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Abstention and Mandamus After Will v. Calvert Fire Insurance Co.

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ABSTENTION AND MANDAMUS AFTER WILL V. CALVERT FIRE INSURANCE CO.

Federal courts have recognized several justifications for declining to hear cases within their jurisidiction. Each of these justifications is embodied in a branch of the federal abstention doctrine. Recently, in *Colorado River Water Conservation District v. United States,*[1] the Supreme Court propagated a new branch—abstention for the convenience of the federal courts.[2] A crop of unresolved issues sprouted from *Colorado River,* among them the propriety of stays for judicial convenience[3] and of appellate review through a petition for mandamus of a district court's decision to abstain. The Court addressed both these issues in *Will v. Calvert Fire Insurance Co.*[4] This Note assesses *Calvert's* impact on the abstention doctrine and on the availability of writs of mandamus.

I

DEVELOPMENT OF THE POWER TO STAY

A. *Traditional Doctrine*

Since 1821 the federal courts have professed that they must hear all cases over which they have jurisdiction. In *Cohens v. Virginia,*[5] Chief Justice Marshall announced in dictum:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution .... 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.[6]

The Supreme Court has consistently paid lip service to this obligation to exercise jurisdiction,[7] but it has been substantially undercut by the growth of the abstention doctrine.

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[1] 424 U.S. 800 (1976).

[2] *But see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 229 (3d ed. 1976) (*Colorado River* rule for exceptional, nonroutine cases only).

[3] *Colorado River* involved a dismissal, not a stay.

[4] 437 U.S. 655 (1978).

[5] 19 U.S. (6 Wheat.) 264 (1821).

[6] *Id.* at 404.

[7] *See, e.g.,* Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817

The abstention doctrine branches in four directions. *Railroad Commission v. Pullman Co.*,[8] the seminal case for the first branch, declared that federal courts should avoid the premature adjudication of constitutional issues.[9] A second branch is reflected in *Louisiana Power & Light Co. v. City of Thibodaux.*[10] In approving a stay of a federal action, the Court deferred to the state's interest in having its own courts resolve difficult questions of state law involving policies of substantial local import.[11] The third branch

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(1976) (dictum) (referring to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); McClellan v. Carland, 217 U.S. 268, 282 (1910) ("the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction"); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction ....").

[8] 312 U.S. 496 (1941).

[9] Pullman and its black porters brought a suit for an injunction, claiming that the Texas Railroad Commission, by issuing a discrimination order, had exceeded its authority under state law and had violated the fourteenth amendment and the commerce clause of the United States Constitution. *Id.* at 498. The Supreme Court held that the district court should have abstained from hearing the action until the Texas courts had determined the legality of the challenged Commission order:

> In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication .... The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

Id. at 500.

Pullman abstention thus directs the federal district court to abstain from deciding federal constitutional claims until a state court has resolved unclear, potentially dispositive state law issues. The federal forum keeps the action on its calendar until the state court renders a final judgment. If the federal plaintiff wins in state court, the constitutional issue is effectively mooted and the federal case may be dismissed. Otherwise, the federal plaintiff returns to federal court. For discussion of the purposes underlying *Pullman* abstention, see Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1113-16 (1974). *See generally* C. WRIGHT, *supra* note 2, § 52, at 218-21 (3d ed. 1976); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1077-79 (1974).

[10] 360 U.S. 25 (1959).

[11] In *City of Thibodaux*, a Louisiana municipality initiated an eminent domain proceeding against the petitioner power and light company in state court. Petitioner removed the action to federal district court on the basis of diversity of citizenship. The federal judge stayed the proceeding pending before him, but the Court of Appeals for the Fifth Circuit reversed. Reinstating the district court order, the Supreme Court commented:

> A determination of the nature and extent of delegation of the power of eminent domain concerns the apportionment of governmental powers between City and State. The issues normally turn on legislation with much local variation interpreted in local settings....
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> The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak

has grown primarily from the Court's more recent holdings in *Younger v. Harris*[12] and *Huffman v. Pursue, Ltd.*[13] This branch prohibits federal courts from interfering with pending state actions involving the enforcement of important state laws, and turns on principles of comity.[14]

The three traditional branches of the abstention doctrine thus limit a federal plaintiff's absolute right to a federal forum for reasons other than the costs inherent in duplicative litigation. Abstention's fourth branch, on which this Note will focus, reflects concern for those costs and the convenience of the federal courts.

B. *Origins of the Fourth Branch*

In *Landis v. North American Co.*[15] the Supreme Court recognized power inherent in federal district courts to stay their own proceedings in deference to actions pending in other federal courts. The Court's rationale turned on considerations of judicial economy and convenience.[16] But application of *Landis* to stays in deference to state proceedings was hampered by *Meredith v. Winter Haven.*[17] In *Meredith,* the Supreme Court declared that stays in

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> definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast.

Id. at 28-29.

City of Thibodaux approved deferral to a state tribunal for a determinative ruling on state policy of first impression. The Supreme Court has also upheld abstention where federal review of a question would disrupt state efforts to establish a coherent policy on matters of local concern. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943). *Burford* and similar cases arose primarily in the context of state administrative law, leading some commentators to recognize a separate category of "administrative abstention." *See* Field, *supra* note 9, at 1153-63. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 999-1004 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

[12] 401 U.S. 37 (1971).

[13] 420 U.S. 592 (1975).

[14] *See generally* C. WRIGHT, *supra* note 2, § 52, at 229-36; Field, *supra* note 9, at 1163-87; Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

[15] 299 U.S. 248 (1936).

[16] [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. at 254-55.

[17] 320 U.S. 228 (1943).

such circumstances were permissible only on certain clearly established grounds. Convenience was not among these grounds.[18]

A number of lower courts evaded *Meredith* and embraced *Landis*. In *Mottolese v. Kaufman*[19] the Second Circuit granted its trial courts broad discretionary power to stay, citing the principles of fairness which underlie the doctrine of *forum non conveniens*[20] and the goal of preventing a multiplicity of suits.[21] The Fourth Circuit has since adopted the *Mottolese* rationale.[22] The Seventh Circuit, in *Aetna State Bank v. Altheimer*,[23] reached a similar result, relying on the court's inherent power, recognized in *Landis*, "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants."[24] In *PPG Industries, Inc. v. Continental Oil Co.*,[25] the Fifth Circuit questioned *Mottolese* insofar as it applied to actions at law, but recognized broad power to stay federal suits seeking equitable and declara-

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[18] The Court stated that federal jurisdiction over state law questions, if properly invoked, must be exercised, absent "exceptional circumstances." *Id.* at 234. "Exceptional circumstances" sufficient to justify non-exercise of jurisdiction were limited to "*recognized* public polic[ies] or *defined* principle[s]." *Id.* (emphasis added). In 1943, these categories did not include convenience of the federal courts. *See id.* at 234-37.

[19] 176 F.2d 301 (2d Cir. 1949).

[20] *Id.* at 303. The doctrine of *forum non conveniens* provides that a federal court may, in its discretion, transfer an action to another eligible forum if such transfer best serves the interests of the parties and the public. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947). *See generally* C. WRIGHT, *supra* note 2, § 44, at 185-86; Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641, 647-48 (1977).

[21] 176 F.2d at 303. Chief Judge Learned Hand interpreted *Meredith* to mean that a defendant must show "some positive reason why the federal action should not proceed," and found economy and convenience to be such reasons. *Id.* For a discussion of *Mottolese*, see Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 686-87 (1960); Note, *Power to Decline the Exercise of Federal Jurisdiction*, 37 MINN. L. REV. 46, 58-61 (1952); Comment, *supra* note 20, at 654; Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 982-91 (1950); 19 U. CHI. L. REV. 361, 369-71 (1952).

[22] Amdur v. Lizars, 372 F.2d 103, 107 (4th Cir. 1967).

[23] 430 F.2d 750 (7th Cir. 1970). The Seventh Circuit overruled *Aetna* in Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978). The court viewed *Aetna* as incompatible with a subsequent Supreme Court case, Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976). The court of appeals denied a rehearing en banc on the question of overruling *Aetna*. Judge Pell filed a dissenting statement in which he reconciled *Aetna* and *Colorado River*, noting that the former involved a stay rather than a dismissal and therefore justified broader trial court discretion. 560 F.2d 796-97 n.5. The Supreme Court's reversal of the Seventh Circuit's judgment in Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), presumably restored vitality to *Aetna*.

[24] 430 F.2d at 755 (quoting *Landis*, 299 U.S. at 254).

[25] 478 F.2d 674 (5th Cir. 1973).

tory relief in deference to parallel state proceedings.[26] Although *PPG* did not mention *forum non conveniens,* it offered four ends that could justify this means: preservation of harmonious federal-state relations, judicial economy, convenience to litigants, and avoidance of races to judgment.[27] Finally, in *Weiner v. Shearson, Hammill & Co.,*[28] the Ninth Circuit recited the reasons set forth in *PPG,*[29] but used them to support the stay of an action at law.[30] Thus, prior to the Supreme Court's holding in *Colorado River Water Conservation District v. United States,*[31] five circuits recognized at least some[32] discretionary power to stay federal actions for reasons of economy and convenience.

