punishing uninformed litigants,[156] as well as the nature of abstention,[157] all suggest that in evaluating this category, the default position should be to exercise jurisdiction. However, where the federal ICARA claim is raised at a very late stage in the state proceedings, or circumstances otherwise suggest that the claim's primary purpose is forum shopping, this approach would afford judges with the discretion to dispose of such cases, without unduly limiting the rights of parties who are acting in good faith.

CONCLUSION

The system of concurrent jurisdiction established under ICARA affords left-behind parents greater convenience and access to the judicial system, in keeping with the time-sensitive nature of proceedings under the Hague Convention. However, concurrent jurisdiction also opens the door to problems of parallel litigation and abusive forum shopping, at the expense of our judicial resources and, most important of all, of the children caught in the middle of the disputes. Over the course of recent years, our federal courts have turned to abstention under *Younger* and *Colorado River* in an attempt to solve this problem, but they often have done so inconsistently and in an unprincipled manner. This Note has attempted to lay out a structure within which these inherently subjective determinations may be made. The flexibility of the *Colorado River* doctrine is its greatest strength, allowing for its adaptation to the particular context in which it is being applied. In dealing with ICARA claims, by placing special emphasis on concerns of forum shopping, judges simultaneously may serve the best interests of children and "wise judicial administration."

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155 The right in question is federal in nature, owing to international treaty obligations, and is designed to supersede state custody proceedings. *See supra* notes 124–29 and accompanying text.

156 *See supra* note 68 and accompanying text.

157 Abstention, especially under *Colorado River*, is only warranted by exceptional circumstances. *See supra* note 57 and accompanying text.