Washington and Lee Law Review

Volume 39 | Issue 2 Article 19

Spring 3-1-1982

# Ix. Federal Jurisdiction

find a violation of Title VII relating to an improper classification of identical jobs with an illegal salary differential.[138]

Such blatant sex discrimination as existed in the advertising department of the *Index-Journal* will seldom occur as employers become more subtle in the forms of discrimination inflicted on women and minorities. The widespread practices that compensate women less for their work than equally valuable men will continue until the courts take a stronger stand against discriminatory pay scales that pay less for women's work than men's. Judicial moderation and political conservatism no doubt motivated the Fourth Circuit in shifting the analysis into the less common realm of discrimination by classification.[139] The pernicious effects of sex discrimination and the resulting economic injury suffered by women in the work place, however, rebut moderation and demand that the courts speak strongly against unfair employment practices which continue to prevent working women from attaining the salaries which they deserve. The Fourth Circuit vindicated Martha Armstrong's rights and redressed her injuries, but few other women will profit from her fight against the *Index-Journal.*

H. DAVID NATKIN

## IX. FEDERAL JURISDICTION

### *A. District Court Discretion to Defer Arbitration Proceedings Pending Resolution of Concurrent State Suits*

Federal courts are courts of limited jurisdiction.[1] Although federal courts have plenary powers to decide controversies legitimately before them,[2] federal courts lack authority to define the extent of federal jurisdiction.[3] In general, federal district courts exercise jurisdiction con-

[138] *See id.*

[139] *See* Gitt & Gelb, *supra* note 2, at 729-30 (discrimination by classification seldom litigated).

[1] Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981); *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 7 (2d ed. 1970) [hereinafter cited as WRIGHT].

[2] *See* Osborn v. United States Bank, 22 U.S. (9 Wheat.) 251, 255 (1824).

[3] *See* U.S. CONST. art. III, § 2 (setting forth jurisdiction of federal courts). *Marbury v. Madison* established that Congress may not expand federal appellate jurisdiction beyond the constitutionally mandated scope. *See* 5 U.S. (1 Cranch) 137, 173-80 (1803). The Constitution gives Congress the power to confer jurisdiction on lower federal courts. U.S. CONST. art. III, § 1; *see* Cary v. Curtis, 15 U.S. (3 How.) 409, 416 (1844). The original jurisdiction of federal district courts extends to cases arising under the Constitution, laws, or

currently with state courts,[4] although Congress may establish exclusive federal jurisdiction over a particular type of controversy.[5] Concurrent jurisdiction may encourage plaintiffs to engage in forum shopping[6] or invite plaintiffs and defendants to race to the court house.[7] The availability of distinct, but theoretically equal, forums for litigation poses questions that courts have had difficulty answering.[8] Concurrent jurisdiction often requires a determination of which court should decide the controversy when cases involving similar parties and issues are before both state and federal courts and each court has jurisdiction.[9] Federal district courts

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treaties of the United States. 28 U.S.C. § 1331 (1976) [*as amended*, Pub. L. 96-486 § 2(a), 94 Stat. 2369 (1980)]. Original jurisdiction also extends to cases involving parties of diverse citizenship if the amount in controversy exceeds $10,000. 28 U.S.C. § 1332 (1976).

[4] *See* Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976) (state courts competent to judge federal constitutional claims); Claflin v. Houseman, 93 U.S. 130, 136 (1876) (state and federal courts possess concurrent jurisdiction over cases arising under laws, treaties, or Constitution of United States unless Congress intended, expressly or by implication, to create exclusive jurisdiction). *See generally* Fisher, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980) [hereinafter cited as Fisher].

[5] *See, e.g.*, The Moses Taylor, 71 U.S. (4 Wall) 411, 429-31 (1866) (statute vesting federal courts with exclusive jurisdiction over admiralty and maritime cases is constitutional exercise of congressional power); 28 U.S.C. § 1338 (1976) (federal courts have exclusive jurisdiction over patent, plant variety protection, and copyright cases).

[6] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-75 (1938) (forum shopping may preclude equal protection of law when plaintiff selects federal or state courts on basis of more favorable law).

[7] *See* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 865 (N.D. Ill. 1978), *aff'd* 600 F.2d 1228 (7th Cir. 1979) (state court defendant seeks duplicative federal forum thereby instituting "undignified" race to judgment between state and federal courts).

[8] Concurrent jurisdiction raises the issue of which court should decide the case. *See* note 9 *infra*. A second issue is whether the law of the state forum or the federal forum should apply. The supremacy clause of the Constitution requires a state court to apply federal law when federal substantive law governs the controversy before the court. U.S. CONST. art. VI, cl. 2; *see* Claflin v. Houseman, 93 U.S. 130, 136 (1876). A federal court exercising diversity jurisdiction must apply the state law of the forum when the controversy before the court does not arise under the Constitution or a federal statute. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Federal courts apply federal rules of procedure even in diversity actions when state law governs the substantive issues in the case. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965). The dichotomy between application of substantive and procedural law produces the quandry of how to distinguish substantive from procedural law, especially when the decision to apply federal or state law is outcome determinative. *See id.* at 468-74. Furthermore, concurrent jurisdiction complicates the application of res judicata and collateral estoppel principles as courts attempt to assess the binding effect of a final judgment in one court on current or future proceedings in another. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 45 (Tent. Draft No. 1, 1973).

[9] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Considerations of judicial economy, comity, and fairness to parties favor a general policy of avoiding duplicative litigation. *See* Mottolese v. Kaufman, 176 F.2d 301, 302-03 (2d Cir. 1949). Nevertheless, a state court may not stay parallel proceedings in a federal court. *See* Donovan v. City of Dallas, 377 U.S. 408, 413 (1964). The Anti-Injunction Act of 1976 limits the circumstances in which a federal court may stay state court proceedings. 28 U.S.C. § 2283 (1976); *see* Roth v. Bank of Commonwealth, 583 F.2d 527, 533 (6th Cir. 1978), *cert.*

generally may not decline to exercise jurisdiction merely because a similar suit is pending in state court.[10] The Supreme Court, however, has acknowledged certain limited circumstances in which a federal district court may stay its proceedings in deference to a state court.[11] In *In re: Mercury Construction Corp.*,[12] the Fourth Circuit recently reviewed a federal district court's discretion to issue a stay pending resolution of a state court suit when the federal plaintiff sought an order compelling arbitration under the United States Arbitration Act (Act).[13]

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*dismissed*, 442 U.S. 925 (1979). A state court may stay or dismiss a suit properly before it in deference to a prior suit in another state or federal court. *See* Power Train, Inc. v. Stuver, 550 P.2d 1293, 1295 (Utah 1976) (right to control docket was basis of state court discretion to grant stay in deference to pending suit in another state court).

The question of whether the state or federal court should decide a case legitimately before both courts is more complex when one plaintiff asserts a federal right under a statute, and Congress has not expressly indicated an intent to assert exclusive federal jurisdiction over the right created. *See* text accompanying notes 3 & 4 *supra*; Fisher, *supra* note 4, at 203-07 (advocating presumption of concurrent equal jurisdiction in state and federal courts hearing federal claims). *But see* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 325 (1976) (challenging presumption that courts should assume Congress intended concurrent jurisdiction and advocating case by case assessment of need for exclusive federal jurisdiction when Congress is silent on jurisdiction).

[10] *See Ex Parte Young*, 209 U.S. 123, 142-43 (1908) (federal courts may no more decline jurisdiction properly granted than usurp jurisdiction not granted). Despite the almost uncritical acceptance of the premise of mandatory federal jurisdiction first enunciated in Cohens v. Virginia, 19 U.S. (6 Wheat.) 82, 100 (1821), in practice, courts often recognized exceptions to the doctrine. *See* WRIGHT, *supra* note 1, § 52.

The rationale for mandatory jurisdiction is the supposed absolute right to a federal forum of a plaintiff whose action meets jurisdictional prerequisites. Checker Cab Mfg. Co. v. Checker Taxi Co., 26 F.2d 752, 752 (N.D. Ill. 1928). The Supreme Court has recognized certain contexts that justify a federal court's refusal to exercise properly-invoked jurisdiction. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 423-25 (1979) (federal court should not hear suit challenging state action when state forum is available in which federal plaintiff can raise federal claims as defense); Younger v. Harris, 401 U.S. 37, 46 (1971) (federal court may not exercise jurisdiction to intervene in state criminal case if defendant can raise federal claim as defense in state court); Gulf Oil Corp. v. Gilbert Storage & Transfer Co., 330 U.S. 501, 508-09 (1947) (doctrine of forum non conveniens justified federal court dismissal of suit if different forum is more convenient for litigants); Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) (federal court should not interfere with ongoing state regulatory scheme); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498, 501 (1941) (federal court should remand case to state court for decision on pertinent state law issue when the state court resolution of unclear state law might allow federal court to avoid deciding constitutional issue).

[11] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976) (consideration of obligation to exercise federal jurisdiction in conjunction with factors mitigating against exercise may justify federal court deference to state court even when federal substantive law governs); *see* note 55 *infra*. The Supreme Court previously had recognized that a federal court stay of proceedings in deference to a concurrent state court suit could be appropriate when state law governed the substantive issues. Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

[12] 656 F.2d 933 (4th Cir. 1981), *rehearing denied*, 664 F.2d 936 (4th Cir. 1981).

[13] *Id.* at 935; *see* The United States Arbitration Act (Act), 9 U.S.C. § 4 (1976); note 26 *infra*.

In *Mercury*, the transaction giving rise to the claim for arbitration was a multi-million dollar contract for hospital additions between Mercury Construction Corporation (Mercury), a Delaware corporation, and the Moses H. Cone Memorial Hospital (the Hospital), chartered in accordance with North Carolina law.[14] The contract contained a broad arbitration clause binding both parties to arbitrate all disagreements arising out of the contract or breach thereof, but requiring that each party submit any claim to the architect (the Architect) for resolution before invoking the arbitration process.[15] Construction began in July 1975 with a target completion date of forty months later.[16] In October 1977 at the Architect's request, Mercury agreed to withhold a claim for impending delay and impact costs until completion of the project.[17] In January 1980 Mercury filed several claims with the Architect, and the two negotiated the claims for several months, agreeing upon a lower figure than Mercury had submitted initially.[18] The Architect informed the Hospital of the compromise on the delay and impact cost claims, and the Hospital's attorneys began negotiating the claims with Mercury.[19] The three parties met August 12, 1980, to discuss the claims, at which time Mercury agreed to provide the Hospital with copies of Mercury's files prior to a meeting of the three parties scheduled for October.[20]

On October 7, 1980, after several telephone conversations, the Hospital warned Mercury of the Hospital's intent to file suit in North Carolina state court seeking a declaratory judgment that Mercury had no arbitrable claim.[21] On October 8, 1980, the Hospital filed a claim against Mercury and the Architect, a North Carolina corporation, the North Carolina General Court of Justice.[22] The Hospital's complaint alleged that Mercury had no basis for asserting a right to arbitration, that Mercury had not demanded arbitration, that the statute of limitations barred Mercury's claim, and that Mercury had waived the right to arbitration, if a right ever existed, by failing to assert a demand for ar-

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[14] 656 F.2d at 935 nn.1 & 3.

[15] *Id.* at 935. The Hospital designated the Architect to act as the Hospital's representative and to review initial claims arising under the contract. *Id.* The parties had to raise all claims within "a reasonable time" after the disputed matter arose, and in any event, before the applicable statute of limitations barred an action. *Id.*

[16] *Id.* Change orders and other problems led the parties to agree to a revised completion date of October 14, 1979. *Id.*

[17] *Id.* at 936. Final inspection occurred June 12, 1979, although the project was substantially complete by February 1979. *Id.*

[18] *Id.* The Hospital appeared unaware of the negotiations between Mercury and the Hospital. *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* In response to the Hospital's suit, Mercury ordered its attorney to file an arbitration demand, which the attorney did on October 9. *Id.*

[22] *Id.* at 935 n.4, 936.

bitration within a reasonable time.[23] On October 15, 1980, the North Carolina court granted the Hospital's *ex parte* request for a temporary injunction. The injunction barred Mercury from seeking arbitration pending the state court trial to decide whether the contract contained a valid and enforceable arbitration agreement.[24] Mercury obtained an order dissolving the injunction on October 27, 1980.[25]

Shortly after the Hospital filed the state claim, Mercury filed suit in federal court, alleging diversity jurisdiction and seeking an order to compel arbitration of the disputes with the Hospital pursuant to the United States Arbitration Act.[26] In addition, Mercury petitioned for

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[23] *Id.* at 936-37. In addition to the claims against Mercury, the Hospital alleged that the Architect had delinquently performed its duties generally, especially in not requiring resolution of claims and disputes as they arose, and sought indemnity from the Architect if the court determined Mercury had a valid claim. *Id.* at 937. The Fourth Circuit's opinion never addressed the validity of the Hospital's claims against the Architect since the court reasoned the Hospital added the Architect as defendant in an attempt to defeat diversity jurisdiction. *Id.* at 944.

[24] *Id.* at 937. Article 45A of the General Statutes of North Carolina, adopted in 1973, make contractual arbitration agreements valid, irrevocable, and enforceable in North Carolina courts. N.C. GEN. STAT. § 1-567.2 (Supp. IA 1981). A court may stay arbitration proceedings commenced or threatened if one party sufficiently challenges the existence of an arbitration agreement pending trial on the issue. *Id.* § 1-567.3(b). After the trial on the question of the existence of the arbitration agreement, the court must issue an order either compelling or staying arbitration. *Id.*

[25] 656 F.2d at 937.

[26] *Id.* The United States Arbitration Act (the Act) creates a federal right to enforcement of an arbitration agreement in a written contract. 9 U.S.C. § 4 (1976). The Act applies only to written provisions in maritime transactions and contracts involving commerce. *Id.* § 2. Commerce includes commerce among the several states or with foreign nations. *Id.* § 1. The statute entitles a party to a contract, aggrieved by another party's refusal to submit to arbitration, to a federal court order compelling arbitration if the federal court determines that an arbitration agreement exists and one party has failed to honor the agreement. *Id.* § 4. Upon motion of one of the parties a federal court hearing a suit involving an arbitrable issue shall stay further court action pending arbitration, after determining that the dispute is arbitrable. *Id.* § 3. If the court finds that the existence of the arbitration agreement or a party's refusal to honor the agreement is in dispute, the court must proceed immediately to trial to resolve the question. *Id.* § 4.

The Act creates a federal right but does not create federal question jurisdiction. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 408 (2d Cir.), *cert. dismissed*, 364 U.S. 801 (1959); Warren Bros. Co. v. Community Bldg. Corp. of Atlanta, Inc., 386 F. Supp. 656, 658-59 (M.D. N.C. 1974); *see* 9 U.S.C. § 4 (1976). A suit to enforce a congressionally conferred right is not a sufficient basis on which to establish federal question jurisdiction. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 114 (1936) (federal question jurisdiction arises only if suit involves validity, construction, or effect of federal statute or constitutional provision and interpretation given will determine suit's result); Commercial Metals Co. v. Balfour, Guthrie & Co., 577 F.2d 264, 267 (5th Cir. 1978) (same). Plaintiffs, therefore, must establish an independent basis of federal jurisdiction, usually diversity, to obtain a hearing in federal court. *See* 577 F.2d at 268.