C. *The Colorado River Standard*

In *Colorado River,* a federal district court deferred to a parallel state proceeding and dismissed a suit brought under the McCarran Amendment[33] to adjudicate federal water rights. The Supreme Court upheld the dismissal, differentiating *Colorado River* from cases reflecting the three traditional forms of abstention:[34]

> Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal

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[26] *Id.* at 681-82.

[27] *Id.* at 679-80. For a helpful critique of the *PPG* rationale, see 51 TEXAS L. REV. 1252 (1973).

[28] 521 F.2d 817 (9th Cir. 1975).

[29] *Id.* at 820.

[30] *Id.* at 821.

[31] 424 U.S. 800 (1976).

[32] In addition to the Fifth Circuit's hesitation concerning actions at law (*see* text accompanying note 26 *supra*), some circuits balked when asked to approve abstention in cases within exclusive federal jurisdiction. *See, e.g.*, Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 n.1 (3d Cir. 1975); Mach-tronics, Inc. v. Zirpoli, 316 F.2d 820, 833-34 (9th Cir. 1963); Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189-90 (2d Cir.), *cert. denied,* 350 U.S. 825 (1955); Telechron, Inc. v. Parissi, 197 F.2d 757 (2d Cir. 1952). *But see* Saler v. Renaire Foods, Inc., 283 F. Supp. 297 (E.D. Pa. 1968) (staying federal securities claim in deference to state court determination of state claims). In other cases convenience and economy justified stays but not outright dismissals. *See, e.g.*, Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 821-22 (9th Cir. 1975); Aetna State Bank v. Altheimer, 430 F.2d 750, 756 (7th Cir. 1970), *overruled in* Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd,* 437 U.S. 655 (1978).

[33] 43 U.S.C. § 666 (1976).

[34] 424 U.S. at 813-17.

> courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehesive disposition of litigation."[35]

The Court, however, emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"[36] and added that only exceptional circumstances can justify dismissal for reasons of economy and convenience.[37] The factors that district courts should balance, in their discretion,[38] against their "heavy obligation to exercise jurisdiction"[39] include "the inconvenience of the federal forum, ... the desirability of avoiding piecemeal litigation, ... and the order in which jurisdiction was obtained by the concurrent forums."[40] Thus, while underscoring the federal courts' responsibility to exercise jurisdiction, the Supreme Court renewed its support of the fourth branch of abstention.

II

THE PROPRIETY OF APPELLATE REVIEW OF STAY ORDERS

Absent outright dismissal of the federal action, the district court's grant or denial of a stay does not ordinarily result in a final order, and hence is generally not appealable.[41] Litigants

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[35] *Id.* at 817.

[36] *Id.*

[37] *Id.* at 818. The decisive exceptional circumstance in *Colorado River* was the clear congressional policy underlying the McCarran Amendment, 43 U.S.C. § 666 (1976), of avoiding piecemeal litigation of water rights. 424 U.S. at 819-20. The Court also suggested that an exceptional circumstance would arise if jurisdiction in the state and federal actions was *in rem* or *quasi-in-rem.* In such cases, "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." *Id.* at 818.

[38] *See* 424 U.S. at 818-19. For a model indicating how and when a district court should grant a stay under the *Colorado River* standard, see Note, *Federal Court Stays and Dismissals In Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641, 665-79 (1977).

[39] 424 U.S. at 820.

[40] *Id.* at 818. *Cf.* HART & WECHSLER, *supra* note 11, at 997 (suggesting factors for abstention analysis); Schoanfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605, 634-35 (1969) (same).

[41] Ever since the adoption of the Judiciary Act of 1789 only final decisions have been appealable, with few exceptions. A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). Appellate courts usually refuse to treat a district court's ruling on a motion to stay the federal proceeding as a final order, because after the state court has entered a judgment, the federal plaintiff can return to the forum that issued the stay and litigate his unsettled claims. Nevertheless, three theories may support the appeal of a stay

who seek review of a stay order normally have only one key to the appellate courthouse door: a petition for a writ of mandamus. But federal courts have traditionally limited use of the writ, recognizing its "drastic and extraordinary" nature.[42] This tight-fisted approach stems from the final judgment rule, which avoids inefficient, expensive piecemeal appeals by requiring litigants to endure the effects of erroneous interlocutory orders.[43]

In *Roche v. Evaporated Milk Association,*[44] the Supreme Court identified two formal requirements for the issuance of mandamus.

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order. First, if the stay effectively terminates the action, it may satisfy the final order requirement of 28 U.S.C. § 1291 (1976). *See* Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962) (stay order appealable where no corresponding litigation pending in state court). *Accord,* Druker v. Sullivan, 458 F.2d 1272, 1274 n.3 (1st Cir. 1972); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967).

Second, 28 U.S.C. § 1292(a)(1) (1976) permits an appeal from "interlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." *Id.* In Enelow v. New York Life Ins. Co., 293 U.S. 379, 382-83 (1935), the Court treated an order that stayed a federal action at law pending the trial of an equitable issue as one granting an injunction. *See generally* Mayton, *Ersatz Federalism Under the Anti-Injunction Statute,* 78 COLUM. L. REV. 330 (1978). But in City of Thibodaux v. Louisiana Power and Light Co., 360 U.S. 25 (1959), the Supreme Court avoided review of a similar construction of § 1292(a)(1) by holding that the trial court's stay order was proper. Since *Thibodaux* the appealability of abstention orders under § 1292(a)(1) has remained uncertain.

Third, a litigant may appeal an abstention order by obtaining certification from the judge that issued the order and applying to the court of appeals for review under 28 U.S.C. § 1292(b) (1976). *See* Public Employees Local 1279 v. Alabama, 453 F.2d 922 (5th Cir. 1972). Appeal via certification, however, is available only when the district judge believes that the stay order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1976). Moreover, the circuit court must ratify this certification. *Id.* Since stay orders seldom involve "controlling questions of law" and appellate review usually would not "materially advance the litigation," certification rarely offers an alternative in abstention cases. *But see* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 866 (1978). For an example of an unchallenged denial of certification, see Will v. Calvert Fire Ins. Co., 437 U.S. 655, 660 (1978). For a discussion of problems concerning the appealability of federal abstention orders, see Note, *Appealability of Abstention Orders,* 10 IND. L. REV. 556 (1977); Note, *Appellate Review of Stay Orders in the Federal Courts,* 72 COLUM. L. REV. 518 (1972). *See generally* HART & WECHSLER, *supra* note 11, n.12 at 1564-72; Field, *supra* note 8, at 1108 n.123.

[42] *Ex parte* Fahey, 332 U.S. 258, 259 (1947). *Cf.* Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) (mandamus should not issue where other means of relief available).

[43] *See* Will v. United States, 389 U.S. 90, 98 n.6 (1967); Cobbledick v. United States, 309 U.S. 323, 325 (1940); notes 78-86 and accompanying text *infra. See generally,* Crick, *The Final Judgment Rule As a Basis for Appeal,* 41 YALE L.J. 539 (1932). For a discussion of the harmful effects of liberal use of mandamus on the final order rule, see Bell, *The Federal Appellate Courts and the All Writs Act,* 23 S.W.L.J. 858 (1969); Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751, 771-78 (1957).

[44] 319 U.S. 21 (1943).

First, the reviewing court must have jurisdiction. The All Writs Act confers jurisdiction on appellate courts to issue the writ when "necessary or appropriate in aid of their respective jurisdictions."[45] Interpreting this language, *Roche* said that "authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."[46] Few cases properly before the district court would fail to satisfy this jurisdictional test.[47] Second, although the *Roche* Court recognized that the issuance of a common-law writ is committed to the discretion of the appellate court,[48] it offered some guidance in defining the boundaries of that discretion: "The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[49] Under the *Roche* formula, the propriety of the writ's issuance thus depends on unauthorized action by the district court.

In the thirty-five years since *Roche,* the Supreme Court has couched its principal mandamus decisions in the terms used by that case.[50] During this period, however, the Court's position on the availability of mandamus has fluctuated considerably. Repetition of the *Roche* formula has often obscured its approach to

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[45] 28 U.S.C. § 1651(a) (1976).

[46] 319 U.S. at 25. "Otherwise, the appellate jurisdiction would be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." *Id.* For a discussion of appellate jurisdiction to issue the writ, see Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 111-17 (1970) (concurring opinion, Harlan, J.).

[47] For a case that would fail to meet this test, see note 52 *infra.*

[48] 319 U.S. at 25. The Court analogized appellate discretion to issue writs of mandamus to judicial discretion to fashion equitable remedies. *See* Parr v. United States, 351 U.S. 513, 520 (1956).

[49] 319 U.S. at 26.

[50] *See, e.g.,* Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 114 (1970); Will v. United States, 389 U.S. 90, 95 (1967); Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964) (dicta); Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245 (1964); La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957); Parr v. United States, 351 U.S. 513, 520 (1956); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945). On occasion, the Court has defined the propriety of a writ's issuance in terms of an abuse of discretion on the part of the lower court. *See, e.g.,* La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957); De Beers Consol. Mines. Ltd. v. United States, 325 U.S. 212, 217 (1945); Banker's Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). *But see* notes 132-34 and accompanying text *infra.*

mandamus. Indeed, the *Roche* vocabulary has sometimes confused the justices themselves; various opinions have used the terms loosely, if not inconsistently.[51] A broader theory of availability than that suggested by *Roche* is necessary to rationalize these cases. Three prerequisites to availability are implicit in the Court's decisions. First, the petition must satisfy the jurisdictional requirement of the All Writs Act. This requirement rarely presents an obstacle.[52] Second, the appellate court must determine the propriety of entertaining a petition to review the particular category of issue presented. Not all issues can generate the extraordinary circumstances necessary to justify mandamus.[53] Finally, the appellate court must decide that the merits of the particular case support an exercise of its discretion to grant a writ.[54]

The Court also requires that the petitioner allege and prove a "clear and indisputable" right to the writ.[55] To meet this standard, he must show clearly that his case falls within an appro-

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[51] *Compare* Will v. United States, 389 U.S. 90, 104 n.14 (1967), *with* Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964). The confusion at the Supreme Court level has filtered down to the lower courts. *See, e.g., In re* Ellsberg, 446 F.2d 954, 956 (1st Cir. 1971) (jurisdictional question tied to discretion of appellate court).

[52] *See* notes 46-47 and accompanying text *supra*. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), however, shows that an appellate court does not always have jurisdiction to issue a writ. *Thermtron* concerned remand to state court of a removed action. The *Thermtron* Court found that Congress had intended to foreclose all means of review if a district court had properly remanded in accordance with 28 U.S.C. § 1447(c) (1976). *Id.* at 343. Thus, if a trial judge remanded a case "on the ground that it was removed 'improvidently and without jurisdiction,'" an appellate court would not have jurisdiction to entertain a petition for a writ of mandamus to review that decision. *Id.* But where the remand order issued on grounds not authorized by § 1447(c), as was the case in *Thermtron*, then mandamus would still lie, in the discretion of the appellate court. *Id.* at 343-45.

[53] *See In re* Ellsberg, 446 F.2d 954, 956-57 (1st Cir. 1971); notes 58-85 and accompanying text *infra*.

[54] *See* Schlagenhauf v. Holder, 379 U.S. 104, 111 n.8 (1964); United States v. Denson, 588 F.2d 1112, 1127-32 (5th cir. 1979); United States v. United States Dist. Court, 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972) (after determining that it could entertain petition because petition presented issue of first impression of extraordinary importance to all parties, court declined on merits to issue writ). *Cf. In re* Ellsberg, 446 F.2d 954, 956-57 (1st Cir. 1971) (unnecessary to determine what line of "exceptional circumstances" cases would support entertaining instant petition for mandamus because district court correctly decided case on merits).

[55] *See, e.g.*, Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).

priate category[56] and that its merits justify mandamus.[57] The bulk of mandamus adjudication focuses on the second component—the propriety of entertaining a petition to review a given category of issue. The Court has not always heeded *Roche*'s limitation of the writ to cases where the trial judge usurped jurisdictional power or failed to comply with a duty to exercise it. Rather, it has expanded availability by extending mandamus to additional categories of issues. In deciding to add a category, the Court has focused on the harm caused by the district court's action, either to the litigants or to the judiciary's institutional integrity. *Roche* implicated both these factors. The Court has also permitted circuit courts to entertain a petition for mandamus seeking to vindicate the seventh amendment right to jury trial,[58] and one seeking relief from sequestration of property in a suit for an injunction.[59] Issuance of mandamus in these cases would obviate injury to the parties. The danger of institutional harm has prompted the Court to approve appellate consideration of petitions alleging judicial interference with foreign relations[60] and disregard of the Federal Rules of Civil Procedure.[61]

When the Supreme Court decided *Roche* in 1943, mandamus was rarely available. The Court had designated only a few categories of issues that could be reviewed through a mandamus petition.[62] *Roche* reaffirmed the traditional view that jurisdic-

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[56] *See* Will v. United States, 389 U.S. 90, 102-07 (1967) (insufficient showing of an institutional need for immediate review through mandamus); *Ex parte* Muir, 254 U.S. 522, 534 (1921) (refusal of writ appropriate where lower court's jurisdiction merely doubtful); *In re* Cooper, 143 U.S. 472, 506 (1892) (mandamus unavailable where exercise of lower court's jurisdiction depended on fact not present in record at time of petition); Morrow v. District of Columbia, 417 F.2d 728, 737 (D.C. Cir. 1969) (the clearer the lack of jurisdiction, the more appropriate mandamus); Note, 86 HARV. L. REV. 595, 600 (1973) ("where the lower court's jurisdiction [is] merely doubtful, or depend[s] upon a finding of fact not in the record at the time of the petition, mandamus [is] normally unavailable") (footnotes omitted).

[57] Thus, in the context of jurisdictional error, the Supreme Court has set up "clear requirements ... in terms of the degree of error necessary before mandamus [will] lie." Note, *supra* note 56, at 600. Moreover, mandamus is usually denied where another form of relief is available. *Ex parte* Peru, 318 U.S. 578, 584 (1943). *See* Kerr v. United States Dist. Court, 426 U.S. 394, 403-06 (1976).

[58] *See* Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

[59] *See* De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220-21 (1945).

[60] *See Ex parte* Peru, 318 U.S. 578, 588 (1943). *Cf.* Maryland v. Soper, 270 U.S. 9 (1926) (mandamus issued to avoid judicial tampering with sensitive questions of federal-state relations).

[61] La Buy v. Howes Leather Co., 352 U.S. 249 (1947).

[62] Before *Roche* the Supreme Court's analysis of mandamus rarely went beyond the jurisdictional catagory which that case reflects. Nevertheless it had sanctioned consideration

tional questions composed one such category. In 1957, however, the Court dramatically expanded availability to permit general supervision of lower court proceedings. In *La Buy v. Howes Leather Co.*,[63] the Court upheld a writ issued by the Seventh Circuit vacating an order of Judge La Buy that referred two private antitrust suits to a master pursuant to Federal Rule of Civil Procedure 53(b). The judge had not "refused to exercise his authority" within the meaning of the *Roche* test. He had power to refer the case to a master, because rule 53(b) leaves the trial judge discretion to define the "exceptional condition[s]" necessary to justify such a reference.[64] Nevertheless, Judge La Buy's erroneous habit of referring cases to masters without an adequate showing of exceptional circumstances[65] threatened harm both to the litigants in the instant case and to the institutional interests of the judiciary.[66] The Court found that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."[67]

In *Schlagenhauf v. Holder*,[68] the Supreme Court continued to increase the availaiblity of mandamus.[69] *Schlagenhauf* vacated the Seventh Circuit's order denying a writ of mandamus against Judge Holder, who had ordered petitioner, a defendant, to submit to nine physical and mental examinations pursuant to Federal Rule of Civil Procedure 35(a).[70] Although district judges had

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of petitions for mandamus that sought vindication of the right to jury trial. (Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 511 (1959)) and petitions that challenged particularly dangerous district court errors. *See, e.g.*, Maryland v. Soper, 270 U.S. 9 (1926).

[63] 352 U.S. 249, *rehearing denied*, 352 U.S. 1019 (1957).

[64] A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FED. R. CIV. P. 53(b).

[65] 352 U.S. at 258. Judge La Buy had referred eleven cases to masters over a six-year period.

[66] *Id.* "But even a 'little cloud may bring a flood's down-pour' if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials." *Id.*

[67] 352 U.S. at 259-60. Despite this conclusion, the Court indicated that the All Writs Act had not conferred on the Seventh Circuit "a 'roving commission' to supervise interlocutory orders of the District Courts in advance of final decision." *Id.* at 257.

[68] 379 U.S. 104 (1964).

[69] *But see* Note, *supra* note 56, at 611-17 (arguing that *La Buy* has broader implications than *Schlagenhauf*).

[70] 379 U.S. at 108-09.

previously ordered plaintiffs to submit to such examinations,[71] Judge Holder was the first to direct such an order at a defendant.[72] The Court held that his authority to issue the order was questionable and that the Seventh Circuit thus properly considered the petition for mandamus.[73] In form this decision is consistent with the *Roche* standard, but the Court had to strain the traditional concept of unauthorized action to reconcile the two.[74] Rule 35(a), on its face, sanctions court ordered medical examinations of any party. At most, Judge Holder misinterpreted the rule, a type of error appellate courts ordinarily review after the trial court enters a final judgment.