Congress promulgated the Act under its constitutional authority to regulate interstate commerce and maritime transactions and to supervise the federal courts. U.S. CONST. art. I,

removal of the North Carolina action to federal court, which the district court granted.[27] Following removal, the Hospital petitioned the district court for remand of the action to the North Carolina court and for a stay of the federal court action pending resolution of the state court case.[28] The district court remanded the case to state court and stayed the federal suit pending resolution of the state court action.[29] The district court ordered the stay because both the state and district court suits involved the same issue of the arbitrability of the dispute between Mercury and the Hospital.[30] Mercury appealed the district court's decision to stay the federal proceedings pending resolution of the state suit.[31]

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§ 8; *see* H. R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). The Supreme Court has held that since the primary source of congressional authority is the power to regulate interstate commerce, the Arbitration Act created an area of federal substantive law applicable in federal court diversity actions without regard to state law. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405, 405 n.13 (1967); *cf.* Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 205 (1956) (apply substantive state law of arbitration in diversity action when transaction not in interstate commerce).

[27] 656 F.2d at 937. Section 1446 of the Judiciary and Judicial Procedure Act sets out the procedures for removing a civil action from state court to federal court. 28 U.S.C. § 1446 (1976 & Supp. II 1978).

[28] 656 F.2d at 937. A district court must remand a case to state court if the district court decides that the district court granted removal improvidently and without proper jurisdiction. 28 U.S.C. § 1447(c) (1976).

[29] 656 F.2d at 937. An order remanding a case from federal to state court is not appealable, except in certain civil rights cases. 28 U.S.C. § 1447(d) (1976).

[30] 656 F.2d at 937.

[31] *Id.* The Fourth Circuit noted that Mercury sought review of the stay by mandamus as well as by direct appeal under §§ 1291 and 1292(a) of Title 28 of the United States Code. 656 F.2d at 937; *see* 28 U.S.C. § 1291 (1976) (appeal of right from final judgment); *id.* § 1292(a) (interlocutory appeal). The Fourth Circuit reviewed the case as an appeal from a final judgment since the court cited Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967), in support of the decision that Mercury could appeal the district court's stay. *See* 656 F.2d at 937-38, 938 n.6. The *Amdur* court reasoned that a stay of district court proceedings pending resolution of a similar state court suit operated as a virtual dismissal of the proceedings, which is an appealable order. *See* 372 F.2d at 106; *accord* Druker v. Sullivan, 458 F.2d 1272, 1274 n.3 (1st Cir. 1972) (district court judgment staying proceedings pending resolution of state court suit appealable as final order under 28 U.S.C. § 1291 (1976)).

The Fourth Circuit in *Mercury*, however, confused the appealability of a district court stay of proceedings pending arbitration with a stay pending resolution of a state suit. 656 F.2d at 938 n.6 (citing cases holding court order staying proceedings pending arbitration appealable as authority for proposition that stay pending resolution of state court suit is appealable); *see, e.g.*, Buffler v. Electronic Computer Programming Instit., Inc., 466 F.2d 694, 696 (6th Cir. 1972) (granting preliminary injunction against arbitration proceedings appealable under 28 U.S.C. § 1292(a)(1) (1976) as interlocutory order); Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.1 (1st Cir. 1968) (order denying stay pending arbitration appealable as prior determination of equitable defense of arbitration in suit at law). *Compare* 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[4.-1] (Supp. 1980-81) (appealability of stay pending arbitration) *with* ¶ 110.20[4.-2] (Supp. 1980-81) (stay pending other litigation generally not appealable order). The *Mercury* court correctly interpreted Fourth Circuit law in allowing Mercury to appeal the district court order.

[32] 656 F.2d at 938. The *Mercury* court considered whether a defendant may frustrate a plaintiff's right to arbitration by a "reactive" filing of a state court action seeking a declaratory judgment denying arbitrability of identical claims. *Id.* In formulating the issues

The Fourth Circuit characterized the primary issue on appeal as the plaintiff's right to a district court order compelling arbitration of Mercury's disputes with the Hospital.[32] The court first examined the plaintiff's right to an order compelling arbitration and then considered whether the district court properly refused to exercise its jurisdiction in deference to a state court proceeding on the same issue.[33] The Fourth Circuit noted that Mercury had established a prima facie case justifying a court order compelling arbitration under the Act.[34] Mercury proved the existence of a contractual agreement to arbitrate disputes arising under the contract and the Hospital's refusal to honor the agreement.[35] The Fourth Circuit further found, as the Act requires, that Mercury was not in default in proceeding with the remedy of arbitration.[36] Mercury did

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in *Mercury*, the Fourth Circuit emphasized that although the defendant Hospital filed a state action first, that claim arose suddenly during the course of negotiations between Mercury and the Hospital. *Id.* at 944. The court implied that the filing was an attempt to destroy federal jurisdiction and to obtain a favorable state court ruling on the merits of the question of arbitrability. *Id.* at 944-45.

[33] *Id.* at 938, 943.

[34] *Id.* at 941-42. The jurisdictional prerequisite of the Arbitration Act is a contract extending to transactions involving commerce, 9 U.S.C. § 2 (1976), including commerce among the several states. *Id.* § 1; *see* Prima Paint Corp. v. Floor & Conklin Mfg. Co., 388 U.S. 395, 401 (1967). The contract between Mercury and the Hospital involved trade between citizens of different states, establishing the contract as within commerce according to the usual judicial construction of the term. 656 F.2d at 935, nn.1 & 3; *see* C. P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446, 451 (M.D. N.C. 1974); Pathman Constr. Co. v. Knox County Hosp. Ass'n, 326 N.E.2d 844, 852 (Ct. App. Ind. 1975). *Contra* Burke County Pub. Sch. Bd. v. Shaver Partnership, 46 N.C. App. 573, 575-76, 265 S.E.2d 481, 482 (1980), *rev'd*, 303 N.C. 408, 279 S.E.2d 816 (1981) (prior to reversal, North Carolina courts had ruled federal Act applied only to transactions involving or relating to actual interstate shipment of goods); Bryant-Durham Elec. Co. v. Durham County Hosp. Corp., 42 N.C. App. 351, 356, 256 S.E.2d 529, 532 (1979) (construction of county hospital not transaction in interstate commerce because contract did not specify interstate shipment of goods). The North Carolina cases were contrary to the federal policy favoring arbitration and a broad interpretation of commerce. *See* note 46 *infra* (North Carolina Supreme Court has adopted prevalent judicial interpretation of interstate commerce).

A plaintiff seeking an order to compel arbitration under the Federal Act must establish two facts in addition to a contract involving interstate commerce. *See* 9 U.S.C. §§ 2, 4 (1976). The plaintiff must show the existence of a written agreement to arbitrate the claims and the refusal of one party to arbitrate a dispute within the arbitration clause. Acevedo Maldonado v. PPG Indus., 514 F.2d 614, 616 (1st Cir. 1975); Warren Bros. Co. v. Community Bldg. Corp. of Atlanta, 386 F. Supp. 656, 664 (M.D. N.C. 1974); *see* note 26 *supra* (discussion of Act).

[35] 656 F.2d at 942.

[36] *Id.* at 939-41. A party in default in seeking the remedy of arbitration is not entitled to a court order compelling arbitration or to a stay of court proceedings pending arbitration of arbitrable issues in the suit. 9 U.S.C. §§ 4, 3 (1976). The purpose of the Act and the vigorous national policy favoring arbitration severely constrict the scope of activities that constitute default and thus a waiver of the right to arbitration. Carolina Throwing Co. v. S. & E. Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam); Hilti, Inc. v. Oldach, 392 F.2d 368, 372 n.9 (1st Cir. 1968).

The Fourth Circuit adopted the Eighth Circuit's criteria for determining the circumstances under which a party waives the right to arbitration. 656 F.2d at 939-40; *see* N & D Fashions, Inc. v. DHI Indus., Inc., 548 F.2d 722 (8th Cir. 1976). A default occurs when a party

not waive the right to arbitration by filing a responsive pleading and seeking removal of a state action to federal court.[37] Mercury's delay in pressing a claim for arbitration did not prejudice the Hospital.[38] The Fourth Circuit rejected the Hospital's contention that joinder of arbitrable and non-arbitrable claims justified delaying or defeating arbitration of the arbitrable issues.[39] Furthermore, the court concluded that pendency of a similar suit in state court still permits a party to assert a right to arbitration in a federal forum.[40] The Fourth Circuit held that Mercury had a clear right to the speedy and inexpensive arbitration procedure that the Act guarantees as a principle of substantive federal law.[41]

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participates in a law suit or takes other action inconsistent with the request for arbitration. 548 F.2d at 728. Waiver is an equitable principle preventing a party from asserting the right to arbitration when that party's delay in pleading its claim diminishes the opposing party's ability to collect evidence. *Id.* at 728-29. Equitable wavier does not bar arbitration, however, because the arbitrator and not the court decides the issue. *Id.*

[37] *See* 656 F.2d at 940. Neither filing a responsive pleading nor seeking removal to federal court constitutes default. *Compare* Carolina Throwing Co. v. S. & E. Novelty Corp., 442 F.2d 329, 330 (4th Cir. 1971) (per curiam) (mechanics of filing answer and counterclaim and seeking removal to federal court not equivalent to waiver in absence of prejudice to objecting party) *and* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412-13 (2d Cir. 1959) (answering complaint and seeking settlement before requesting stay pending arbitration not waiver when defendant filed notice of intent to arbitrate with complaint) *with* E. C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1040-41 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978) (party waived right to arbitration by litigating merits of case for two and one half years before requesting arbitration).

[38] *See* 656 F.2d at 940; Hilti, Inc. v. Oldach, 392 F.2d 368, 370-71 (1st Cir. 1968) (delay in requesting stay pending arbitration that arises out of legitimate pre-arbitration discovery not default when other party has notice of arbitration claim).

[39] *See* 656 F.2d at 940-42. The presence of non-arbitrable claims does not preclude a court from ordering pretrial arbitration of appropriate issues that allows the trial to go forward to resolve the non-arbitrable disputes. Janmort Leasing Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1291-92 (E.D. N.Y. 1979); *accord* Acevedo Maldonado v. PPG Indus., Inc., 514 F.2d 614, 617 (1st Cir. 1975) (court stayed trial of claims raised in third party complaint pending arbitration, but allowed other issues to go to trial).

[40] 656 F.2d at 943-45; *see* Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1273-74 (7th Cir. 1976) (within federal court discretion to stay state court proceedings if necessary to protect or effectuate federal court judgment); *accord*, Burger Chef Sys., Inc. v. Baldwin, Inc., 365 F. Supp. 1229, 1233 (S.D.N.Y. 1973); Network Cinema Corp. v. Glassburn, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (stay of state court proceedings justified when state court suit involved dispute subject to Act and state court refused to apply federal law). *Compare* Sumitomo Corp. v. Parakopi Compania Maritima, 477 F. Supp. 737, 741-42 (S.D.N.Y. 1979) (considerations of comity do not require deference to foreign court in suit to enforce federal right to arbitration especially when party seeks to avoid arbitration by invoking jurisdiction of foreign court) *with* E. C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694, 701 (S.D.N.Y. 1978) (motion to stay federal court proceedings granted when federal forum inconvenient to parties since federal court may not grant transfer of suit to amenable forum).

[41] 656 F.2d at 945-46; *see* note 26 *supra*. The Fourth Circuit stressed that Mercury had established an independent basis of federal jurisdiction through diversity of parties. 656 F.2d at 941. In addition, Mercury had proven a contract involving interstate commerce, ac-

After determining that Mercury had a right to invoke arbitration of the dispute with the Hospital, the Fourth Circuit considered Mercury's right to a federal forum in which to assert the arbitration claim.[42] The *Mercury* court examined the limitations on the district court's discretion to defer to pending state proceedings when the federal plaintiff seeks enforcement of a federal right to arbitration.[43] The Fourth Circuit expressed concern that the Hospital had tried to circumvent the contractual arbitration agreement by filing a pre-emptive state court suit and by joining the Architect as defendant to prevent removal to federal court.[44] The Hospital contended that the North Carolina court was competent to determine whether federal or North Carolina law of arbitration applied to the controversy.[45] The Fourth Circuit disagreed, fearing that the state court would determine that the controversy did not involve interstate commerce, and would, thus, apply the North Carolina arbitration statute rather than the federal Act.[46] The Fourth Circuit

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cording to federal and most state court interpretations of the term. *Id.* at 942; *see* note 34 *supra*. Furthermore, Mercury had proven a written contract with a broad and comprehensive arbitration agreement and the Hospital's refusal to arbitrate a dispute within the scope of the arbitration agreement. *Id.* Establishing prima facie elements of a right to an order compelling arbitration under the Act and a basis for federal court jurisdiction entitles the plaintiff to a district court order compelling arbitration. 9 U.S.C. § 4 (1976); *see* note 26 *supra*.

The Fourth Circuit characterized as "novel" the Hospital's contention that Mercury had wavied its right to arbitration since the alleged waiver arose out of the Architect's negligence in deciding claims promptly when the Architect acted as the Hospital's agent. *Id.* at 943. The Fourth Circuit held that since the question of whether a party has waived the right to arbitration is one for the arbitrator to decide, Mercury was entitled to a court order compelling arbitration. *Id.* at 942; *see* note 36 *supra* (distinguishing between default as question for court to decide and waiver as question for arbitrator).

[42] *Id.* at 942.

[43] *Id.* The *Mercury* district court had adopted the Hospital's contention that the state suit defeated Mercury's right to a federal forum in which to raise the claim for arbitration under the Act. *Id.*

[44] *Id.* The Fourth Circuit expressed no opinion on the district court's removal and subsequent remand of the state court action. *Id.*

[45] *Id.* Congress intended for the Act to create a substantive body of federal law applicable to arbitration agreements in contracts affecting interstate commerce whether suit is brought in state or federal court. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404-05 (2d Cir. 1959); American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811, 816 (6th Cir. 1959); 16 WILLISTON ON CONTRACTS § 1921 (3d ed. 1976); ABA COMM. ON COMMERCE, TRADE & COMMERCIAL LAW, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 154 (1925) (Congress possesses ample power to declare that arbitration agreements in contracts related to interstate commerce or admiralty transactions are within interstate commerce).

State courts must apply substantive federal law when parties properly invoke the Act to compel arbitration, even when application of state law would result in a judgment denying the enforceability of the arbitration agreement. *See* Pathman Constr. Co. v. Knox County Hosp. Ass'n., 326 N.E.2d 844, 851 (Ct. App. Ind. 1975).