A better, but less traditional rationale may have motivated the Court. The question of whether rule 35(a) authorized court-ordered medical examination of defendants was novel and important. Arguably, the benefit that district courts would derive from immediate guidance on this issue outweighed the policies associated with the final order rule.[75] This rationale did not surface, however, until the Court concluded that *Schlagenhauf* presented a power question. The Court then held that since the petition had been properly before the Seventh Circuit, it should have considered two peripheral issues that also involved "new and important problems."[76] This aspect of the opinion has led at least two courts to interpret *Schlagenhauf* as precedent for mandamus whenever a petitioner presents significant and novel issues.[77]

Only three years later, *Will v. United States*[78] signaled a retreat from the broad availability of mandamus fashioned in *La Buy* and *Schlagenhauf*. In a criminal tax evasion case, Judge Will ordered the government to furnish information requested in the defendant's bill of particulars. The Seventh Circuit issued a writ of mandamus vacating Judge Will's order. The Supreme Court assumed, without deciding, that the Seventh Circuit's jurisdiction

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[71] *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[72] 379 U.S. at 110.

[73] *Id.* at 110.

[74] *See* Note, *supra* note 56, at 615 n.86.

[75] *See* note 43 and accompanying text *supra*.

[76] 379 U.S. at 111. These issues involved interpretation of the "in controversy" and "good cause" clauses of rule 35(a) of the Federal Rules of Civil Procedure.

[77] *See In re* Ellsberg, 446 F.2d 954, 956-57 (1st Cir. 1971); United States v. United States Dist. Court, 444 F.2d 651, 655-56 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972). *See generally* Note, *supra* note 56, at 616-17.

[78] 389 U.S. 90 (1967).

flowed from a possible future appeal by the government,[79] but held that the appellate court had abused its discretion in granting mandamus.[80] Mandamus failed for want of an appropriate category of issue. Since Judge Will had acted within the scope of his authority in entering the order,[81] mandamus could not be justified under the *Roche* standard. Moreover, the Court found no evidence of persistent disregard of the federal rules, such as that which supported supervisory mandamus in *La Buy*.[82] Finally, still ignoring the implausibility of its argument, the Court reiterated that review of the petition in *Schlagenhauf* had been appropriate only because the district court's authority had been doubtful.[83] *Will* failed to acknowledge the propriety of mandamus in cases involving new and important issues.

In sum, the Court has vacillated on the categories of issues that may justify a writ of mandamus. It has recognized a number of categories, among them jurisdictional mandamus in *Roche*, supervisory mandamus in *La Buy*, and, apparently, advisory mandamus in *Schlagenhauf*. In *Will*, however, the Court adopted a more restrictive approach to availability by reading *Schlagenhauf* as a jurisdictional mandamus case, thereby undermining the advisory mandamus category. Furthermore, the *Will* Court stated that mandamus should not be allowed to negate the final order rule,[84] a concern noticeably absent from *La Buy* and *Schlagenhauf*. The Court, however, declined to decide whether petitions for mandamus that arise in a criminal context have to satisfy a more restrictive standard than their civil counterparts.[85]

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[79] 389 U.S. at 95 n.4.

[80] *Id.* at 95 n.4, 98 & 107.

[81] *Id.* at 98. The Court explained that the trial judge has "very broad discretion" in considering a request for a bill of particulars order under FED. R. CRIM. P. 7(f). *Id.* at 98-99. (citing Wong Tai v. United States, 273 U.S. 77, 82 (1927)).

[82] 389 U.S. at 100, 107.

[83] *Id.* at 104 n.14.

[84] *Id.* at 96-97. In *Will* this argument had a constitutional dimension. Avoiding delay is one purpose of the final order rule. The constitutional guarantee of a speedy trial gives added importance to this goal. Moreover, Congress has limited government appeals in criminal cases "at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." *Id.* at 96.

[85] *Id.* at 100 n.10.

Will v. Calvert Fire Insurance Co.

A. *The Facts*

The question of the propriety of a writ of mandamus to quash a federal stay order issued in deference to a parallel state action first reached the Court in *Will v. Calvert Fire Insurance Co.*[86] In 1974, Calvert Fire Insurance Company notified American Mutual Reinsurance Company that it had elected to rescind its membership in a reinsurance pool which American operated. American then sued Calvert in an Illinois state court seeking a declaratory judgement that the pool agreement continued to bind Calvert. Calvert answered that the agreement was unenforceable because American had violated, *inter alia,* the Securities Act of 1933, the Securities Exchange Act of 1934, and the Illinois Securities Act. It counterclaimed for damages on all of the grounds that it set up in defense to American's claim except for the alleged violation of the Securities Exchange Act's rule 10b-5.[87] Simultaneously, Calvert filed a complaint in the United States District Court for the Northern District of Illinois, asserting the rule 10b-5 claim along with the other claims that it had raised in state court. American moved to stay or dismiss[88] Calvert's federal suit.[89]

Judge Will stayed all claims except Calvert's rule 10b-5 damage claim, over which the district court specifically retained immediate jurisdiction.[90] Although he heard oral argument on this

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[86] 437 U.S. 655 (1978).

[87] 17 C.F.R. § 240.10-5 (1978). Because § 27 of the 1934 Act, 15 U.S.C. § 78aa (1976), grants the federal courts exclusive jurisdiction to enforce that Act, Calvert could not seek affirmative relief (monetary damages) in state court for American's alleged violations of rule 10b-5. Despite this exclusive jurisdiction, state courts must recognize affirmative defenses grounded on the Securities Exchange Act. In McGough v. First Arlington Nat'l Bank, 519 F.2d 552 (7th Cir. 1975), the court explained that

> while 15 U.S.C. § 78aa confines jurisdiction over suits seeking affirmative relief under the Exchange Act to the federal district courts, it [does] not preclude a state court defendant from pleading, and a state court from recognizing, an affirmative defense of illegality under the Act. The Supremacy Clause [U.S. CONST. art. VI, cl. 2] would seem to demand this construction of § 78aa.

Id. at 555 n.1.

[88] American labelled this ploy a "motion to abate." *Id.* at 659. Although abatement pleadings are equivalent to motions to dismiss, *see* 1A MOORE'S FEDERAL PRACTICE ¶ 0.219, at 2601 (2d ed. 1978), the trial court treated it as a motion for a stay. 437 U.S. at 659.

[89] 437 U.S. at 659. American moved to dismiss because the insurance contract allegedly was not a "security" within the meaning of either the 1933 Act or the 1934 Act. The motion for a stay rested on the fact that the state court proceedings had commenced six months before the federal action, and included most of the same claims. *Id.*

[90] *Id.* at 659-60.

claim soon thereafter, Judge Will did not rule on the issue.[91] He twice refused to reconsider his stay order, and refused to certify an interlocutory appeal.[92]

Calvert petitioned the Court of Appeals for the Seventh Circuit for a writ of mandamus directing Judge Will to proceed to adjudicate its rule 10b-5 claims.[93] The Seventh Circuit issued the writ and instructed Judge Will "to proceed immediately with Calvert's claim for damages and equitable relief under the Securities Exchange Act of 1934."[94] The Supreme Court granted certiorari "to consider Judge Will's contention that the issuance of the writ of mandamus impermissibly interfered with the discretion of a district court to control its own docket."[95]

B. *The Decision*

Two issues confronted the Supreme Court in *Calvert:* first, the extent of a district court's discretion to stay a federal proceeding, or to delay resolution of a claim over which the court retains exclusive jurisdiction, in deference to a concurrent state proceeding;[96] and second, the propriety of an appellate court's use of mandamus to override that decision. Justice Rehnquist, writing

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[91] For explanation of this procedural history. see Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 861-62 (N.D. Ill. 1978). Judge Will's opinion on remand suggests that he may have stayed *all* claims pending before him, including the rule 10b-5 damages claim, until the state court ruled on a potentially dispositive issue. *See id.*; note 112 *infra.*

[92] 437 U.S. at 660. An interlocutory appeal under 28 U.S.C. § 1292(b) (1976) is one of three ways to appeal stay orders. *See* note 41 *supra.*

[93] *See* Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7th Cir. 1977). The stay order did not apply to respondent's claim for damages under rule 10b-5. *See* text accompanying note 90 *supra.* The stay order did apply, however, to respondent's claim for equitable relief because the state court had jurisdiction to rescind the pool agreement in recognition of a 10b-5 defense. *See* note 87 and accompanying text *supra.* The petition did not mention the claims contained in respondent's federal complaint for equitable and monetary relief under the Securities Act of 1933 or state law. 560 F.2d at 794 n.2.

[94] *Id.* at 797. The Seventh Circuit held that the lower court should not have deferred to the state court because the "exceptional circumstance" requirement of *Colorado River,* which was decided after the issuance of the stay, had not been met. 560 F.2d at 796-97. For discussion of *Colorado River,* see notes 33-40 and accompanying text *supra.*

[95] 437 U.S. at 661.