[46] 656 F.2d at 942; *see* note 34 *supra*. The Hospital hoped to take advantage of North Carolina decisions that suggested that the subject of the contract between Mercury and the

focused on Mercury's right as a federal plaintiff to a federal forum in which to raise the federal claim when the alternate state forum appears unlikely to enforce that right.[47]

The *Mercury* court criticized the district court's analysis of the circumstances under which a federal court may decline to exercise jurisdiction.[48] In examining the standards for assessing the propriety of a district court's deferral to state court,[49] the *Mercury* court discussed several recent decisions circumscribing a district court's discretion to stay proceedings.[50] The Fourth Circuit relied on the Seventh Circuit's interpretation of *Will v. Calvert Fire Insurance Co.*,[51] which applied the doctrine set out in *Colorado River Water Conservation District v. United States*.[52] In *Colorado River*, the Supreme Court set forth the general

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Hospital, additions to a county hospital, did not constitute a shipment of goods in interstate commerce. *Id.*; *see* Burke County Pub. School Bd. v. Shaver Partnership, 46 N.C. App. 573, 578, 265 S.E.2d 481, 482 (1980), *rev'd* 303 N.C. 408, 279 S.E.2d 816 (1981); Bryant-Durham Elec. Co. v. Durham County Hosp. Corp., 42 N.C. App. 351, 356, 256 S.E.2d 529, 532 (1979). The North Carolina Supreme Court in *Burke County* adopted the prevalent judicial construction of the term interstate commerce, and held that transactions between citizens of different states constitute interstate commerce. Burke County Pub. School Bd. v. Shaver Partnership, 303 N.C. 408, 415-20, 279 S.E.2d 816, 820-23 (1981). A narrow interpretation of interstate commerce, however, frustrates Congress' intent to make the Act as widely applicable as the commerce power allows to effectuate the legislative purpose of avoiding the delay and expense of litigation. *See* J. S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 214-15 (5th Cir. 1973); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404-06 (2d Cir. 1959). *See also* C. P. Robinson Constr. Co. v. Nat'l Corp. for Hous. Partnership, 375 F. Supp. 446, 450-51 (M.D. N.C. 1974) (case law defines interstate commerce under Act broadly, including trade between citizens of different states); Pathman Constr. Co. v. Knox County Hosp. Ass'n, 326 N.E.2d 844, 852 (Ct. App. Ind. 1975) (same). If the state court had determined that the contract did not involve interstate commerce, North Carolina law would have controlled. *See* note 34 *supra*.

Although the North Carolina statute governing arbitration agreements is similar to the federal statute, *compare* note 24 *supra with* note 26 *supra*, the Fourth Circuit expressed concern that the lack of case law interpreting the North Carolina statute would prejudice Mercury's right to arbitration in advance of litigation. 656 F.2d at 945. The Fourth Circuit particularly questioned the North Carolina court's willingness to cede the question of waiver under the North Carolina statute to the arbitrator as the federal Act does, thus frustrating the congressional intent to provide a speedy arbitration process bypassing litigation. *Id.*

The Fourth Circuit subsequently clarified the decision in *Mercury*, explaining that although the court considered whether the North Carolina court would characterize the contract as the interstate or intrastate commerce, the court focused on a federal plaintiff's right to bring a federal claim in a federal forum. 664 F.2d 936, 937 (denying rehearing of 656 F.2d 933 (4th Cir. 1981)).

[47] 656 F.2d at 944-46. The *Mercury* court stressed that doubts about the willingness of the North Carolina court to enforce Mercury's federal substantive right to arbitration influenced the decision. *Id.* at 945-46.

[48] *Id.* at 946.

[49] *Id.* at 943.

[50] *Id.* at 943-44.

[51] 437 U.S. 655 (1978).

[52] 656 F.2d at 943-44; Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

obligation of a federal court to exercise jurisdiction over cases and controversies properly before it.[53] According to the *Colorado River* Court, the obligation to exercise federal jurisdiction does not dissipate in the face of a concurrent state court proceeding involving the same parties and issues except under exceptional circumstances.[54] Factors for a court to consider in evaluating the existence of exceptional circumstances in the controversy before it include whether the state court has established jurisdiction over the *res*, whether the federal forum is inconvenient to one or more parties, whether the litigation in state court avoids piecemeal adjudication of the issues, and whether the state court obtained jurisdiction over the action earlier than the federal court did.[55]

The Fourth Circuit analyzed the extent of the district court's discretion to deny Mercury access to a federal forum according to the *Will* Court's interpretation of the exceptional circumstances test.[56] In the *Will* case, the Supreme Court reiterated that a district court may decline to exercise jurisdiction only in limited and extraordinary situations.[57] The *Will* Court recognized that a district court has some discretion, based on considerations of judicial economy and comity, to stay its own proceed-

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[53] 424 U.S. at 813.

[54] *Id.* at 813, 817.

[55] *Id.* at 818. The *Colorado River* Court stressed that the McCarran Amendment, also known as the McCarran Water Rights Suit Act of 1952, Pub. L. No. 495, 66 Stat. 560 (codified at 43 U.S.C. § 661 (1976)), constituted a specific grant to state courts of jurisdiction over cases both involving the adjudication of water rights and to which the United States is a party, when the state has developed a comprehensive system for adjudicating those rights. 424 U.S. at 819-20. In addition to the specific congressional policy favoring state court adjudication of water rights, the *Colorado River* Court identified the significance of the absence of federal proceedings beyond the complaint stage, the involvement of 1,000 defendants in the state suit over water rights, the inconvenience to multiple parties of a federal forum hundreds of miles away, and concurrent United States involvement in similar litigation in other water Divisions. *Id.* at 820. In upholding the dismissal, however, the Court emphasized the general obligation to exercise jurisdiction unless similar exceptional circumstances outweigh a federal court's duty to hear cases properly before the court. *Id.*

[56] 656 F.2d at 943-45. The Fourth Circuit criticized the district court's reliance on E. C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694 (S.D.N.Y. 1978) in granting the motion to stay its own proceeding. 656 F.2d at 945 n.21. The *Ernst* court applied the *Colorado River* standard for deciding the propriety of a district court's stay of its own proceedings pending resolution of a state court suit. 462 F. Supp. at 700-01. The *Ernst* court granted the motion to stay proceedings primarily on the basis of the inconvenience of the federal forum in New York to the situs of the controversy in Arkansas. *Id.* The court added, however, that the state court suit would avoid piecemeal litigation by deciding all the issues among all the parties, but that the state court action would still be necessary if the federal suit proceeded. *Id.* Finally, the court noted that the state suit had begun first and had proceeded further than the federal action. *Id.* at 700. The *Ernst* court concluded that the Act does not expressly preclude a district court from staying a motion to compel arbitration pending resolution of a state suit although the court found no cases on the precise issue. *Id.* at 701. The *Ernst* court thus based the decision on factors the court considered exceptional within the *Colorado River* standard. *Id.* The Fourth Circuit asserted that reliance on *Ernst* was inappropriate because the same exceptional circumstances were not present in this case. *Id.*

[57] Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663-64 (1978).

ings in deference to a state court under the kinds of exceptional circumstances identified in *Colorado River*.[58] On remand of the *Will* case, the Seventh Circuit[59] and the district court[60] applied the *Colorado River* Court's exceptional circumstances rule to justify a stay of federal court proceedings.[61]

The federal plaintiff in *Will* had filed a federal complaint concurrently with the filing of an answer in the state court suit the plaintiff was defending.[62] The federal complaint was identical to the state court answer, except that the federal complaint alleged a violation of Rule 10b-5 of the Securities and Exchange Act of 1934.[63] On remand of the *Will* case from the Seventh Circuit, the district court in *Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*,[64] justified reissuing the stay by stressing the tenuous and contrived nature of the federal plaintiff's federal claim, which the court characterized as a reactive, defensive, and delaying maneuver.[65] The *Calvert* district court, applying *Colorado River*, noted that fairness, efficiency, and the integrity of the judicial system required the stay.[66] The *Calvert* court asserted that the stay, unlike a dismissal, still permitted the federal plaintiff access to a federal forum.[67] The district court in *Calvert* concluded that *Colorado River* did not deny a district court's discretion to stay proceedings, but

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[58] *Id.* at 663-64. The *Will* Court relied on the *Colorado River* decision that set forth the exceptional circumstances in which a district court may decline to exercise jurisdiction over matters involving substantive federal law. *Id.* at 664; *see* text accompanying note 55 *supra*. The *Will* Court reversed the Seventh Circuit's writ of mandamus ordering the district court to exercise jurisdiction. *Id.* at 666-67. The Court ruled that mandamus was an improper remedy since a district court has discretion to stay proceedings pending resolution of a state court controversy. *Id.* The decisive vote in the *Will* case, as the Fourth Circuit noted, 656 F.2d at 943-44, was Justice Blackmun's concurring opinion suggesting that the Seventh Circuit should have remanded the case to the district court for reconsideration in light of *Colorado River*. 437 U.S. at 667-68.

[59] Calvert Fire Ins. Co. v. Will, 586 F.2d 12, 13 (7th Cir. 1978) (per curiam). The Seventh Circuit dismissed the writ of mandamus it had previously issued and agreed with Justice Blackmun's concurring opinion in Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667-68 (1978), that the district court should reconsider the case in light of the *Colorado River* doctrine. 586 F.2d at 14.

[60] Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979).

[61] 459 F. Supp. at 862.

[62] *Id.* at 860 (federal court complaint and state court answer filed six months after state complaint).

[63] *Id.* at 861.

[64] 459 F. Supp. 859 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979).

[65] *Id.* at 862-63. The district court in *Calvert* noted that the state defendant (federal plaintiff) had not attempted to remove the action to federal court although it could have done so. *Id.* at 862. Additionally, the *Calvert* district court required periodic conferences with the parties to the federal action to ensure that the state plaintiff expeditiously pursued its claims in state court. *Id.* at 861.

[66] *Id.* at 863.

only required the district court to weigh factors supporting a stay against the obligation to exercise jurisdiction.[68] The *Calvert* court further found that the particular federal plaintiff failed to exercise the right to remove the state action to federal court.[69]

The Fourth Circuit distinguished the *Mercury* case from the *Calvert* case on the ground that the *Mercury* case lacked exceptional circumstances justifying the stay.[70] In *Mercury*, the federal plaintiff invoked a substantive federal right central to its suit in the federal forum, and the state court plaintiff engaged in defensive maneuvering and delaying tactics by initiating the state court action.[71] The Fourth Circuit held that, in light of *Colorado River*, the district court in the *Mercury* case had abused its discretion in issuing a stay since the district court identified no exceptional circumstances like those noted in *Calvert*.[72]

In a dissenting opinion, Judge Hall chastised the majority for addressing the merits of Mercury's claim for arbitration rather than what the dissent perceived as the real issue before the court.[73] Judge Hall asserted that the court should have addressed the question of which court should decide, on the basis of the applicable statute, whether to compel arbitration of the dispute between Mercury and the Hospital.[74] The dissent noted that the issues of waiver and arbitration were properly before each court as were the parties to the dispute, and that each court had the statutory authority to compel arbitration if the circumstances

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[67] *Id.* at 863-64.

[68] *Id.* at 864.

[69] *Id.*

[70] 656 F.2d at 944. The district court judge in *Calvert* considered Calvert's federal claim to be a delaying tactic and defensive maneuver of the type the Supreme Court specifically discouraged in Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977), which held that a party may not use rule 10b-5 to federalize state controversies. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 863, 866 (N.D. Ill. 1978).

[71] 656 F.2d at 944.

[72] *Id.* at 946.

[73] *Id.* at 948 (Hall, J., dissenting).

[74] *Id.* The *Mercury* dissent stressed that when the contract involves transactions in interstate commerce, federal substantive law governs the contract. *Id.* at n.3 (Hall, J., dissenting); *see* note 45 *supra*. The dissent subsequently noted that the North Carolina Supreme Court recently emphasized that application of the substantive federal arbitration law in state courts would discourage forum shopping among parties to a contract dispute. 664 F.2d at 936-37 (Widener, J., dissenting). In addition, the dissent argued that the nearly identical provisions in the North Carolina and Federal Arbitration Acts minimized the danger that North Carolina would improperly deny Mercury a right to arbitration, even if the state court applied state and not federal law in evaluating the legitimacy of Mercury's claim. 656 F.2d at 947 (Widener, J., dissenting); *see* notes 24 (North Carolina Act) & 26 (Federal Act) *supra*. The *Mercury* majority argued that the questions of waiver and estoppel previously had not come before the North Carolina court and that the federal courts' interpretation of the federal Act did not bind the state court to interpret a similar statute in a like manner. 656 F.2d at 945. Thus, the court was concerned that the Hospital might succeed in the attempt to avoid arbitration by pursuing a state court action that might result in a jury trial, further delaying the arbitration process. *Id.* at 944-45; *see* note 46 *supra*.

justified such an order.[75] The Hall dissent applied *Colorado River* and concluded that the district court correctly deferred to a competent court of prior jurisdiction, thus eliminating the possibility of duplicate or conflicting results.[76] In reaching the conclusion, the Hall dissent applied the same exceptional circumstances test as the majority but arrived at the opposite result.[77] According to the dissent, the exceptional circumstances justifying the stay in *Mercury* included the priority in time of the state suit and the state court's enhanced ability to resolve the controversy fully and promptly because the state suit encompassed all the parties to the controversy and included the Hospital's claim against the Architect.[78]

The Fourth Circuit's analysis of Mercury's right to arbitration under the Act is consistent with case law in other federal and state courts[79] and with the congressional intent to establish a quick, efficient, and inexpensive procedure for resolving contract disputes.[80] The Fourth Circuit determined that the contract between the Hospital and Mercury involved interstate commerce,[81] that the arbitration clause in the contract encompassed the dispute between Mercury and the Hospital,[82] and that the Hospital had breached the agreement to arbitrate.[83] The Fourth Circuit

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[75] 656 F.2d at 948 (Hall, J., dissenting). The Hall dissent argued that the federal right to arbitration of contractual disputes within the scope of the Act does not extend to guarantee a federal forum to enforce that right when another forum is available. *Id.* at 949-50; *see* E. C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694, 700-01 (S.D.N.Y. 1978) (mandatory language of 9 U.S.C. § 4 (1976) does not apply until court assumes jurisdiction of action through independent basis).

[76] 656 F.2d at 950 (Hall, J., dissenting); *see* note 55 *supra*. Judge Hall, viewing the Hospital's state action as a last resort after the failure of a good faith effort to resolve the dispute by negotiation, was less suspicious of the Hospital's motives than was the majority. *Id.* at 948 (Hall, J., dissenting). In a separate dissent, Judge Widener scolded the federal plaintiff for failing to take advantage of the compulsory process for arbitration available to a defendant in state court under the federal Act, 9 U.S.C. § 4 (1976), or the North Carolina statute, N.C. GEN. STAT. § 1-567.3(a)(c) (Supp. 1981). 656 F.2d at 947 (Widener, J., dissenting).

[77] 656 F.2d at 950 (Hall, J., dissenting).

[78] *Id.* The Hall dissent in *Mercury* found that the state court action could provide complete relief to all parties to the suit, thus avoiding piecemeal litigation. *Id.* In addition, the state court action predated the federal suit. *Id.* The dissent asserted that the absence of the other two *Colorado River* factors did not preclude a finding that the district court correctly exercised its discretion in staying its proceedings pending disposition of the state action. *Id.* at 950 n.5 (Hall, J., dissenting); *see* text accompanying note 55 *supra* (*Colorado River* factors).

[79] *See* notes 34-39 *supra*.

[80] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (Congress intended speedy federal arbitration procedure not subject to judicial delay and obstruction in courts); A.B.A. COMM. ON TRADE & COMMERCIAL LAW, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925); note 46 *supra*.

[81] 656 F.2d at 942; *see* note 34 *supra*.

[82] 656 F.2d at 942.

[83] *Id.*

thus correctly concluded that Mercury had met the jurisdictional and statutory prerequisites for obtaining a court order compelling arbitration of the dispute.[84]

Following determination of Mercury's right to arbitration, the Fourth Circuit examined Mercury's right as a state court defendant to assert a claim for arbitration as a plaintiff in a federal forum when the state suit encompassed the same parties and identical issues.[85] The *Mercury* court correctly applied the proper *Colorado River* exceptional circumstances test for justifying a district court's issuance of a stay pending resolution of similar proceedings in state court.[86] The *Colorado River* Court held that a district court's discretion in deciding whether to defer to concurrent state court proceedings extends to balancing the obligation to exercise properly invoked jurisdiction with factors mitigating against the exercise of jurisdiction.[87] The *Mercury* majority's application of the exceptional circumstances standard is remarkably similar to the Seventh Circuit's application of the standard in *Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.*[88]

The facts of *Bio-Analytical* were analogous to those in *Mercury*. In *Bio-Analytical*, the state court defendant filed suit in district court seeking an order compelling arbitration under the Arbitration Act.[89] The federal district court dismissed the complaint finding that a party whose joinder would defeat diversity jurisdiction was an indispensible party whose absence mandated dismissal.[90] The Seventh Circuit held that a prior state court suit with jurisdiction over all parties involved in the controversy did not justify dismissal of the federal action.[91] In applying the *Colorado River* exceptional circumstances doctrine to the facts of the *Bio-Analytical* case, the Seventh Circuit stressed the difference beween the McCarran Amendment and the Arbitration Act. The court emphasized that the McCarran Amendment indicates a federal policy of deferring to state court adjudication of water rights, while the Arbitration Act indicates a federal policy favoring a federal forum for enforcing the federal right to arbitration.[92] The distinction was particularly critical since the Seventh Circuit noted that the state court declined to apply the federal Act to determine the arbitrability of the suit before it.[93]

The Seventh Circuit in *Bio-Analytical* did not deem controlling the

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[84] *See* note 41 *supra*.
[85] 656 F.2d at 942.
[86] *See* notes 48-72 *supra*.
[87] 424 U.S. 800, 818-19 (1976); *see* text accompanying notes 50-55 *supra*.
[88] 565 F.2d 450 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).
[89] *Id.* at 452.
[90] *Id.*
[91] *Id.* at 453.
[92] *Id.* at 454 n.4.
[93] *Id.* at 454.

state suit's priority in time when the federal plaintiff had filed suit only eighteen minutes after the state plaintiff.[94] The Seventh Circuit concluded that *Colorado River* severely restricted the scope of a district court's discretion to deny a state court defendant access to a federal forum as a plaintiff invoking a federal right to arbitration.[95]

The *Mercury* court interpreted the *Colorado River* exceptional circumstances doctrine in the same manner as the Seventh Circuit in *Bio-Analytical.* The Fourth Circuit's assessment of the Hospital's motives in filing a pre-emptive state suit closely resembles the Seventh Circuit's dismissal of the priority in time factor when circumstances minimize the importance of the time of filing.[96] The Fourth Circuit correctly distinguished the *Mercury* case, which lacked clear cut justifications for dismissal, from the *Colorado River* and *Calvert* cases, which justified dismissal.[97] In *Mercury*, the federal plaintiff had a legitimate federal right that the state court appeared unlikely to enforce, despite a statutory obligation to do so.[98] Mercury promptly invoked a contractual right to arbitration when the Hospital indicated an intent to discontinue negotiations and filed the federal complaint shortly after the Hospital initiated the state action.[99] By contrast, the district court in *Calvert* characterized the federal plaintiff's federal claim as contrived and tangential to the central issue in the state court case, which state law controlled.[100] The *Mercury* majority contrasted the Hospital's state suit to the *Calvert* federal suit and correctly refused to equate Mercury's dominant federal claim with the *Calvert* plaintiff's deliberate attempt to federalize a state claim.[101] Like the *Bio-Analytical* court, the Fourth Circuit distinguished the McCarran Act[102] from the Arbitration Act. The Arbitration Act does not create federal question jurisdiction, but does create a federal right and demonstrates a federal bias in favor of arbitration, whether enforced in a state or federal forum.[103] In applying one of the *Colorado River* exceptional circumstances, the *Mercury* court considered the relative convenience of the federal and state forums, and correctly concluded that equal accessibility to federal and state forums eliminated any justification for favoring the state forum.[104]

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[94] *Id.* at 452.

[95] *Id.* at 454.

[96] *See* note 41 *supra.*

[97] *See* note 55 *supra* (exceptional circumstances in *Colorado River*) & text accompanying notes 64-69 *supra.*

[98] 656 F.2d at 944.

[99] *Id.* at 936-37.

[100] *See* text accompanying note 65 *supra.*

[101] 656 F.2d at 944.

[102] *See* note 55 & text accompanying note 92 *supra.*

[103] *See* note 26 *supra.*

[104] *See* E. C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694, 700 (S.D.N.Y. 1978) (relative inconvenience of federal forum primary justification for stay of federal proceedings).

The *Mercury* dissent failed to recognize the gravity of the exceptional circumstances in the *Colorado River* and *Calvert* cases. The dissent incorrectly equated the slight priority in time of the state suit in *Mercury* with the ongoing state suit in *Colorado River* involving over one thousand parties.[105] Thus, the *Mercury* dissent's assertion that the federal court should defer to the pending state court action does not reflect the proper application of the *Colorado River* exceptional circumstances test.

The *Mercury* dissent correctly noted, however, that the majority misconstrued the relative importance of establishing a jurisdictional basis for providing a plaintiff with a federal forum prior to enforcing that plaintiff's federal right to arbitration in the federal forum.[106] The *Mercury* court first established that Mercury had a right to arbitration under the Act.[107] The Fourth Circuit then used the existence of that federal right to justify overruling the district court's stay of its proceedings.[108] Since the Arbitration Act does not create federal jurisdiction,[109] the preferable procedure would be to review the district court's decision to determine whether the district court properly exercised its discretion in ordering the stay, before determining the merits of a motion still at the pleading stage in both the state and federal courts. Neither the *Mercury* majority nor the dissent discussed the probability of suits involving arbitration questions becoming monuments to delay, thus frustrating the congressional intent to avoid time-consuming and costly litigation by providing a process for compulsory arbitration of disputes.[110]

The existence of federal and state courts with concurrent jurisdiction inevitably induces conflict between the two systems.[111] The *Mercury* case exemplifies the problems a federal court faces in determining the deference owed to a competent state court hearing a case nearly identical to the one before the federal court. The Fourth Circuit correctly weighed the general obligation to decide a controversy legitimately before the court against the possibility of exceptional circumstances justifying deference to a state court.[112] The Fourth Circuit properly

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[105] 656 F.2d at 950 (Hall, J., dissenting).

[106] *Id.* at 950-51.

[107] 656 F.2d at 941-42.

[108] *Id.* at 945-46.

[109] *See* note 26 *supra.*

[110] *See* Standard Chlorine of Del., Inc. v. Leonard, 384 F.2d 304, 306 (2d Cir. 1967); note 46 *supra.*

[111] *See* text accompanying notes 6-9 *supra.*

[112] *See* Levy v. Lewis, 635 F.2d 960, 966-67 (2d Cir. 1980) (requisite exceptional circumstances present when federal policy favors state regulation of insurance industry and state court better forum for adjudicating issues under state law, state court proceeding further advanced than federal, and state court has jurisdiction over multiple claims against insolvent insurance company); Local Div. 519, Amalgamated Transit Union v. Lacrosse Mun.

determined that *Mercury* did not involve the exceptional circumstances the *Colorado River* Court identified as justifying a federal court's stay pending resolution of a state suit.[113] The *Mercury* court legitimately construed the policy behind the Arbitration Act as promoting the resolution of contract disputes through arbitration rather than time-consuming and expensive litigation.[114] Properly concerned that the state court might refuse to apply the federal Act, and that application of the state statute might result in a trial rather than an order compelling arbitration,[115] the Fourth Circuit found that the district court erred in refusing to exercise jurisdiction. The *Mercury* case exemplifies the conflict inherent in a judicial system that provides parties to a controversy with distinct forums, when the choice of forums is potentially outcome determinative.

CATHERINE O'CONNOR

### *B. Foreign Sovereign Immunities Act Bars Jury Trials Against Foreign Government-Owned Corporations*

Under the doctrine of absolute foreign sovereign immunity, foreign states traditionally were immune from judicial action in the courts of other states.[1] The United States followed the doctrine of absolute foreign sovereign immunity until 1952, when the State Department adopted the restrictive theory of foreign sovereign immunity.[2] The

Transit Util., 585 F.2d 1340, 1350 (7th Cir. 1978) (mandatory arbitration provision possibly conflicting with state statutory rights governing similar employment contracts does not meet exceptional circumstances standard).

[113] *See* text accompanying notes 85-101 *supra.*

[114] *See* note 46 *supra.*

[115] *See* text accompanying notes 44-46 *supra.*

[1] *See* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 212-13 (1979) [hereinafter cited as Kahale & Vega]; von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34-35 (1978) [hereinafter cited as von Mehren]. The doctrine of absolute foreign sovereign immunity developed as a matter of comity between nations and rested upon the concept of implied consent. *Id.* at 34-35. When a host nation permitted a foreign sovereign to conduct activities within the host nation's territory, the host nation theoretically waived absolute sovereignty over the foreign state within the host sovereign's territory. *Id.* at 35.

[2] *See* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity*, 85 COM. L. J. 167, 168-69 (1980) [hereinafter cited as Dellapenna] (development of restrictive theory of sovereign immunity). Chief Justice Marshall established the American doctrine of absolute foreign sovereign immunity in The Schooner Exchange v. M'Faddon, 11 U.S. [7 Cranch] 116, 136-37 (1812). Since all sovereigns were equal under international law, Marshall reasoned that a sovereign entering the territory of an amicable foreign government did so in reliance on the implied promise of the host state that the host would respect the sovereign rights and immunities of the foreign sovereign. *Id.* Since *The Schooner Ex-*

restrictive theory provides immunity from suit for the public acts of a foreign sovereign, but not for a foreign state's commercial activities.[3] Neither the State Department nor the courts, however, established criteria for distinguishing between public and commercial acts, or established procedural guidelines for maintaining an action when a foreign state was not immune from suit.[4] Thus, actual operation of the restrictive theory of foreign sovereign immunity remained unclear.[5]

In 1976 Congress enacted the Foreign Sovereign Immunities Act[6] (Immunities Act) to resolve confusion concerning application of the restrictive theory of foreign sovereign immunity.[7] The Immunities Act codified the restrictive theory of foreign sovereign immunity and

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*change* involved foreign military vessels, the question of the immunity of foreign-owned commercial vessels remained open. In Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926), the Supreme Court held that the doctrine of absolute foreign sovereign immunity applied to all acts of a "public purpose," including obtaining revenue for the sovereign's treasury and advancing the trade of its citizens. *Id.* at 574.

Although courts initially determined the scope of foreign sovereign immunity, the view that issues of immunity involved foreign relations implications led to gradual judicial deference to State Department recommendations. *See* von Mehren, *supra* note 1, at 40-41. By the middle of the 1940's, foreign sovereign immunity, although still based upon the absolute theory, was regarded as a mixed legal and political question to be resolved by the executive branch. *Id.* at 41; *see* Mexico v. Hoffman, 324 U.S. 30, 35-56 (1945) (question of foreign sovereign immunity political question requiring resolution by executive branch); *Ex parte* Republic of Peru, 318 U.S. 578, 588-89 (1943) (judiciary obligated to accept executive branch decisions concerning foreign sovereign immunity).

In 1952, the State Department departed from the absolute theory of foreign sovereign immunity and adopted the restrictive theory of foreign sovereign immunity. *See* Letter of May 19, 1952 from Acting Legal Adviser Jack Tate to Acting Attorney General. 26 DEP'T. STATE BULL. 984-85 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976). The "Tate Letter" noted the insufficiency of the doctrine of absolute foreign sovereign immunity in view of the widespread involvement of sovereigns in commercial activities. *See id.* Several foreign states, particularly civil law jurisdictions, adopted the restrictive theory by 1952, and the State Department anticipated that other foreign states would adopt the restrictive theory. *See id.* The State Department concluded that the United States should adopt the restrictive theory of sovereign immunity to conform with prevalent international practice. *See id.*

[3] *See* Williams v. Shipping Corp. of India, 653 F.2d 875, 878 (4th Cir. 1981) (discussing restrictive theory of foreign sovereign immunity), *cert. denied*, 50 U.S.L.W. 3670 (1982).

[4] *See id.* The State Department failed to develop a consistent application of the restrictive theory of sovereign immunity. *See* Dellapenna, *supra* note 2, at 169. Courts had difficulty applying the restrictive theory of immunity in the absence of guidelines from the executive department. *Id.* at 169; *see, e.g.*, Mexico v. Hoffman, 324 U.S. 30, 31 (1945) (noting absence of State Department guidelines concerning immunity of vessels owned but not possessed by foreign state); Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (1964) (absent State Department criteria, courts must deny claim of immunity for acts not strictly political or public in nature), *cert. denied*, 381 U.S. 934 (1965).

[5] *See* Dellapenna, *supra* note 2, at 169; text accompanying note 4 *supra*.

[6] 28 U.S.C. §§ 1330, 1602-11 (1976) (amending 28 U.S.C. §§ 1332, 1391, 1441 (1970)).

[7] Williams v. Shipping Corp. of India, 653 F.2d 875, 878 (4th Cir. 1981); *see* Dellapenna, *supra* note 2, at 169 (Immunities Act intended to resolve uncertainty surrounding restrictive theory); text accompanying note 5 *supra*.

established standards for judicial resolution of claims of immunity.[8] The Immunities Act established a definition of "foreign states" subject to the provisions of the Act in section 1603 of title 28 of the United States Code.[9] For purposes of the Immunities Act, foreign states include foreign sovereigns and certain instrumentalities of foreign states.[10] In section 1330 of title 28 of the United States Code, the Immunities Act conferred on federal district courts original jurisdiction over all nonjury civil actions resulting from the commercial activities of foreign states as defined in section 1603.[11] In addition, the Immunities Act amended section 1441 of title 28 of the United States Code to include section 1441(d).[12] Section 1441(d) provides for removal by foreign states of actions originally filed in a state court to a federal district court, where the action is

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[8] *See* 28 U.S.C. §§ 1602-1611 (1976). The purposes of the Immunities Act are to remove the commercial activities of foreign states from jurisdictional immunity and to leave the determination of claims to immunity to the United States courts. *Id.* § 1602. To achieve the purposes of the Immunities Act, Congress enacted §§ 1603-11, which contain comprehensive substantive and procedural provisions for resolving questions of sovereign immunity raised by foreign states. *See id.* §§ 1603-11.

[9] U.S.C. § 1603 (1976) provides:

§ 1603. Definitions

For purposes of this chapter—

(a) A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country. . . .

*Id.*

[10] *See* 28 U.S.C. § 1603(b) (1976).

[11] *See* 28 U.S.C. § 1330 (1976). Section 1330 provides in part:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

*Id.*

[12] *See* 28 U.S.C. § 1441(d) (1976). Section 1441(d) provides in part:

§ 1441. Actions Removable Generally

. . . .

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. . . .