[96] A trial judge's discretion to stay a claim over which the federal courts have exclusive jurisdiction was not directly in issue in *Calvert,* because, according to the plurality, Judge Will did not formally stay the rule 10b-5 damage claim. *See* 437 U.S. at 666-67; text accompanying note 90 *supra.* However, as Justice Brennan argued in dissent, the trial judge's delay on the damage claim had the same effect as a stay, if not a dismissal. *Id.* at 676-77. From this standpoint, the issue was before the Court in *Calvert.* Furthermore, Judge Will's opinion on remand suggests that a formal stay may have issued after all. *See* note 112 *infra.*

for the plurality,[97] first examined the Seventh Circuit's issuance of the writ. Although the plurality failed to address the threshold jurisdictional issue, presumably jurisdiction obtained because the Seventh Circuit could have entertained an appeal from the district court at some stage of the case.[98] Justice Rehnquist concentrated on the second component of the availability test—whether the case involved a category of issue that justified granting mandamus. Noting that "[t]he correct disposition of this case hinges in large part on the appropriate standard of inquiry to be employed by a court of appeals in determining whether to issue a writ of mandamus to a district court,"[99] Justice Rehnquist concluded that mandamus could issue only if Calvert showed that it had a "clear and indisputable right" to have its claims adjudicated in a federal forum.[100]

The plurality concluded that Calvert could not make this showing with regard to the category of issue presented by its case because the trial judge had discretion to stay federal claims in deference to contemporaneous state court proceedings. Relying on *Brillhart v. Excess Insurance Co. of America*[101] and *Colorado River,* the plurality endorsed this discretion to stay in deference to a state court action, "even when matters of substantive federal law are involved."[102] Discretion to defer, said Justice Rehnquist, has resulted by necessity from congressional expansion of federal jurisdiction, which increased the likelihood of "duplicative litigation and the concomitant tension between state and federal courts."[103] The plurality handily discarded the *Colorado River* dictum that reminded courts of their "unflagging obligation" to exercise their

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[97] Justice Rehnquist announced the judgment of the Court, and delivered an opinion in which Justices Stewart, White, and Stevens joined. Justice Blackmun concurred in the judgment. Chief Justice Burger dissented. Justice Brennan also filed a dissenting opinion, in which Chief Justice Burger and Justices Powell and Marshall joined. Each of the *Calvert* dissenters numbered among the six-man majority in *Colorado River*. Only Justices Rehnquist and White voted for the Court's judgment in both cases. Justices Stewart and Stevens switched from the minority in *Colorado River* to the plurality in *Calvert*. Justice Blackmun, the swing vote in *Calvert*, sided with the minority in *Colorado River*.

[98] *See* notes 45-47 and accompanying text *supra*.

[99] 437 U.S. at 661.

[100] 437 U.S. at 662.

[101] 316 U.S. 491 (1942).

[102] 437 U.S. at 664.

[103] *Id.* at 663. According to Justice Rehnquist, this expansion rendered obsolete *McClellan v. Carland*, 217 U.S. 268 (1910), which appeared to support the issuance of mandamus on similar facts. 437 U.S. at 663. The dissent considered this position a "flouting of *McClellan*." *Id.* at 674.

jurisdiction: "[A]n opinion which *upheld* the correctness of a district court's *final decision* to dismiss because of concurrent jurisdiction does little to bolster a claim for the extraordinary writ of mandamus in a case such as this where the District Court has rendered no final decision."[104] Nor, as the court of appeals supposed, is deferral "equivalent to dismissal."[105] Calvert could urge Judge Will to reconsider his deferral based on the progress of the state case.[106] Moreover, Justice Rehnquist suggested that the trial judge's grant of the motion to stay was functionally equivalent to a mere exercise of his clear power to set his own calendar and defer the trial until the state case was completed; the stay was a mere formality.[107] Thus, the plurality concluded that the decision to stay for purposes of convenience lies in the district court's discretion, and "[w]here a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"[108]

Finally, Justice Rehnquist examined the propriety of Judge Will's delay in deciding the claim over which he had retained immediate jurisdiction.[109] Calvert claimed that the district court had no power "to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented."[110] Justice Rehnquist agreed that "[w]here a district court obstinately refuses to adjudicate a matter properly before it,"[111] mandamus is proper, but pointed out that the delay was not a stay.[112] Mandamus will not issue merely to speed a trial judge's deliberations.

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[104] 437 U.S. at 664 (emphasis in original). In *Colorado River,* the lower court had dismissed the entire action—a final order from which appeal was automatically available pursuant to 28 U.S.C. § 1291 (1976). *See* notes 31-34 *supra*. The court of appeals thus could "affirm, modify, vacate, set aside or reverse" the district court order and direct such further action "as may be just under the circumstances." 28 U.S.C. § 2106 (1976). In contrast, the district court in *Calvert* granted a stay, which in this case was reviewable only by a petition for mandamus. *See* notes 41-42 and accompanying text *supra*.

[105] 437 U.S. at 664.

[106] *Id.* at 665.

[107] *Id.*

[108] *Id.* at 665-66.

[109] *See* text accompanying note 90 *supra*.

[110] 437 U.S. at 666.

[111] *Id.*

[112] *Id.* Justice Brennan, in his dissenting opinion, agreed that no stay had been issued, but asserted that the delay had the effect of a stay. *Id.* at 676-77. Judge Will's memorandum opinion on remand, however, seems to indicate that although he first refrained from staying the rule 10b-5 damages claim, he later stayed "*all* proceedings," which presumably included the damages claim. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F.

Justice Blackmun, who held the swing vote, concurred on narrow grounds. In his view, the Seventh Circuit's issuance of the writ was "premature" because the Supreme Court had handed down the *Colorado River* ruling after the trial judge's decision in *Calvert* but before the court of appeals reviewed that decision. He voted to vacate the writ of mandamus so that Judge Will could reconsider his stay order with reference to the *Colorado River* standard.[113] Justice Blackmun parted company with the plurality on the abstention issue because he doubted the applicability of *Brillhart*. He questioned the plurality's reliance on *Brillhart*, a diversity case, since *Colorado River*, a federal question case, seemed

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Supp. 859, 861 (N.D. Ill. 1978) (emphasis added). This apparent addition to the "sparse record" (437 U.S. at 667) before the Supreme Court would have necessarily altered the plurality's reasoning, if not its result.

[113] 437 U.S. at 668. On remand, however, the Seventh Circuit took its directive from the opinion of the four *dissenting* justices, combined with that of Justice Blackmun. Calvert Fire Ins. Co. v. Will, 586 F.2d 12, 14 (7th Cir. 1978). The court of appeals reasoned that the grounds for Justice Blackmun's concurrence differed significantly from the plurality's position. Indeed, Justice Blackmun agreed with the dissenters that Justice Rehnquist had misused *Brillhart* by holding that the stay order was committed to the trial judge's discretion. Although Justice Blackmun did not support the dissent's view that *Colorado River* controlled, he did vote to remand so that Judge Will could reconsider his decision in light of *Colorado River*. Justice Rehnquist, on the other hand, stated flatly that *Colorado River* did not control. Therefore, the Seventh Circuit concluded that the dissenters and Justice Blackmun would at least agree that the district court should "reconsider its actions in this case in light of *Colorado River*." *Id.* at 14.

Confronted with a confusing mixture of two Supreme Court and two Seventh Circuit opinions, Judge Will reconsidered his order to stay in Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978). He indicated that his original decision to stay was "not 'simply the product of the normal excessive load of business in the District Court,' ... although that excessive workload is real. Rather, the stay is essential to assure efficient justice to the litigants and to maintain the integrity of the two court systems." *Id.* at 862. In an important revelation, Judge Will stated that Calvert's counsel had admitted that Calvert had suffered no damages to date from its association with the reinsurance pool, and that therefore Calvert's sole exclusive jurisdiction claim—the 1934 Act damage claim—was questionable. *Id.* at 861. Judge Will then cited four reasons why *Colorado River* did not prohibit the stay. First, "considerations of 'wise judicial administration, ... conservation of judicial resources and comprehensive disposition of litigation'" counseled as much in favor of a stay in the present proceedings as they had in *Colorado River* when viewed in light of the "principles of fairness, efficiency, and avoidance of duplicative trials and appeals of the same issues." *Id.* at 863. Second, Judge Will did not accept the dissent's view that deferral of the exclusive jurisdiction claim was equivalent to dismissal. *Id.* at 863-64. Third, he declared that it was "the clear intention of *Colorado River* ... not to limit the district court's discretion" in abstention cases. *Id.* at 864. Finally, he interpreted Calvert's filing of the federal action as a mere tactical maneuver designed to secure duplicative adjudications, a situation not present in *Colorado River*. *Id.* In reaching this conclusion, he noted that Calvert had failed to remove the state action to federal court under 28 U.S.C. § 1441 (1976).

the more relevant precedent.[114] Moreover, he disputed the viability of *Brillhart's* recognition of a broad discretion to stay after *Colorado River's* more restrictive holding.[115]

The four dissenting justices[116] disagreed with the plurality on both the abstention and mandamus issues. First, they stated that the rule of *McClellan v. Carland,*[117] that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,"[118] applies with particular strength to cases like *Calvert* involving issues subject to the federal courts' exclusive jurisdiction.[119] The dissent amplified Justice Blackmun's objections to the plurality's use of *Brillhart*[120] and attacked its application of *Colorado River,* finding no exceptional circumstances warranting a stay.[121] The dissenters also criticized the plurality for disregarding the collateral estoppel problems inherent in staying claims within the exclusive jurisdiction of the federal courts.[122] Finally, the dissent asserted that mandamus was proper under either the test of *La Buy v. Howes Leather Co.*[123] or the traditional test of *Roche v. Evaporated Milk Ass'n;*[124] they brushed aside as unrealistic the plurality's point that

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[114] 437 U.S. at 667. Justice Blackmun may have felt that federal question cases present the stronger case for retention of the federal forum, because federal courts are more competent to decide issues of federal law. He had concurred with Justice Stewart's dissent in *Colorado River*, which declared that "there was no justification at all" for the district court's order of dismissal. 424 U.S. at 826.