*Id.*

tried without a jury.[13] In *Williams v. Shipping Corporation of India*,[14] the Fourth Circuit considered whether sections 1330 and 1441(d) constitute the exclusive jurisdictional basis for an action against a corporation wholly owned by a foreign state[15] and whether the nonjury provisions of the Immunities Act violate the seventh amendment right to a jury trial.[16]

In *Williams*, Lenwood Williams, Jr., filed suit and demanded a jury trial in Virginia state court against the Shipping Corporation of India to recover damages for injuries suffered while working aboard defendant's ship.[17] Defendant removed the case to federal district court and moved to strike Williams' jury trial demand.[18] Since the Government of India wholly owned the Shipping Corporation of India, defendant was a foreign state under section 1603 of the Immunities Act.[19] Defendant alleged, therefore, federal jurisdiction based upon section 1330 of the Immunities Act, which governs actions against foreign states.[20] Since section 1330 provided jurisdiction over Williams' action, defendant maintained that removal to the federal district court was proper under section 1441(d), which provides for removal of any action against a foreign state from state court to federal court.[21] Section 1441(d) precludes jury trials in actions against foreign states as defined in section 1603.[22] Thus, defendant reasoned that sections 1330 and 1441(d) barred Williams' jury trial demand.[23] Williams contended, however, that an alternative jurisdictional basis to sections 1330 and 1441(d) existed which permitted a jury trial in an action against a foreign government-owned corpora-

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[13] *Id.*

[14] 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3670 (1982).

[15] *Id.* at 877-81; *see* text accompanying notes 35-56 *infra*.

[16] 653 F.2d at 881-83; *see* text accompanying notes 56-68 *infra*.

[17] 653 F.2d at 876-77. Williams received personal injuries while working as a longshoreman aboard defendant's ship. *Id.* at 876. Williams alleged that his injuries resulted from defendant's negligence in maintaining the area where the accident occurred. *See id.*; Brief for Appellant at 2, Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981) [hereinafter cited as Brief for Appellant].

[18] *Id.* at 876-77. Although defendant argued that removal was based on § 1441(d), the removal petition contained no reference to § 1441(d). *Id.* at 877. *See* Brief for Appellant, *supra* note 17, at 2. The removal petition alleged diversity of citizenship and amount in controversy exceeding $10,000. *See id.*; 28 U.S.C. § 1332(a)(2) (1976). Williams apparently believed defendant's failure specifically to assert removal under 1441(d) strengthened Williams' position that his action was removable under § 1441(a) in conjunction with § 1332(a)(2) diversity jurisdiction. *See* 653 F.2d at 877. The Fourth Circuit rejected plaintiff's argument. *Id.* at 879-81; *see* text accompanying notes 52-56 *infra*.

[19] *See* 653 F.2d at 876; 28 U.S.C. § 1603(a) (1976); note 9 *supra* ("foreign state" includes any corporation owned or controlled by a foreign sovereign).

[20] 653 F.2d at 877. Section 1330 specifically incorporates the § 1603 definition of "foreign states." *See* 28 U.S.C. § 1330 (1976); note 11 *supra*.

[21] 653 F.2d at 877; *see* 28 U.S.C. § 1441(d) (1976); note 12 *supra*.

[22] *See* 28 U.S.C. § 1441(d) (1976); note 12 *supra*.

[23] *See* 653 F.2d at 877.

tion.[24] Reasoning that defendant was a "citizen or subject of a foreign state," Williams argued that the federal district court had diversity jurisdiction under section 1332(a)(2) of title 28 of the United States Code.[25] Section 1332(a)(2) grants federal district courts original jurisdiction over actions by citizens of a State against citizens or subjects of a foreign state.[26] Since section 1332(a)(2) provided jurisdiction over defendant, Williams reasoned that his action was removable to federal district court under section 1441(a) of title 28 of the United States Code.[27] Section 1441(a) applies to actions removed from state court to federal court by defendants in general and does not proscribe a jury trial in the federal court.[28] Reasoning that sections 1332(a)(2) and 1441(a) provided an alternative basis of jurisdiction, Williams contended that the court should grant his jury trial demand.[29] Alternatively, Williams asserted that the Immunities Act violated his seventh amendment right to a jury trial.[30]

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[24] *Id.* at 880. Williams cited two district court decisions that permitted alternative jurisdiction in actions against foreign government-owned corporations. *Id.* at 880; *see generally* Rex v. Cia. Pervana De Vapores, S.A., 493 F. Supp. 459 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3rd Cir. 1981); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979). In *Icenogle*, the district court permitted diversity of citizenship jurisdiction over a foreign government-owned airline under § 1332(a)(2) and granted a jury trial. 82 F.R.D. at 37. In *Rex* the plaintiff sued a foreign government-owned corporation under the Longshoremen's and Harbor Workers Act, 33 U.S.C. § 905(b) (1976). 493 F. Supp. at 460. The district court asserted § 1331 federal question jurisdiction and permitted a jury trial. *Id.* at 467. After the *Williams* decision, however, the Third Circuit reversed the district court's holding in *Rex* and denied a jury trial under § 1330. Rex v. Cia. Pervana De Vapores, S.A., 660 F.2d 61 (3rd Cir. 1981); *see* note 86 *infra*.

[25] 653 F.2d at 877, 880; *see* 28 U.S.C. § 1332(a)(2) (1976).

[26] *See* 28 U.S.C. § 1332(a)(2) (1976).

[27] 653 F.2d at 877, 880. Section 1441(a) provides that, except as otherwise established by Act of Congress, a defendant may remove from state court to federal district court any civil action over which the federal district court has original jurisdiction. 28 U.S.C. § 1441(a) (1976). Williams reasoned that § 1441(a) applied to removal of his action from state court since the district court had original jurisdiction under § 1332. 653 F.2d at 877, 880; *see* Thompson v. Gillen, 491 F. Supp. 24, 27 (E.D. Va. 1980) (diversity of citizenship basis for removal under § 1441(a)).

[28] *See* 28 U.S.C. § 1441(a) (1976).

[29] 653 F.2d at 877, 880; *see* Reply Brief for Appellant at 1-3, Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981) [hereinafter cited as Reply Brief for Appellant]. Williams urged the Fourth Circuit to adopt a jurisdictional avenue which afforded him a jury trial. *Id.* Williams argued that §§ 1332(a)(2) and 1441(a) enabled the court to grant his jury trial demand consistent with the Immunities Act. *See* Brief for Appellant, *supra* note 17, at 19. Although the Immunities Act precludes jury trials against foreign states, Williams reasoned that the Immunities Act preserved jury trials in actions against entities which were also citizens or subjects of a foreign state under § 1332(a)(2). *Id.* Williams maintained that the Fourth Circuit must base removal of Williams' action on § 1441(a) and grant a jury trial to avoid the seventh amendment issue that the nonjury provisions of the Immunities Act posed. *See* Reply Brief for Appellant, *supra*, at 3.

[30] 653 F.2d at 877; *see* Reply Brief for Appellant, *supra* note 29, at 1-3; text accompanying notes 57-68 *infra*.

The district court rejected Williams' argument and held that sections 1330 and 1441(d) provide the exclusive source of jurisdiction for actions against foreign sovereigns or their instrumentalities.[31] Accordingly, the district court dismissed Williams' jury trial demand.[32] Williams appealed to the Fourth Circuit.[33] The Fourth Circuit affirmed the district court's holding that sections 1330 and 1441(d) provide the sole basis of jurisdiction in actions against foreign government-owned corporations.[34] Although the Fourth Circuit's decision barred Williams' jury trial demand, the *Williams* court concluded that application of the Immunities Act to Williams' action did not violate Williams' seventh amendment rights.[35]

In determining that sections 1330 and 1441(d) constitute the sole jurisdictional basis in an action against a foreign government-owned corporation, the Fourth Circuit analyzed the history and scope of the Immunities Act.[36] The *Williams* court noted that the legislative history of the Immunities Act indicates congressional intent to codify the restrictive theory of sovereign immunity and to aid resolution of claims of foreign sovereign immunity.[37] The Fourth Circuit reasoned that to implement the legislative scheme of the Immunities Act, Congress modified the subject matter jurisdiction of the federal district courts by enacting section 1330.[38] Since section 1330 provides that federal district courts have original jurisdiction over any nonjury civil action against a foreign state as defined in section 1603, the *Williams* court concluded that Congress intended section 1330 to govern all actions against foreign states.[39]

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[31] *See* Williams v. Shipping Corp. of India, 489 F. Supp. 526, 531-32 (E.D. Va. 1980), *aff'd*, 653 F.2d 875 (4th Cir. 1981).

[32] 489 F. Supp. at 532; *see* 653 F.2d at 877.

[33] *See* Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981).

[34] *Id.* at 883; *see* text accompanying notes 36-56 *infra*.

[35] 653 F.2d at 883; *see* text accompanying notes 57-68 *infra*.

[36] *See* 653 F.2d at 877-81; text accompanying notes 1-5 *supra* (development of United States' policy of foreign sovereign immunity); text accompanying notes 37-45 and 52-56 *infra* (examining scope of 28 U.S.C. §§ 1330 & 1441(d) (1976)).

[37] 653 F.2d at 878; *see* H.R. REP. No. 94-1487, at 6-8, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6604-06 [hereinafter cited as House Report] (purposes of Immunities Act); S. REP. No. 94-1310 at 8-9, 94th Cong., 2d Sess. 5 (1976) [hereinafter cited as Senate Report] (objectives of Immunities Act); text accompanying notes 7-8 *supra*.

[38] 653 F.2d at 878-79; *see* text accompanying notes 39-45 *infra*.

[39] *See* 28 U.S.C. § 1330 (1976). Section 1330 confers original jurisdiction over "foreign states" regardless of the amount in controversy. *Id.* Section 1330 applies to all claims for relief in personam arising from activities for which a foreign state is not immune under other provisions of the Immunities Act. *Id.*; *see* notes 9 & 11 *supra*. The Report of the House Judiciary Committee stated that section 1330 establishes a broad, comprehensive jurisdictional scheme concerning actions against foreign states. *See* House Report, *supra* note 37, at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611. Congress perceived broad federal jurisdiction as conducive to uniform treatment of cases involving foreign states.

The Fourth Circuit suggested further that Congress' amendment of the diversity jurisdiction provisions in section 1332 evinced congressional intent to establish section 1330 as the exclusive source of jurisdiction over foreign government-owned corporations.[40] Before enactment of the Immunities Act, section 1332(a)(2) provided federal district courts original jurisdiction in all civil actions between citizens of a State and foreign states or citizens or subjects of a foreign state, where the amount in controversy exceeded $10,000.[41] The Fourth Circuit noted that in addition to enacting section 1330, the Immunities Act eliminated reference in section 1332(a)(2) to foreign states as defendants.[42] Congress added a new subsection to section 1332 providing diversity jurisdiction only when the plaintiff is a foreign state under section 1603.[43]

The *Williams* court found additional support for its interpretation of the Immunities Act in Reports of the House and Senate Judiciary Committees, which specifically stated that section 1332 is unnecessary as a basis of jurisdiction for actions against foreign states in light of the comprehensive jurisdictional scheme provided under section 1330.[44] Thus, the Fourth Circuit reasoned that deletion of the phrase "foreign states" from section 1332(a)(2) and inclusion of foreign states in section 1330 indicated Congress' intent to eliminate diversity jurisdiction in actions against all foreign states and instrumentalities within the scope of section 1603.[45]

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House Report, *supra* note 37, at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611. Congress believed uniformity of decision in actions against foreign states would prevent adverse foreign relations which might result from disparate treatment of foreign states. House Report, *supra* note 37, at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611.

[40] *See* House Report, *supra* note 37 at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611.

[41] 28 U.S.C. § 1332(a)(2) (1970) (current version at 28 U.S.C. § 1332(a)(2) (1976)). Before enactment of the Immunities Act, diversity jurisdiction governed actions against foreign government-owned corporations, which were regarded as citizens or subjects of the parent state. *See, e.g.*, Steamship Co. v. Tugman, 106 U.S. 118, 121 (1882) (corporation created by laws of foreign country regarded as citizen of foreign state for purpose of federal diversity jurisdiction); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 534 (2d Cir.) (diversity of citizenship over foreign government-owned airline), *cert. denied*, 382 U.S. 983 (1965).

[42] *See* 28 U.S.C. § 1332(a)(2) (1976). The Immunities Act preserved diversity jurisdiction in actions by a citizen of one of the United States against "citizens or subjects of a foreign state." *See id.* Diversity jurisdiction also remains in actions between United States citizens in which citizens or subjects of foreign states are additional parties. *See id.* § 1332(a)(3) (1976).

[43] *See* 28 U.S.C. § 1332(a)(4) (1976); note 9 *supra*.

[44] 653 F.2d at 880; *see* House Report, *supra* note 37, at 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6613 (diversity jurisdiction over foreign states superfluous because § 1330 contains broad jurisdictional grant); Senate Report, *supra* note 37, at 13 (§ 1330 renders diversity jurisdiction over foreign states unnecessary).

[45] 653 F.2d at 878-81.

In rejecting Williams' argument that he could have sued originally in federal district court under section 1332(a)(2), the *Williams* court adopted the Second Circuit's reasoning in *Ruggiero v. Compania Peruana De Vapores*.[46] In *Ruggiero*, plaintiffs alleged diversity jurisdiction under section 1332(a)(2) and demanded jury trials in personal injury actions against a foreign government-owned shipping company.[47] The Second Circuit, however, held that Congress intended the jurisdictional provisions of the Immunities Act to provide the sole basis of jurisdiction in actions against foreign government-owned corporations.[48] Since the defendant in *Ruggiero* was a foreign state under the Immunities Act, the Second Circuit reasoned that the defendant could not also be a citizen or subject of a foreign state under section 1332(a)(2).[49] Thus, the *Ruggiero* court concluded that section 1330 constitutes the exclusive source of original federal jurisdiction for actions against foreign government-owned corporations.[50] In addition, the Second Circuit suggested that the

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[46] *See* 639 F.2d 872 (2d Cir. 1981). At the time of the *Williams* decision, *Ruggiero* was the sole circuit court opinion to consider the scope of the jurisdictional provisions of the Immunities Act. *But see* note 86 *infra* (3rd Circuit addressing jurisdictional issue after the *Williams* decision). Although several district courts had addressed the jurisdiction issue, the district courts were divided over application of § 1330 and § 1441(d). *See* text accompanying notes 87-92 *infra*. Williams argued that the definition of "foreign state" in § 1603 does not extend to § 1332 because § 1332 contains no cross-reference to § 1603. *See* 653 F.2d at 880. In addition, plaintiff suggested that the § 1603 definition does not apply to § 1332, because § 1603 specifically applies only to Chapter 97 of Title 28 of the United States Code, and § 1332 is located in Chapter 85 of Title 28 of the United States Code. *Id.* at 880-81. Williams claimed, therefore, that his action was against a "citizen or subject of a foreign state" under § 1332(a)(2) rather than against a "foreign state" under § 1330. *Id.* The Fourth Circuit rejected Willams' "hypertechnical analysis" of the Immunities Act, emphasizing that the jurisdictional provisions of the Act specifically refer to the § 1603 definition of foreign state. *Id.* Since amendment of § 1332 deleted reference to foreign states, a cross-reference to the § 1603 definition is unnecessary. *See* Ruggiero v. Compania Peruana De Vapores, 639 F.2d at 875 n.6.

[47] *See* 639 F.2d at 873.

[48] *Id.* at 875-76. In *Ruggiero*, the Second Circuit thoroughly examined the language and legislative history of the Immunities Act to hold that Congress established § 1330 and § 1441(d) as the exclusive jurisdictional vehicle against foreign states and their entities. *Id.* at 875-77. The *Ruggiero* court concluded that Congress intended that procedures governing suits against foreign states parallel procedures governing actions against the United States. *Id.* at 878; *see* Note, *Foreign Sovereign Immunity and the Seventh Amendment: Recognizing the Right to Jury Trial in Suits Against Foreign States and State-Owned Corporations*, 21 VA. J. INT'L L. 521, 535 (1981) [hereinafter cited as *Foreign Sovereign*] (congressional intent to conform procedures for suits against foreign states with procedures for actions against United States).

[49] 639 F.2d at 875. The *Ruggiero* court noted that the traditional justification for regarding foreign corporations as citizens of their state of incorporation was that courts regarded suits against a corporation as against the shareholders, who were citizens or subjects of the state of incorporation. *Id.* The Second Circuit reasoned that Congress eliminated the legal fiction for foreign government-owned corporations by treating foreign corporations like their controlling shareholders—foreign sovereigns. *Id.*

[50] 639 F.2d at 875.

Immunities Act established section 1441(d) as the exclusive provision for removal by foreign states of actions filed in state courts.[51]

In denying Williams' jury demand, the Fourth Circuit rejected Williams' argument that section 1441(a) governed removal of Williams' action from the state court instead of section 1441(d).[52] Section 1441(d) establishes the right of a foreign state to remove to a federal district court an action filed in a state court.[53] Since section 1441(d) requires a nonjury trial upon removal of an action, removal of a suit from state to federal court under section 1441(d) extinguishes a jury trial demand made at the state level.[54] The Fourth Circuit reasoned that section 1441(d) reflects legislative intent that only judges act as triers of fact in actions against foreign states.[55] Thus, the *Williams* court concluded that sections 1330 and 1441(d) constitute the exclusive jurisdictional avenue for suits against foreign states and bar a jury trial whether the action is removed from the state court or filed originally in federal district court.[56]

Noting that the seventh amendment gurantees a defendant the right to a jury trial only where a jury trial was available in "suits at common law," the Fourth Circuit also rejected Williams' contention that the Immunities Act violated his seventh amendment right to a jury trial.[57] In *Parsons v. Bedford*,[58] the Supreme Court held the phrase "suits at common law" to refer to all actions involving rights and remedies enforced

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[51] *See id.* at 876 n.7, 878. The *Ruggiero* court noted that Congress intended § 1330 and § 1441(d) to provide a single avenue for suing foreign sovereigns or their instrumentalities and to bar jury trials in all actions against such defendants. *Id.* at 878. The *Williams* court concluded that the rationale of *Ruggiero*, concerning an action filed originally in federal court, also governed an action removed by a foreign defendant from state court. *See* 653 F.2d at 880 n.4. Indeed, the conclusion that the Immunities Act exclusively governs actions against foreign states appears stronger in actions removed from state court by a foreign state. As the *Ruggiero* court noted, both § 1330 and § 1441(d) refer to nonjury trials in civil actions against defendants falling within the § 1603 definition of foreign state. 639 F.2d at 878. Although the language of § 1330 implicitly bars a jury trial, the statutory language of § 1441(d) unequivocally denies a jury trial. *Compare* 28 U.S.C. § 1330 (1976) ("The district courts shall have original jurisdiction . . . of any nonjury civil action . . . .") *with* 28 U.S.C. § 1441(d) ("Upon removal the action shall be tried by the court without a jury.")

[52] 653 F.2d at 880-81; *see* note 29 *supra.*

[53] 28 U.S.C. § 1441(d) (1976); *see* note 12 *supra.*

[54] *See* House Report, *supra* note 37, at 33, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6632.

[55] 653 F.2d at 879; *see* text accompanying notes 81-84 *infra* (rationale for barring jury trials in actions against foreign states); *cf.* text accompanying notes 105-109 *infra* (policy considerations favoring denial of jury trials against foreign states).

[56] 653 F.2d at 881.

[57] *Id.* at 881-82. The seventh amendment preserves the right to trial by jury in "suits at common law," where the amount in controversy exceeds twenty dollars. U.S. CONST. amend. VII; *see* Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 459 (1977) (jury trial required only where required at common law).

[58] 28 U.S. [3 Pet.] 441 (1830).

under the common law in 1791, the date of enactment of the seventh amendment.[59] Relying upon *Parsons*, Williams contended that the seventh amendment guaranteed his right to a jury trial because his cause of action rested on common law tort theory.[60] The Fourth Circuit rejected Williams' argument, reasoning that an action also must be brought against a defendant suable at common law.[61] Under the common law in 1791, a foreign state was immune from all suits without the foreign sovereign's consent.[62] The *Williams* court also compared a foreign sovereign's immunity from jury trial with the sovereign immunity of the United States.[63] Courts consistently uphold denial of jury trials in actions against the United States because the United States, as sovereign, was not suable at common law without the government's consent.[64] Moreover, even if the United States consents to suit, Congress has the power to prescribe the manner in which the action proceeds.[65] The Fourth Circuit reasoned that the same rationale applies to actions against foreign states, since suits against foreign states also were

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[59] *Id.* at 446-48. In *Parsons v. Bedford*, the Supreme Court construed the seventh amendment to embrace all suits involving legal rights enforceable at common law, as opposed to equitable or admiralty rights. *Id.* at 447; *see* Pernell v. Southall Realty, 416 U.S. 363, 376 (1974) (seventh amendment guarantees right to jury trial in action for recovery of possession of real property because comparable action triable by jury in 1791); Curtis v. Loether, 415 U.S. 189, 194-95 (1974) (action for damgaes under Title VIII of Civil Rights Act, 42 U.S.C. § 3612 (1976), requires jury trial under seventh amendment since cause of action analogous to common law tort action).

[60] 653 F.2d at 883; Brief for Appellant, *supra* ntoe 17, at 14-17.

[61] 653 F.2d at 883.

[62] *Id.* at 881-82; *see* Dellapenna, *supra* note 2, at 168-69 (traditional absolute immunity of foreign sovereigns); Kahale & Vega, *supra* note 1, at 212 (former United States policy of absolute foreign sovereign immunity); von Mehren, *supra* note 1, at 34-35 (historial practice of absolute foreign sovereign immunity).

[63] 653 F.2d at 882. Chief Justice Marshall suggested an analogy between foreign sovereign immunity and domestic foreign immunity in The Schooner Exchange v. M'Faddon, 11 U.S. [7 Cranch] 116, 136-39 (1812). The concept of foreign sovereign immunity rests upon the theory that a nation, possessing absolute sovereignty and power within its own territory, should afford foreign sovereigns within the host nation's territory the same exemptions enjoyed by the host sovereign. *Id.*; *see* text accompanying note 2 *supra*, & notes 100-104 *infra*.

[64] *See, e.g.*, Lehman v. Nakshian, 101 S.Ct. 2698, 2702 n.9 (1981) (seventh amendment right to jury trial never applied to action against United States), Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1961) (suits against the United States not suits at common law subject to seventh amendment); Galloway v. United States, 319 U.S. 372, 388 (1943) (no right to assert claim against sovereign under common law in 1791); McElrath v. United States, 102 U.S. 426, 440 (1880) (suits against government not suits at common law within meaning of seventh amendment).

[65] *See* McElrath v. United States, 102 U.S. 426, 440 (1880). The *McElrath* court noted that a sovereign can determine the form and procedures to govern suits to which it consents. *Id.* at 440; *see* United States v. Sherwood, 321 U.S. 584, 587-88 (1941) (sovereign has power to impose conditions when consenting to suit).

unknown at common law.[66] Accordingly, the *Williams* court concluded that Congress has the power to restrict the right to a jury trial in an action against a foreign state.[67] Thus, the *Williams* court held that denial of a jury trial under the Immunities Act did not violate Williams' seventh amendment rights.[68]

The statutory language and legislative history of the Immunities Act support the Fourth Circuit's holding that Congress intended the Immunities Act to provide the exclusive jurisdictional basis for actions against foreign government-owned corporations.[69] Williams' claim that he could have sued originally in federal court based upon diversity jurisdiction ignored the implications of section 1330.[70] Before 1976, section 1332 diversity jurisdiction governed actions against both foreign states and foreign government-owned corporations.[71] Congress enacted section 1330 to provide original federal jurisdiction over actions against foreign states and amended section 1332 to eliminate reference to foreign states as defendants.[72] Although the Immunities Act preserved reference to citizens or subjects of a foreign state in section 1332, Congress could not have intended that section 1332 continue to provide jurisdiction in actions against foreign government-owned corporations.[73] Section 1603 defines foreign states specifically to include foreign government-owned corporations.[74] As the Second Circuit emphasized in *Ruggiero*, the same entity cannot be both a foreign state and a citizen or subject of a foreign state.[75] Since section 1330, which incorporates the section 1603 definition of foreign states, encompasses all nonjury civil ac-

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[66] 653 F.2d at 882. The Fourth Circuit reasoned that the same concern for amicable foreign relations that influenced the common law theory of absolute foreign sovereign immunity influenced Congress' decision to bar jury trials when it established jurisdiction over actions against foreign states. *Id.*; *see* text accompanying notes 105-109 *infra*.

[67] 653 F.2d at 882-83; *see* text accompanying notes 100-104 *infra*.

[68] 653 F.2d at 882-83.

[69] *See* text accompanying notes 70-84 *infra*.

[70] *See* 28 U.S.C. § 1330 (1976); text accompanying notes 71-78 *infra*.

[71] *See* Note, *Jurisdiction and Jury Trials in Actions Against Foreign Government Owned Corporations*, 38 WASH. & LEE L. REV. 1211, 1211 & n.1 (1981) [hereinafter cited as *Jurisdiction and Jury Trials*] (traditional diversity jurisdiction over foreign government-owned corporations); text accompanying note 41 *supra* (diversity jurisdiction over foreign government-owned corporations before enactment of Immunities Act).

[72] *See* 28 U.S.C. §§ 1330, 1332 (1976); text accompanying notes 38-45 *supra*, & notes 73-77 *infra*.

[73] *See* 653 F.2d at 880-81; text accompanying notes 40-45 *supra*.

[74] *See* 28 U.S.C. § 1603 (1976). Section 1603 defines "foreign state" to include a corporate entity "a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). To come within the § 1603 definition of foreign state, however, a foreign corporation cannot also be a citizen of the United States under § 1332(c) and (d). *Id.* § 1603(b)(3).

[75] *See* 639 F.2d at 875; text accompanying note 49 *supra*. *Cf.* Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 217 (1938) (State cannot also be citizen of State for purpose of diversity jurisdiction).

tions against foreign states and their instrumentalities, Congress had no reason to preserve an alternative jurisdictional basis under section 1332.[76] In addition, the legislative history of the Immunities Act indicates that Congress considered diversity jurisdiction over foreign states and foreign government-owned corporations superfluous after enactment of section 1330.[77] Since statutory language and legislative history of a statute control a court's interpretation of legislative intent, the Fourth Circuit properly concluded that Congress intended to extinguish diversity jurisdiction over foreign states as broadly defined in section 1603.[78]

Similarly, the language and legislative history of section 1441(d) support the *Williams* court's holding that the Immunities Act bars jury trials against foreign government-owned corporations. Section 1441(d) states that actions removed from a state court will be tried in the federal district court without a jury.[79] The legislative history of the Immunities Act expresses Congress' recognition that removal of actions under section 1441(d) extinguishes a jury trial demand made in state court.[80] In addition, the legislative history suggests that Congress intended actions removed by a foreign state or its instrumentalities to be tried without a jury to insure uniformity of decision.[81] Since the commercial activities of foreign states and their agencies often have political implications, actions against foreign sovereigns or their instrumentalities frequently involve a sensitive combination of political and legal considerations.[82] Congress observed that uniformity of decision would

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[76] *See* Williams v. Shipping Corp. of India, 653 F.2d 875, 881 (4th Cir. 1981); Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872, 878 (2d Cir. 1981). In *Ruggiero*, the Second Circuit reasoned that the Immunities Act created a new type of jurisdiction applying exclusively to actions against foreign states and their instrumentalities. 639 F.2d at 876. The Second Circuit concluded that the jurisdictional provisions of the Immunities Act apply exclusively to all actions against foreign states and bar jury trials even if an action meets the technical requirements of one of the other jurisdictional categories. *Id.*

[77] *See* House Report, *supra* note 37, at 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6613. Discussing the deletion of "foreign states" from § 1332(a)(2) and (3), the House Report noted that the comprehensive jurisdictional scheme in § 1330 eliminated the need for diversity jurisdiction over foreign states. House Report, *supra* note 37, at 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6613; *see* Senate Report, *supra* note 37, at 13-14.

[78] *See, e.g.*, American Medical Ass'n v. United States, 317 U.S. 519, 535 (1943) (legislative intent determined primarily from statutory language); United States v. N. E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 53-55 (1942) (interpretation of legislative intent derived from statutory language and purpose); McClain v. Commissioner, 311 U.S. 527, 530 (1941) (language and legislative history control statutory construction).

[79] 28 U.S.C. § 1441(d) (1976); *see* note 12 *supra*.

[80] *See* House Report, *supra* note 37, at 32-33, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6631-32; Senate Report, *supra* note 37, at 32.

[81] See House Report, *supra* note 37, at 32, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6631; Senate Report, *supra* note 37, at 32.

[82] *See Foreign Sovereign*, *supra* note 48, at 530, 535.

mitigate the sensitivity of suits against foreign states.[83] To circumvent potential problems of disparate treatment by state courts, Congress added section 1441(d) to require that actions against foreign states and their instrumentalities be tried in a federal forum by a judge without a jury.[84]

Other circuit court decisions considering the scope of the jurisdictional provisions of the Immunities Act also provide persuasive support for the Fourth Circuit's holding in *Williams*.[85] After thoroughly examining the language and legislative history of the Immunities Act, circuit courts generally have concluded that Congress intended the Immunities Act to provide the exclusive source of jurisdiction over actions against foreign states as broadly defined by the Immunities Act.[86] Similarly, several district court decisions have interpreted the jurisdictional sections of the Immunities Act to supersede other bases of jurisdiction over foreign states and their instrumentalities.[87] Although some district courts have upheld jury trial demands against foreign sovereigns by permitting alternative sources of jurisdiction,[88] no federal district court

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[83] *See* House Report, *supra* note 37, at 32, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6631 (sensitive nature of actions against foreign sovereigns requires uniformity among judicial decisions); Senate Report, *supra* note 37, at 52 (sensitive foreign relations favor uniformity of decision); Dellapenna, *supra* note 2, at 497 (uniformity desirable because of sensitive foreign policy considerations); *Foreign Sovereign, supra* note 48, at 535 (lack of uniformity may have adverse foreign relations effect).

[84] *See* House Report, *supra* note 37, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611-12, 6632; Senate Report, *supra* note 37, at 11-12, 32; text accompanying notes 105-109 *infra* (policy considerations favoring denial of jury trial in actions against foreign states).

[85] *See* Rex v. Cia. Pervana De Vapores, 660 F.2d 61, 62-69 (3rd Cir. 1981); Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872, 873-81 (2d Cir. 1981).