[115] 437 U.S. at 667. In addition, the declaratory judgment statute upon which the *Brillhart* Court relied (316 U.S. 491, 494 (1942)) committed the decision to grant jurisdiction to the trial court's discretion. 28 U.S.C. § 400 (1940) (current version at 28 U.S.C. § 2201 (1976)). No such statute was applicable in *Calvert*.

[116] *See* note 97 *supra*.

[117] 217 U.S. 268 (1910).

[118] *Id.* at 282.

[119] 437 U.S. at 670.

[120] *Id.* at 670-72. The dissenters emphasized that the presence of exclusive jurisdiction in *Calvert* further distinguished *Brillhart*. *Id.* at 672.

[121] *Id.* at 672-74. The dissenters claimed that only "one of the four secondary factors found to support the federal dismissal in [*Colorado River*]—the fact that the state proceedings were initiated before the federal suit"—was present in *Calvert*. *Id.* at 674. *See* text accompanying notes 38-40 *supra*. In so doing, they seemed to treat the *Colorado River* factors as the exclusive ingredients of "exceptional circumstances," allowing no room for mere consideration of judicial economy. The language of *Colorado River*, however, is more open-ended. *See* 424 U.S. at 818 ("a federal court may also consider *such factors as* . . .") (emphasis added).

[122] *Id.* at 674-76. *See* notes 150-72 and accompanying text *infra*.

[123] 352 U.S. 249 (1957). *La Buy* sanctions the use of mandamus to correct a clear abuse of discretion. *Id.* at 257.

[124] 319 U.S. 21 (1943).

Judge Will had not actually stayed the rule 10b-5 damages claims.[125]

C. *The Uncertain Forecast*

No soothsayer can with certainty predict the impact *Calvert* will have upon the law of abstention and mandamus. The most obvious hurdle to predictability is the failure of a majority of the Court to agree explicitly on anything more significant than that mandamus was improper, at least because of the peculiar timing of the case. Justice Blackmun may have sided with the dissent on the abstention issue, but this is not clear.[126] Nevertheless, the approach of the plurality merits attention because lower courts will almost surely apply it, at least until the Supreme Court next confronts the issue.[127]

The plurality's discussion of mandamus indicates that *Calvert* continued and accelerated the trend initiated in *Will v. United States*[128] to restrict the availability of the writ. The opinion noted that the policies behind the final decision rule militated against the availability of mandamus,[129] extending to civil cases *Will*'s bias against interlocutory review of lower court orders in criminal proceedings.[130] Furthermore, Justice Rehnquist found that the petition for a writ did not fall within the *Roche* category because a district judge does have the authority to order a stay of claims

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[125] 437 U.S. at 676-77. Chief Justice Burger joined in Justice Brennan's dissent, but also wrote a separate dissenting opinion. He found that a stay of a claim over which the federal courts have exclusive jurisdiction, in deference to a state court proceeding, is inappropriate regardless of the res judicata problem. Thus, determination of the res judicata issue was unnecessary. *Id.* at 668.

[126] On remand, the Seventh Circuit appeared to align Justice Blackmun's views on abstention with those of the dissent. Calvert Fire Ins. Co. v. Will, 586 F.2d 12, 14 (7th Cir. 1978). Judge Will correctly recognized that the Supreme Court's disposition of the case left the abstention issue uncertain. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 864 & n.4 (N.D. Ill. 1978). *See* note 113 *supra*.

[127] Some courts have already relied on the *Calvert* plurality opinion. *See, e.g.*, Finch v. Mississippi State Medical Ass'n, 585 F.2d 765, 777 (5th Cir. 1978) (*Calvert* held that lower federal court may appropriately delay federal action until state court has resolved parallel claims in pending case); Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, 590 F.2d 1209, 1219 (D.C. Cir. 1978) (*Calvert* invoked principles of comity to justify deferral of federal claim in favor of state action involving same issues and subject matter); Zellen v. Second New Haven Bank, 454 F. Supp. 1359, 1363-64 (D. Conn. 1978) (*Calvert* reaffirmed holding of *Brillhart* that decision to defer to concurrent jurisdiction of state court committed entirely to district court's discretion).

[128] 389 U.S. 90 (1967). *See* notes 78-85 and accompanying text *supra*.

[129] 437 U.S. at 661.

[130] *See* note 84 and accompanying text *supra*.

over which a federal court has concurrent jurisdiction.[131] At most, then, Judge Will had erred within an area committed to his discretion. Using language that has sweeping implications for the propriety of entertaining petitions from all the presently approved categories of issues, the plurality opinion stated:

> Although in at least one instance we approved the issuance of the writ upon a mere showing of abuse of discretion, *La Buy v. Howes Leather Co.*, 352 U.S. 294, 257 ... (1957), we warned soon thereafter against the dangers of such a practice. "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."[132]

As applied in the context of a stay, this language admonishes circuit courts that "the District Court's exercise of its discretion ... ought not ... to be overridden by a writ of mandamus."[133] Casting the decision in traditional terms, Justice Rehnquist stated that "a litigant's right to proceed with a duplicative action in a federal court can never be said to be 'clear and indisputable.'"[134] If future decisions give full effect to this language, it may eliminate the entire *La Buy* category which allows review, on a petition for mandamus, of an abuse of discretion that the trial judge has repeated several times.[135] Finally, the plurality never mentioned the possibility of using advisory mandamus in *Calvert*, even though its facts were well suited to that category.[136]

Although future decisions may read the plurality's opinion broadly, they need not. Justice Rehnquist may have only meant that no case can fall within the jurisdictional category unless the trial judge acted outside the area of his discretion. *La Buy* did not focus on the abuse of discretion, but rather on damage to institutional integrity caused by the repetition of error.[137] By referring to *La Buy*, Justice Rehnquist may have merely intended to re-

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[131] *See* notes 101-07 and accompanying text *supra*.

[132] 437 U.S. at 665-66 n.7 (quoting Will v. United States, 389 U.S. 90, 98 n.6 (1967)).

[133] 437 U.S. at 665.

[134] *Id.* at 666 n.8.

[135] *See* notes 63-67 and accompanying text *supra*.

[136] The *stay* of a federal proceeding itself involved "new and important" questions of law, and the Seventh Circuit could have formulated the "necessary guidelines" to resolve those issues in light of *Colorado River*. *See* notes 68-77 and accompanying text *supra*.

[137] *See* notes 63-67 and accompanying text *supra*.

pudiate any attempt to read that case as precedent for jurisdictional mandamus whenever a petitioner shows abuse of discretion.

In addition to its mandamus discussion, the plurality affirmed the fourth branch of abstention and expanded it in the context of stay orders. The plurality said that a trial court has discretion in deciding whether to stay its proceedings in deference to concurrent state court actions as a mere matter of convenience to the federal court. At the very least, the *Calvert* plurality attempted to expand *Colorado River*'s "exceptional circumstances" requirement where abstention is accomplished by stay rather than by dismissal. Unhappily, this distinction obscures the plurality's view of the precise scope of the fourth branch. They proclaimed merely that a district court has *some* discretion. By rejecting the use of mandamus to correct an abuse of discretion,[138] the plurality avoided deciding whether Judge Will had abused his discretion. Thus, the opinion sheds little light on the fourth branch's bounds.

Nevertheless, some guidelines can be divined. By relying on *Colorado River*, the plurality implicitly reaffirmed the factors cited in that case that contribute to a decision to abstain: "[t]he inconvenience of the federal forum, ... the desirability of avoiding piecemeal litigation, ... and the order in which jurisdiction was obtained by the concurrent forums ...."[139] Additional considerations such as an overcrowded docket and scheduling difficulties may weigh in the district court's decision.[140] Congressional expansion of federal jurisdiction, which leads to duplicative litigation, tension between federal and state courts[141] and overburdened federal dockets,[142] justifies this expansion of the *Colorado River* standard, at least in the context of a stay.[143]

The *Calvert* guidelines grant lower federal courts confronted with motions to stay a degree of discretion proportionate with the

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[138] Nevertheless, the result the plurality reaches in *Calvert* suggests that the importance of the federal right may determine the bounds of the fourth branch of the abstention doctrine. *See* notes 154-72 and accompanying text *infra*.