[86] *See* Rex v. Cia. Pervana De Vapores, 660 F.2d 61, 62-69 (3rd Cir. 1981); Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872, 873-81 (2d Cir. 1981). In *Ruggiero*, the Second Circuit rejected § 1332(a)(2) diversity jurisdiction as an alternative jurisdictional source to the Immunities Act. 639 F.2d at 875; *see* text accompanying notes 46-50 *supra*. Similarly, after *Williams*, the Third Circuit in *Rex* refused to base jurisdiction over a foreign government-owned corporation on § 1331 federal question jurisdiction. 660 F.2d at 64-65. Plaintiff in *Rex* filed suit for damages under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1976) and demanded a jury trial, alleging both diversity of citizenship jurisdiction under § 1332(a)(2) and federal question jurisdiction under § 1331. 660 F.2d at 62. Examining the *Ruggiero* and *Williams* decisions and the statutory language and legislative history of the Immunities Act, the Third Circuit concluded that the Immunities Act eliminated both diversity jurisdiction and federal question jurisdiction over foreign government-owned corporations. *See id.* at 62-65.

[87] *See, e.g.*, Goar v. Compania Peruana de Vapores, 510 F. Supp. 737, 738 (E.D. La. 1981) (jury trial demand denied in personal injury suit against foreign government-owned corporation because jurisdiction based upon § 1330); Herman v. El Al Israel Airlines, Ltd., 502 F. Supp. 277, 279 (S.D.N.Y. 1980) (no alternative jurisdictional basis for action removed under § 1441(d)); Jones v. Shipping Corp. of India, Ltd., 941 F. Supp. 1260, 1261-62 (E.D. Va. 1980) (no right to jury trial where jurisdiction over foreign government-owned shipping corporation rested on § 1330).

[88] *See, e.g.*, Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 75 (D. Md. 1980) (jury trial granted under § 1332(a)(2) diversity jurisdiction in action against government-owned

decision supports jury trials in an action removed from a state court.[89] Several district courts noted that section 1441(d) expressly precludes a jury trial in any action removed to federal court from a state court.[90] In addition, the district courts adopting an alternative basis of jurisdiction indicated that their rationale was to avoid constitutional issues arising from section 1330's denial of a jury trial.[91] The *Williams* court, however, could not avoid the constitutional question since removal of actions against foreign states under section 1441(d) specifically bars jury trials.[92]

In addressing Williams' seventh amendment argument, the Fourth Circuit noted correctly that the seventh amendment does not require a jury trial where none was required at common law.[93] Several Supreme Court cases have interpreted "suits at common law" to include actions involving rights analogous to legal rights recognized at common law.[94] The Supreme Court holds consistently, however, that the seventh amendment applies only to defendants suable at common law.[95] Since foreign sovereigns were not suable under the common law, no right to a

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shipping company); Lonon v. Companhia De Navegacao Lloyd Basiliero, 85 F.R.D. 71, 73 (E.D. Pa. 1979) (jury trial demand granted under § 1332(a)(2) diversity jurisdiction in personal injury action against foreign government-owned corporation); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 37 (D.D.C. 1979) (jury trial requests granted under § 1332(a)(2) diversity jurisdiction in wrongful death actions against foreign government-owned airline). *Williams* specifically relied upon the reasoning of *Icenogle*. *See* Williams v. Shipping Corp. of India, 653 F.2d 875, 880 (4th Cir. 1981). The *Icenogle* court reasoned that Congress intended to preserve § 1332(a)(2) as a jurisdictional avenue against foreign government-owned corporations since the Immunities Act retained the reference to citizens or subjects of a foreign state while deleting reference to foreign states. *See* 82 F.R.D. at 37-38.

[89] *See, e.g.*, Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 72 (D. Md. 1980) (action originally filed in federal district court); Lonon v. Companhia De Navegacao Lloyd Basiliero, 85 F.R.D. 71, 72 (E.D. Pa. 1979) (suit filed in federal district court); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 37 (D.C. 1979) (case originally filed in federal court).

[90] *See e.g.*, Herman v. El Al Israel Airlines, Ltd., 502 F. Supp. 277, 279 & n.4, 280 (S.D.N.Y. 1980) (recognizing § 1441(d), which expressly bars jury trials, as exclusive source of jurisdiction in actions removed by foreign states); Lonon v. Companhia De Navegacao Lloyd Basiliero, 85 F.R.D. 71, 73 (E.D. Pa. 1979) (no right to jury trial in actions removed to federal court under § 1441(d)); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 39 & n.7 (D.D.C. 1979) (§ 1441(d) requires nonjury trial in actions removed from state court).

[91] *See, e.g.*, Lonon v. Companhia De Navegacao Lloyd Basiliero, 85 F.R.D. 71, 73 (E.D. Pa. 1979) (no need to consider seventh amendment issue where § 1332(a)(2) permits jury trial); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 39-40 (jurisdiction under § 1332(a)(2) avoids inquiry into constitutionality of jurisdictional provisions of Immunities Act barring jury trial).

[92] *See* 653 F.2d at 881-83; text accompanying notes 57-68 *supra*.

[93] *See* U.S. CONST. amend. VII; text accompanying notes 57-68 *supra*.

[94] *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 375-76 (1974); Curtis v. Loether, 415 U.S. 189, 193-95 (1974); Parsons v. Bedford, 28 U.S. [3 Pet.] 444, 446-47 (1830); text accompanying note 59 *supra*.

[95] *See, e.g.*, Lehman v. Nakshian, 101 S. Ct. 2692, 2702 n.9 (1981); Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962); Galloway v. United States, 319 U.S. 372, 388 (1943); McElrath v. United States, 102 U.S. 426, 440 (1980); text accompanying notes 61-64 *supra*.

jury trial against a foreign sovereign existed in 1791.[96] The issue whether immunity extended to foreign government-owned corporations never arose because such entities did not exist at the time of the seventh amendment's adoption.[97] Since the absolute theory of foreign sovereign immunity did not distinguish between public and commercial acts of foreign governments, foreign sovereign immunity arguably would have extended to government-owned corporations.[98] Therefore, the *Williams* court's conclusion that no right to a jury trial against a foreign government-owned corporation existed at common law appears sound.[99]

Moreover, the Supreme Court repeatedly upholds the denial of jury trials in suits against the United States on the ground that suits against the sovereign did not exist at common law in in 1791.[100] Similarly, suits against foreign sovereigns were unknown in 1791.[101] Although foreign sovereign immunity rests upon principles different from domestic sovereign immunity, the power of Congress to declare immunity exists in both situations.[102] Congress possesses authority to confer absolute sovereign immunity on foreign states and instrumentalities.[103] In light of Congress' authority to exempt foreign states and instrumentalities from all liability, Congress arguably possesses authority to restrict the immunity of foreign states by permitting actions against foreign states, subject to procedural limitations.[104]

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[96] *See* text accompanying notes 1 & 2, 62 *supra*.

[97] *See Jurisdiction and Jury Trials, supra* note 71, at 1223 (foreign government-owned corporations nonexistent at common law).

[98] *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 569-74 (1926). *Berizzi* involved an action against a merchant vessel owned by a foreign state. *Id.* The *Berizzi* Court concluded that the principle of foreign sovereign immunity extended to all activities pursued for a public purpose including the advancement of trade. *Id.* at 574.

[99] *See* 553 F.2d at 881-82; text accompanying notes 93-98 *supra*.

[100] *See* text accompanying notes 63-64 *supra*.

[101] *See* text accompanying notes 1 & 2, 62 *supra*.

[102] *See* Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872, 880 & n.11 (2d Cir. 1981) (different bases for domestic and foreign sovereign immunity); text accompanying note 2 *supra* (traditional bases of foreign and domestic sovereign immunity). Congress has authority under Article I, sec. 8, cl. 9 and Article III, sec. 1 of the U.S. Constitution to establish the jurisdiction of the Federal courts. *See* U.S. CONST. art. 1, § 8, cl. 9; art. III, § 1. Congress has authority to set the conditions for suits to which the United States consents. *See* United States v. Sherwood, 312 U.S. 584, 587-88 (1941).

Congressional authority for prescribing terms of suits against against foreign sovereigns flows from several sources. *See* U.S. CONST. art. I, § 8, cl. 9; art. III, § 1 (power to define jurisdiction of federal courts); U.S. CONST. art. I, § 8, cl. 3 (power to regulate commerce with foreign nations); U.S. CONST. art. I, § 8, cl. 10 (power to define offenses against "Law of Nations"); U.S. CONST. art. I, § 8, cl. 18 (power to enact all laws "necessary and proper" to carry out the powers of the United States government); House Report, *supra* note 37, at 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6611 (constitutional authority for enacting the Immunities Act).

[103] *See* The Schooner Exchange v. M'Faddon, 11 U.S. [7 Cranch] 116, 136-37 (1812) (power of host nation to exempt foreign sovereigns from jurisdiction of host sovereign).

[104] *See* Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872, 880 (2d Cir. 1981) (ability of Congress to limit immunity of foreign states and place restrictions on form of suit); note 102 *supra*.

Sound policy considerations also support the denial of jury trials in actions against foreign sovereigns and their instrumentalities. A lack of uniform treatment of foreign states or their instrumentalities by United States courts could have an adverse impact on foreign relations.[105] Foreign states with legal systems which do not employ jury trials might object to trial by jury in the United States.[106] In addition, national prejudice or hostility toward a particular foreign nation is more likely to influence a jury than a judge.[107] Finally, the possibility exists that juries will award excessive damages when confronted with the "deep pocket" of a foreign sovereign defendant.[108] Thus, rational policy considerations support the Fourth Circuit's holding in *Williams*.[109]

The Fourth Circuit's decision in *Williams v. Shipping Corporation of India* evidences a trend among the federal circuit courts to uphold section 1330 as the exclusive jurisdictional basis for actions against foreign states and their instrumentalities and to deny jury trials in all such actions.[110] While other federal courts may adopt an alternative jurisdiction approach, acceptance of alternative jurisdictional avenues to the Immunities Act appears unlikely in light of circuit court precedent.[111] The Fourth Circuit's thorough analysis of the statutory language and legislative history of the Immunities Act demonstrates that Congress did not intend to preserve alternative sources of jurisdiction over foreign government-owned corporations.[112] After *Williams*, actions brought in the Fourth Circuit against a foreign state or its instrumentalities will be tried without a jury, whether the action originates in federal district court or is removed to federal court from a state court.[113]

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[105] *See* text accompanying notes 82-84 *supra*.

[106] *See* Ruggiero v. Compania Peruana De Vapores, 639 F.2d at 880 (2d Cir. 1981).

[107] *See id.* at 880 & n.12; *Jurisdiction and Jury Trials*, *supra* note 71, at 1221. Most foreign countries do not use a civil jury. 639 F.2d at 880. Although some foreign states might object to trial by jury, the *Ruggiero* court reasoned that most foreign nations may be less likely to object to trial by a judge in commercial cases since the United States government is subject to similar procedures in commercial actions. *Id.*

[108] *See* 639 F.2d at 880 & n.12; *Jurisdiction and Jury Trials*, *supra* note 71, at 1221.

[109] *See* 639 F.2d at 880; *Foreign Sovereign*, *supra* note 48, at 526. A traditional justification for the United States' refusal to submit to a jury trial is the fear that juries will award excessive judgments. *See* 639 F.2d at 880; *Foreign Sovereign*, *supra* note 48, at 526.

[110] *See* text accompanying notes 85 & 86 *supra*.

[111] *See* text accompanying notes 85 & 86, 91 *supra*. Since the seventh amendment right to a jury trial is a fundamental right, constitutional challenges to the jurisdictional provisions may continue. *See* Dellapenna, *supra* note 2, at 500-01 (since jury trial basic right, controversy over nonjury provisions of Immunities Act may require Supreme Court resolution). *But see* text accompanying notes 85-87 *supra* (circuit and district court precedent holding Immunities Act exclusive source of jurisdiction over foreign government-owned corporations).

[112] *See* text accompanying notes 70-84 *supra*.

[113] *See* text accompanying note 56 *supra*.

### C. *The* Younger *Doctrine Applied to an Administrative Decision Pending in State Court*

Congress long has limited the extent to which federal courts can interfere with state judicial proceedings.[1] Since 1793, an anti-injunction statute, codified at section 2283 of Title 28 of the United States Code, has barred the granting of federal injunctions to stay state proceedings.[2] Section 1983 of the Civil Rights Act of 1871[3] falls under an express exception to section 2283 and provides an independent cause of action that permits federal injunctive relief to prevent the deprivation of federal rights by state action.[4] Although section 1983 permits federal injunctive relief, a federal court will not interfere with state court proceedings unless the proceeding fails to meet the principles formulated by the Supreme Court in *Younger v. Harris*.[5] The Supreme Court principles,

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[1] Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, *as amended*, ch. 646, § 2283, 62 Stat. 968 (1948) (codified at 28 U.S.C. § 2283 (1976)). Section 2283 provides that a federal court may not stay a state court proceeding by granting an injunction unless the injunction is authorized by an act of Congress, is necessary for the federal court's jurisdiction, or protects or makes effective the federal court's judgments. *Id.*; *see* Younger v. Harris, 401 U.S. 37, 43 (1971) (discussion of § 2283); Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 7-9 (1940) (§ 2283 bars indirect stays of state proceedings by injunctions directed at parties rather than court itself).

[2] *See* 28 U.S.C. § 2283 (1976); note 1 *supra* (discussion of § 2283).

[3] Pub. L. No. 96-170, 93 Stat. 1284 (1979) (codified at 42 U.S.C. § 1983 (Supp. III 1979)). Section 1983 is the recodification of a portion of the Civil Rights Act of 1871. *Id.*; *See* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 131. The section provides a cause of action in law or in equity against a person who deprives another person of any rights provided by the Constitution and laws of the United States. 42 U.S.C. § 1983 (Supp. III 1979).

[4] Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (§ 1983 falls under the authorized expressly by act of Congress exception to § 2283); *see* Rizzo v. Goode, 423 U.S. 362, 379 (1976) (§ 1983 actions within exceptions to § 2283); Huffman v. Pursue, Ltd., 420 U.S. 592, 600 n.15 (1975) (§ 2283 does not apply since federal cause of action exists under § 1983); Comment, *Closing the Courthouse Door: The Expanding Rationale of* Younger *Abstention*, 19 B.C. L. REV. 699, 707-08 (1978) (§ 1983 an exception to § 2283) [hereinafter cited as *Closing the Courthouse Door*].

[5] 401 U.S. 37, 54 (1971). The Supreme Court applied the *Younger* principles to five other cases decided on the same day as *Younger*. *See* Byrne v. Karalexis, 401 U.S. 216, 220 (1971); Dyson v. Stein, 401 U.S. 200, 202-03 (1971); Perez v. Ledesma, 401 U.S. 82, 84 (1971); Boyle v. Landry, 401 U.S. 77, 81 (1971); Samuels v. Mackell, 401 U.S. 66, 68-69 (1971).