[139] 424 U.S. at 818. *See* text accompanying notes 39-40 *supra*.

[140] The plurality cited these considerations not as factors, but as reasons why a district judge has "wide latitude in setting his own calendar." 437 U.S. at 665. Because the plurality found no difference between a district judge's decision to defer setting a case for trial and to formally stay its proceedings (*id.*), the factors that determine the calendar may also affect the decision to stay.

[141] *Id.* at 663.

[142] For discussion of the burden expanded jurisdiction places on federal court dockets, see Tyler, *Congressional and Executive Expansion of Federal Jurisdiction*, 71 F.R.D. 229 (1976).

[143] *See* note 113 *supra* for a trial judge's perspective on the decision to stay.

impact of deferral. The discretion available in such circumstances is less than that allowed in *Brillhart*, where both the underlying enabling statute[144] and the fact that jurisdiction rested on diversity[145] provided compelling reasons for a large grant of discretion. In contrast, *Calvert* allows more discretion than *Colorado River* where dismissal completely deprived the federal plaintiff of his federal forum. Because a federal stay does not necessarily deprive the litigant of a federal forum,[146] a district court's exercise of discretion is more appropriate on a motion for a stay than on a motion for dismissal.[147]

Thus, the *Calvert* plurality opinion expands a district judge's discretion in two ways. First, by extending the fourth branch of abstention, *Calvert* gives judges wider latitude in deciding whether to stay an action in deference to concurrent state court proceedings. Second, by restricting the availability of mandamus, the opinion reduces the likelihood of interference from a court of appeals.[148] The district judge's enhanced ability to avoid duplicative and piecemeal litigation promotes the efficient operation of the federal courts.

D. *The Unanswered Question*

The plurality failed to respond to a crucial abstention issue—the res judicata[149] problem raised by Justice Brennan's dissenting opinion. Justice Brennan asked what effect, if any, a federal district judge should give to a state court's determination of a federal plaintiff's affirmative defense when the case returns to federal court after a stay.[150] In particular, the dissent ques-

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[144] *See* note 115 and accompanying text *supra*.

[145] *See* note 114 and accompanying text *supra*.

[146] A stay would not deprive the federal plaintiff of a federal forum unless the determinations of the state court bind the federal court. For a possible solution to this problem, see text accompanying notes 154-72 *infra*.

[147] *See* notes 104-07 and accompanying text *supra*.

[148] Indeed, read literally, the plurality opinion would foreclose all review of orders to stay duplicative claims through mandamus. *See* 437 U.S. at 665-66, 666 n.8; notes 100, 128-36 and accompanying text *supra*.

[149] This Note, like the RESTATEMENT (SECOND) OF JUDGMENTS, will use the term "res-judicata" to include the doctrines of merger (which extinguishes a victorious plaintiff's claim on the merits and gives rise to a new claim on the judgment), bar (which extinguishes a claim against a victorious defendant), and issue preclusion (which gives binding effect, as between two parties, to any issues actually litigated and determined, and essential to judgment in a previous litigation between them). Unlike the RESTATEMENT this Note will use the term "collateral estoppel" as a synonym for issue preclusion.

[150] 437 U.S. at 674-76. *See generally* Einhorn & Gray, *The Preclusive Effect of State Court*

tioned Judge Will's assertion that he would give collateral estoppel effect to "the state court's determination that the disputed transaction did not involve a 'security' within the meaning of the 1934 Act."[151] Two undesirable results follow from this position, according to the dissent: (1) respondent would be deprived of a federal forum;[152] and (2) "the exclusive jurisdiction given the federal courts over 1934 Act claims would be effectively thwarted, and the policy of uniform and effective federal administration and interpretation of the 1934 Act frustrated."[153]

The dissent correctly criticized Judge Will's position.[154] A dismissal or a stay coupled with full application of res judicata could deprive the federal plaintiff of a federal forum. Denial of

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Determinations in Federal Actions Under the Securities Exchange Act of 1934, 3 J. CORP. L. 235 (1978); Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 W. RES. L. REV. 157 (1966); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978); Note, *The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934*, 46 N.Y.U.L. REV. 936 (1971); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 U.VA. L. REV. 1360 (1967).

[151] 437 U.S. at 677. On remand, Judge Will revealed the circumstances which had contributed to his collateral estoppel decision: "We concluded, therefore, that Calvert's demand that we decide the same questions already determined by the state court was intended to delay the proceedings in the state court and to obtain two adjudications with two possible appeals of the same legal issue." Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 861-62 (N.D. Ill. 1978).

This collateral estoppel problem has plagued the courts for many years. Initially, the Supreme Court had held that state court determinations should preclude relitigation of the issues in federal court, even where issue preclusion effectively barred a claim over which the federal court had exclusive jurisdiction. Becher v. Contoure Labs., Inc., 279 U.S. 388 (1929). Since then, the trend has been to limit the preclusive effect of prior state court judgments. In Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), the Second Circuit said that issue preclusion should not bar the relitigation of an exclusive jurisdiction claim in federal court, at least "where the putative estoppel includes the whole nexus of facts that makes up the wrong." Even the treatment of state court findings of fact was brought into question in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964). *But cf.* Granader v. Public Bank, 417 F.2d 75 (6th Cir. 1969) (collateral estoppel appropriate); Vanderveer v. Erie Malleable Iron Co., 238 F.2d 510 (3d Cir. 1956) (same).

[152] 437 U.S. at 677.

[153] *Id.* at 675-76.

[154] *See* notes 167-72 and accompanying text *infra*. At least the dissent correctly criticized Judge Will's position as it appeared from the record before the Court. On remand, Judge Will noted that the state judge had been present with him at the hearing on the meaning of the term "security" and that Calvert's counsel had admitted that its 1934 Act damage claim was frivolous. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978). Judge Will stated that he might not have issued the stay had the exclusive jurisdiction claim been substantial. *Id.*

the forum would frustrate the congressional policies underlying the grant of jurisdiction to the federal courts in the given class of actions.[155] In the securities regulation field, these policies include ensuring judicial expertise, creating a uniform body of law, avoiding possible pro-business bias in state court, and using liberal discovery rules.[156] The type of jurisdiction Congress selects for a particular claim—concurrent or exclusive—indicates the weight it gives these policies.

The existence of concurrent jurisdiction over a claim does not necessarily mean that Congress would not prefer that a federal court adjudicate the claim. For example, litigation in a federal forum of claims arising under the Securities Act of 1933 would advance significant congressional policies.[157] Congress does not value these policies so highly, however, that it will never allow state court adjudication of such claims in the interest of convenience. On the other hand, Congress probably would prefer that a state court hear claims that would qualify for federal diversity jurisdiction. Litigation of diversity claims in federal court advances few federal interests.[158]

The res judicata problem is not insurmountable. A district judge should refuse, of course, to dismiss an exclusive jurisdiction claim in deference to a contemporaneous state proceeding, since the state court would lack jurisdiction to hear the claim. Nevertheless, a delay in litigating the exclusive jurisdiction claim—whether resulting from a formal stay or a heavy docket—could present the district judge with a collateral estoppel problem if a state court in the interim renders a judgment on issues that will arise in the subsequent federal litigation.[159] For example, Judge Will's delay

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[155] *See* Note, *supra* note 150, 91 HARV. L. REV. at 1281-1296. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, Comment (Tent. Draft No. 4, 1977).

[156] *See* 437 U.S. at 670 (dissenting opinion, Brennan, J.). *Cf.* Note, *supra* note 150, 91 HARV. L. REV. at 1282 (intermediate goals of exclusive jurisdiction to ensure vindication of federal law). Pro-business bias may arise in state court from a fear that strict enforcement of the securities laws would drive corporations out of the state, causing serious harm to the state's economy.

[157] *See* text accompanying note 156 *supra*.

[158] The House Committee on the Judiciary is now considering a proposal to withdraw diversity of citizenship as a basis for federal jurisdiction. H.R. 130, 96th Cong., 1st Sess. (1979). One commentator has proposed a "local option plan," giving each federal district the opportunity to retain, limit, or abolish diversity jurisdiction. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 339-55 (1977).

[159] RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977) provides: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

in adjudicating respondent's 1934 Act damage claim triggered this problem in *Calvert*.[160] By considering the res judicata implications of his initial decision to dismiss, stay, or proceed with a federal action,[161] a district judge can minimize the collateral estoppel problem. When a judge stays particular claims in deference to contemporaneous state proceedings, the res judicata effects that will ensue if the case returns to federal court after the state forum's judgment should be expected and palatable. Any concurrent jurisdiction claims that the federal court stays[162] and the state court actually adjudicates will be barred from relitigation.[163] The plaintiff may assert a concurrent jurisdiction claim that the state court did not adjudicate. But if any issues that the state court did litigate arise in the adjudication of that claim, the federal court should give full collateral estoppel effect to the state court determination of those issues—whether of law or of fact.[164] If these res judicata effects pose an intolerable danger to the federal policies underlying the relevant jurisdictional statute the judge should refuse to grant the stay.[165]

The fact that a federal court adjudicates the second action does not of itself affect the application of this rule. *See id.* at § 68.1, Comment on Clause (c); 28 U.S.C. § 1738 (1976).

Although the *Calvert* plurality and dissenting opinions quarrelled over whether Judge Will's delay in deciding Calvert's 1934 Act damages claim was equivalent to a stay (*see* notes 91 & 112 and accompanying text *supra*), the matter does not affect collateral estoppel. A district judge must confront the same collateral estoppel question under RESTATEMENT § 68 whether he stayed the exclusive jurisdiction claim in deference to a concurrent state court proceeding, whether he merely delayed his decision on that claim until after the state court entered its judgment, or whether the plaintiff filed the federal action after the state court entered its judgment. Moreover, the res judicata defense arises as soon as the trial judge in the first action enters a final decision on the issue. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 865 n.7 (N.D. Ill. 1978).

[160] *See* 437 U.S. at 668, 677.

[161] The judge would analyze the res judicata implications along with the factors discussed in the text accompanying notes 139-40 *supra*.

[162] Calvert's 1933 Act damage claims are one example. *See* note 87 *supra*.

[163] RESTATEMENT (SECOND) OF JUDGMENTS § 48 (Tent. Draft No. 1, 1973) provides: "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."

[164] RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). This preclusion would advance the policies underlying res judicata, which include ending litigation, conserving judicial resources, and preventing harassment of litigants. *See* Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 858 (1966). The second of these policies also underlies the fourth branch of abstention and the doctrine of res judicata makes the stay a useful tool for implementing this branch.

[165] Even though a state court has concurrent jurisdiction over a claim, litigation of all the issues essential to that claim in federal court might serve various federal interests. *See* text accompanying note 156-57 *supra*. Therefore, federal courts making the initial decision to stay may wish to allow the parties to reserve their right to return to federal court for litigation of the federal issues. In Government & Civic Employees Organizing Comm., CIO

The most difficult question of collateral estoppel application arises if the case returns to federal court for litigation of an exclusive jurisdiction claim after the state court has adjudicated issues that will arise in the federal litigation. Three types of findings could confront the federal court: issues of fact, issues of law, and mixed questions of fact and law.[166]

A federal court should give preclusive effect to state court findings that bear on the pending federal claim only to the extent that such action will not frustrate the purposes underlying the congressional grant of exclusive jurisdiction.[167] For example, in *Calvert*, as the dissent noted, the federal defendant apparently will return to federal court armed with a mixed finding of fact and law arising from the adjudication of one of Calvert's affirmative

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v. Windsor, 353 U.S. 364 (1957), the Supreme Court held that a federal court should retain jurisdiction over a constitutional question until state courts pass on issues of local law. *Id.* at 366. The Supreme Court clarified this procedure in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). In *England*, the Court acknowledged that the federal plaintiff could explicitly reserve his right to return to federal court for adjudication of the federal question in case the state court held against him on the issue of state law. *Id.* at 419. The federal question need not be litigated in the state court, but the federal plaintiff "must inform those courts what his federal claims are, so that the state statute may be construed 'in light of' those claims." *Id.* at 420. Extension of the *Windsor* reservation to the fourth branch would allow a federal district court to stay an action while ensuring that, if necessary, it could adjudicate all the issues essential to a given federal claim. The state court would decide the overlapping issues to enable it to reach a judgment in the case before it, but collateral estoppel would not bar the relitigation of reserved issues. This procedure would encourage courts to order stays, in the hope that the case would not return or that it would return with fewer claims and issues, while providing the federal plaintiff with full federal consideration of those issues more appropriately heard in federal court.

[166] *See* Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963). *Cf.* Becher v. Contoure Labs., Inc., 279 U.S. 388, 391 (1929) (distinction between establishing fact and giving specific effect to it by judgment).

[167] The RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(c) (Tent. Draft No. 4, 1977) provides for this refusal to give full preclusive effect to the state court findings: "A new determination of the issue is warranted . . . by factors relating to the allocation of jurisdiction between [the courts]." The Comment on clause (c) offers an example of an appropriate situation for a federal court to avoid according preclusive effect to findings of a state court:

> [A] determination in a state court action on a patent license agreement upholding the defense that the patent was invalid for want of invention would not be held binding in a suhsequent federal court action for patent infringement if the Congressional grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise. The question in each such case would be resolved in the light of the legislative purpose in vesting exclusive jurisdiction in a particular court.

Id., Comment (e). This rationale applies equally to the grant of exclusive jurisdiction over securities claims.

defenses—that the insurance pool did not qualify as a security within the 1934 Act.[168] Judge Will should examine the consequences of applying collateral estoppel in light of the policies underlying the grant of exclusive jurisdiction for 1934 Act claims: (1) providing judicial expertise; (2) creating a uniform body of law; (3) avoiding possible pro-business bias in state court; and (4) employing liberal discovery rules.[169] Because issue preclusion as to findings of law or mixed findings of fact and law might conflict with the first three congressional policies, a federal court should relitigate those issues.[170] Giving preclusive effect to findings of fact might infringe upon the fourth policy.[171] Such findings should be open to relitigation, unless state procedures provide liberal discovery or the federal judge conditions the stay upon the use of federal discovery rules.[172]

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[168] 437 U.S. at 677. The dissent warned that if collateral estoppel were accorded to this issue, the result would deprive the federal plaintiff of a federal forum for his exclusive jurisdiction claim. *Id.* On the other hand, if no issue preclusion applied, then the original purpose of the stay would be defeated.

[169] *See* note 156 and accompanying text *supra*.

[170] The federal defendant in *Calvert* might oppose this conclusion if the state court rules against Calvert's 1933 Act counterclaim—to be distinguished from its 1933 Act affirmative defense—on the ground that the insurance pool does not constitute a security. The defendant would contend that the same definition of security applies to both the 1933 and 1934 Acts. It would then argue that the plaintiff voluntarily chose to litigate the definition of security in state court by filing its 1933 Act counterclaim. Illinois has no compulsory counterclaim provision. *See* Civil Practice Act of 1933 § 38, ILL. REV. STAT. ch. 110, § 38 (Supp. 1978). The defendant would then conclude that the plaintiff had its choice of forum, and therefore should not be permitted to waste judicial resources and harass the defendant by relitigating the issue.

This argument is fatally flawed because Calvert really had no choice of forum. If Calvert had withheld its counterclaim and filed its 1933 Act damage claim only in federal court, it would have found itself preculded from relitigating the definition of security in the 1933 Act claim. The source of the preclusion lies in the 1933 Act affirmative defense in state court. The state court would construe security in the context of the affirmative defense, and RESTATEMENT § 68 would preclude relitigation of the issue in a concurrent jurisdiction claim in federal court. *See* note 164 and accompanying text *supra*. If the federal courts extended the *Windsor* line of cases to the fourth branch of abstention, however, the federal plaintiff could relitigate the issue in a concurrent claim. *See* note 165 *supra*.

The federal defendant may have a more convincing argument against relitigatiou of the definition of security. Calvert had the power under 28 U.S.C. § 1441 (1976) to remove the entire state action to federal court. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 864 (N.D. Ill. 1978). The defendant could argue that Calvert's failure to invoke the removal procedure estops it from relitigating the issues decided by the state court.

[171] *Cf.* Will v. Calvert Fire Ins. Co., 437 U.S. at 675 (dissenting opinion, Brennan, J.) (liberal federal discovery procedures possibly crucial to resolve claims over which federal courts have exclusive jurisdiction).

[172] *See, e.g.*, Aetna State Bank v. Altheimer, 430 F.2d 750, 758 (7th Cir. 1970) (following Boggess v. Columbian Rope Co., 167 F. Supp. 854, 856 (S.D.N.Y. 1958)), *overruled in* Cal-

CONCLUSION

The impact of *Will v. Calvert Fire Insurance Co.* on the federal abstention doctrine and appellate review of abstention orders is uncertain. The lack of a clear majority obscures the position the Supreme Court will take on these issues in the future. However, by endorsing abstention for reasons of convenience, at least in the context of a stay, the plurality probably furthered acclamation of the fourth branch of abstention. The forecast for mandamus is less clear. Prior to *Calvert* courts had usually granted mandamus in cases that presented issues belonging to one of three categories: jurisdictional, supervisory, or advisory. One reading of the plurality opinion suggests that the supervisory and advisory roles of the appellate courts have been severely limited; another merely restricts the availability of mandamus to correct jurisdictional abuses. In either case, *Calvert* continued a trend toward reduced availability of mandamus.

In practical terms, *Calvert* enlarged the discretion accorded to federal district courts in the disposition of matters pending before them. The plurality's position on abstention increased the trial judge's discretion on a motion to stay; the restriction on the availability of mandamus reduced interference from an appellate court on a nonappealable order. This Note has attempted to define limits on the increased discretion to abstain, and to provide a framework within which to assess the availability of mandamus.

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vert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978).

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