In *Younger*, the state of California was prosecuting Harris for violation of the California Criminal Syndicalism Act. 401 U.S. at 38. Harris filed a complaint in federal district court asking the court to enjoin the state prosecution. *Id.* at 38-39. Harris alleged that the prosecution and the presence of the Syndicalism Act inhibited the exercise of his rights of free speech and press, rights as guaranteed by the first and fourteenth amendments. *Id.* The Supreme Court recognized a longstanding public policy against federal court interference with pending state court proceedings. 401 U.S. at 43. The Court based the source of the public policy on the principles of equity, comity, and federalism. *Id.* The Supreme Court noted that courts of equity should not act when a remedy at law exists and when the complaining party will not suffer irreparable injury if denied equitable relief. *Id.* at 43-44. The *Younger* court acknowledged that the purpose of the equity principle was to prevent

known as the *Younger* doctrine, require a federal court to apply equitable principles and dismiss an action that seeks relief also available in a pending state proceeding.[6] For example, the Supreme Court has interpreted *Younger* to provide that a federal court may not intervene by way of injunction,[7] or declaratory judgment[8] in a pending state criminal proceeding,[9] a quasi-criminal proceeding,[10] a state civil contempt proceeding,[11] or a civil enforcement action brought by a state in its sovereign capacity.[12]

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erosion of the role of the jury and to prevent duplicate legal proceedings when one suit would adequately protect the asserted rights. *Id.* at 44. The Court defined comity as a proper respect for state function and a belief that it is in the national government's best interest that the federal courts accord respect to the separate functioning of the state. *Id.* Lastly, the *Younger* court found that federalism supported a policy of abstention through which the national government endeavors to protect federal rights without interfering with the legitimate activities of the states. *Id.*

[6] Younger v. Harris, 401 U.S. 37, 54 (1971); Laycock, *Federal Interference With State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194 (discussion of *Younger* doctrine); *Closing the Courthouse Door*, *supra* note 4, at 701 (discussion of *Younger* doctrine); *see* note 5 *supra* (discussion of *Younger*).

[7] 401 U.S. at 41.

[8] Samuels v. Mackell, 401 U.S. 66, 72-73 (1971). In *Samuels*, the Supreme Court held declaratory relief impermissible when a state criminal prosecution is pending at the time of the federal suit's initiation. *Id.* at 72-73. The *Samuels* Court noted that declaratory judgments issued during pending state proceedings may serve as a basis for a subsequent injunction against the pending state proceeding to protect the declaratory judgment. *Id.* The Court relied on the Declaratory Judgment Act, 28 U.S.C. § 2202 (1976), which provides that after a federal court issues a declaratory judgment the district court may enforce it by granting further relief. 401 U.S. at 72-73. In addition, the Supreme Court found that a declaratory judgment in effect has the same degree of interference with state proceedings as do injunctions. *Id.* The Court observed, however, that under unusual circumstances the declaratory judgment might be appropriate when the plaintiff has a strong claim for relief but the injunction is withheld because it is particularly offensive or intrusive. *Id.* at 73.

[9] Younger v. Harris, 401 U.S. at 46; *see* note 5 *supra* (discussion of *Younger*).

[10] Huffman v. Pursue, Ltd., 420 U.S. 592, 603-07 (1975). In *Huffman*, the Supreme Court applied the *Younger* abstention doctrine to a civil proceeding that was in aid of and closely related to a criminal statute. *Id.* at 604; *see* Younger v. Harris, 401 U.S. at 54; note 5 *supra* (discussion of *Younger*); note 46 *infra* (discussion of *Huffman*).

[11] Juidice v. Vail, 430 U.S. 327, 335-36 (1977). In *Juidice*, the Supreme Court held that the *Younger* principles apply to a case that involves a state's comtempt process. *Id.* at 335; *see* 401 U.S. at 54; note 5 *supra* (discussion of *Younger*). The *Juidice* Court reasoned that the State's interest in the contempt process is equal to its interest in a criminal proceeding. *Id.* at 335-36. The Supreme Court noted that interference with the contempt process, through which the state vindicates the regular operation of its judicial process, could easily lead to a negative relfection on the state court's ability to enforce constitutional principles. *Id.* at 336. The *Juidice* Court did not consider the question of the applicability of *Younger* to all civil litigation, thus implying that the Supreme Court would not apply *Younger* to all civil proceedings. *Id.* at 336 n.13.

[12] Trainor v. Hernandez, 431 U.S. 434, 444 (1977). In *Trainor*, the Supreme Court held that the principles of *Younger* and *Huffman* apply to federal court interference with an ongoing civil enforcement proceeding brought by the state in its sovereign capacity. *Id.*; *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 603-07 (1975); 401 U.S. at 54; notes 5 & 10 *supra*

In *Younger* the Supreme Court permitted federal intervention under extraordinary circumstances when the danger of irreparable loss is serious and immediate.[13] Extraordinary circumstances exist when the state conducts a proceeding in bad faith or for purposes of harassment, or when the state flagrantly and patently violates express constitutional prohibitions in its application of a statute to a criminal proceeding.[14] Irreparable loss occurs only when the plaintiff's defense against a single prosecution cannot eliminate the threat to his federal rights.[15] In *Simopoulos v. Virginia State Board of Medicine*,[16] the Fourth Circuit examined whether the *Younger* doctrine proscribes the maintenance of an action for declaratory and injunctive relief while a criminal and a civil case are pending in state courts.[17]

The Commonwealth of Virginia arrested Dr. Simopoulos in November of 1979 for violating a Virginia abortion statute.[18] The arrest warrant

(discussion of *Huffman* and *Younger*). In *Trainor*, the State was a party in a suit brought to vindicate important state policies such as safeguarding the fiscal integrity of its public assistance programs. 431 U.S. at 444. The *Trainor* Court noted that a state acts in its sovereign capacity when it acts to vindicate state policy. *Id.*

[13] Younger v. Harris, 401 U.S. at 45-46. Traditionally, showing irreparable injury is important to obtain an injunction. Therefore, the *Younger* irreparable injury requirement is not entirely new. *See id.*; Kugler v. Helfant, 421 U.S. 117, 124-25 (1975) (federal intervention not warranted because circumstances were not extraordinarily nor was danger of irreparable loss great and immediate); Annot., 44 L.Ed. 2d 692 (1976) (discussion of *Younger* doctrine and its exceptions).

[14] Younger v. Harris, 401 U.S. at 53-54. In *Younger*, the Supreme Court stated that an extraordinary circumstance exists if, for example, a statute flagrantly and patently violates express constitutional prohibitons in every clause, sentence, and paragraph, and in whatever and against whomever a court might apply the statute. *Id.* (citing Watson v. Buck, 313 U.S. 387, 402 (1941); *see* Kugler v. Helfant, 421 U.S. 117, 124-25 (1975) (circumstances must be extraordinary in sense of creating extraordinarily pressing need for immediate federal equitable relief, not merely in sense of presenting highly unusual factual situation); Gibson v. Berryhill, 411 U.S. 564, 573-74 (1973) (federal court may intervene only in presence of special circumstances suggesting bad faith, harassment, or irreparable injury that is both serious and immediate); Roe v. Wade, 410 U.S. 113, 124 (1973) (absent harassment and bad faith, defendant in pending state criminal case cannot affirmatively challenge in federal court statutes under which the state prosecutes him); Mitchum v. Foster, 407 U.S. 225, 230-31 (1972) (exceptional circumstances occur when irreparable injury is both great and immediate, state law is flagrantly and patently violative of express constitutional prohibitions, and when showing of bad faith, harassment, or other unusual circumstances exists); Perez v. Ledesma, 401 U.S. 82, 85 (1971) (extraordinary circumstances exist in cases of proven harassment, prosecutions undertaken in bad faith without hope of obtaining a valid conviction and other exceptional circumstances when irreparable injury can be shown).

[15] Younger v. Harris, 401 U.S. at 46; *see* Kugler v. Helfant, 421 U.S. 117, 124 (1975) (cost, anxiety, and inconvenience of having to defend against single criminal prosecution does not constitute irreparable injury).

[16] 644 F.2d 321 (4th Cir. 1981).

[17] *Id.* at 323. The dissent thus concluded that *Scruggs* does not involve the procedural due process claims present in *Simopoulos*. 644 F.2d at 336 (Butzner, J., dissenting); *see* 630 F.2d at 239.

[18] *Id.* at 322; VA. CODE § 18.2-73 (1975). Section 18.2-73 provides that a licensed physician may perform a lawful abortion during a second trimester of pregnancy only if the physician performs the abortion in a hospital licensed by the State Department of Health or under the control of the State Board of Mental Health and Retardation. *Id.*

alleged that Simopoulos performed an unlawful abortion on a minor.[19] The state court delayed the preliminary hearing at Simopoulos' request.[20] During the delay, Simopoulos instituted a section 1983 action in a federal district court to enjoin prosecution under the arrest warrant and any other prosecutions under the abortion statute.[21] Simopoulos brought the section 1983 action to challenge the constitutionality of the statute.[22] The district court applied the *Younger* doctrine to dismiss the doctor's action, holding that to decide the constitutional question would interfere with the state's prosecution.[23] Simopoulos appealed the district court's dismissal to the Fourth Circuit and sought a temporary injunction against state prosecution pending hearing of the appeal.[24] The Fourth Circuit denied the request for injunctive relief and subsequently dismissed the appeal.[25] Consequently, the state circuit court convicted and sentenced Simopoulos for violating the state's abortion statute.[26] The doctor appealed the decision to the Virginia Supreme Court.[27]

Upon certification of the conviction, the Virginia State Board of Medicine revoked Dr. Simopoulos' license to practice pursuant to the Virginia license suspension statute.[28] Simopoulos applied for reinstate-

[19] 644 F.2d at 322. The state charged Simopoulos with performing an abortion on a minor during the second trimester of pregnancy outside a hospital licensed as required by the Virginia abortion statute. 644 F.2d at 322; *see* note 18 *supra* (abortion statute provision).

[20] 644 F.2d at 322.

[21] *Id.*; *see* 42 U.S.C. § 1983 (Supp. III 1979).

[22] 644 F.2d at 322. In *Simopoulos*, Simopoulos brought the § 1983 suit on the ground that the Virginia abortion statute, VA. CODE § 18.2-73 on which the Commonwealth of Virginia based its prosecution, was unconstitutional. *Id.* The doctor asserted that application of the statute was unconstitutional because it was administered in conjunction with hospital rules that required parental consent for a minor's abortion. *Id.* at 332 n.1 (Butzner, J. dissenting); *see* Planned Parenthood Ass'n of Kansas City v. Ashcroft, 483 F. Supp. 679, 687 (W.D. Mo. 1980) (in-hospital requirement unconstitutional because it gave parents of women under eighteen absolute and possibly arbitrary veto over her abortion). *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (statutes unqualifiedly imposing provisions for parental consent are unconstitutional).

[23] 644 F.2d at 322.

[24] *Id.*

[25] *Id.*

[26] *Id.* The *Simopoulos* state circuit court convicted the doctor without a jury and sentenced him to two years imprisonment suspended for good behavior upon the condition that he serve 30 days in jail. Simopoulos v. Commonwealth, 221 Va. 1059, 1062, 277 S.E.2d 194, 196 (1981).

[27] 644 F.2d at 322. At the time the Fourth Circuit published the *Simopoulos* opinion, Dr. Simopoulos' appeal of his state circuit court criminal conviction was pending before the Virginia Supreme Court, which subsequently affirmed the doctor's conviction. Simopoulos v. Commonwealth, 221 Va. 1059, 1077, 277 S.E.2d 194, 205 (1981).

[28] 644 F.2d at 322; VA. CODE § 54-321.2 (Supp. 1981). Section 54-321.2 provides that the Board of Medicine will suspend or revoke a physician's license to practice medicine without a hearing upon conviction of a felony. *Id.* Section 54-316(3) provides that the Board may suspend or revoke a physician's license indefinitely if it finds the physician guilty of unprofessional conduct. VA. CODE § 54-316(3) (Supp. 1981). Section 54-317(1) provides that a physician is guilty of unprofessional conduct if he performs a criminal abortion. VA. CODE § 54-317(1) (Supp. 1981). Section 54-321.2 provides that when the Board of Medicine suspends a physician's license under § 54-321.2, the physician may apply to the Board for reinstatement of his

ment of his license before the Board of Medicine, seeking a termination or stay of the revocation pending appeal of his criminal conviction.[29] The Board of Medicine scheduled a hearing to occur in 56 days to consider his application.[30] The Board of Medicine subsequently heard Simopoulos' application regarding revocation of his license.[31] The Board denied the application without disclosing the basis for its decision.[32] Simopoulos appealed the denial of his application to the state circuit court.[33]

During the 56 day interim prior to the hearing before the Board of Medicine, Simopoulos had filed another section 1983 action in the federal district court in which he had asked for declaratory judgments that the Virginia abortion statute and the Virginia license suspension statute were unconstitutional in violation of the due process and equal protection clauses and of the right to privacy implied in the fourteenth amendment.[34] In addition, Simopoulos asked for injunctive relief, both preliminary and permanent, to restore his license to practice medicine and reinstate his previous hospital staff memberships.[35] The district court, however, dismissed the doctor's section 1983 action, abstaining from consideration of Simopoulos' attack on the constitutionality of the Virginia abortion statute.[36] Moreover, the district court found that the Virginia license suspension statute was reasonable on its face and that the doctor could apply for a hearing before the Board of Medicine if he felt aggrieved at the suspension of his license.[37] Simopoulos appealed to the Fourth Circuit.[38]

On appeal, the Fourth Circuit determined whether a federal court

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license. VA. CODE § 54-312.2 (Supp. 1981). Upon application the Board will provide a hearing at the Board meeting that takes place 10 days after receipt of the application. *Id.* The Board must formally record its proceedings. *Id.*; *see* text accompanying notes 32 & 68 *infra* (*Simopoulos* Board did not record proceedings). A physician may appeal any action of the Board to the circuit court of the county, or the circuit court or corporation court of the city that has jurisdiction over the physician. VA. CODE § 54-320 (1978).

[29] 644 F.2d at 322; *see* note 28 *supra* (hearing subsequent to license suspension).

[30] 644 F.2d at 322.

[31] *Id.* at 323.

[32] *Id.*; *id.* at 333 (Butzner, J., dissenting).

[33] 644 F.2d at 323. In *Simopoulos*, the plaintiff based his appeal in the state circuit court on a claim of inconsistencies between the Board of Medicine's hearing and the requirements of the Virginia Administration Process Act (VAPA). *Id.*; *see* VA. CODE §§ 9-6.14:1 to 20 (1978). Under § 9-6.14:3(A), the VAPA does not, however, supersede or repeal additional procedural requirements in present and future basic laws conferring authority on agencies to make regulations or decide cases. VA. CODE § 9-6.14:3(A) (1978).

[34] 644 F.2d at 322-23; *see* U.S. CONST. amend. XIV.

[35] *Id.* at 323.

[36] *Id.*; *see* VA. CODE § 18.2-73 (1975); note 22 *supra* (constitutional attack on abortion statute).

[37] 644 F.2d at 323; *see* VA. CODE § 54-321.2 (Supp. 1981); note 28 *supra* (discussion of license suspension statute). The *Simopoulos* district court relied on Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174, 180 (4th Cir. 1974), to find the Virginia license suspension statute reasonable on its face. 644 F.2d at 323. The *Christhilf* court held that due process does not always require a hearing. 496 F.2d at 180.

[38] 644 F.2d at 323.

could grant injunctive relief under due process considerations when a civil case, Simopoulos' license suspension action, is pending in a state court.[39] In addition, the *Simopoulos* court decided whether declaratory relief regarding the constitutionality of the state criminal abortion statute is proper when an appeal is pending in a state court.[40] The Fourth Circuit affirmed the district court's dismissal of the section 1983 action for both declaratory and injunctive relief.[41] The court left redress of Simopoulos' rights, whether state or federal, to his two pending state appeals.[42]

The *Simopoulos* court first examined judicial precedent regarding the development of the *Younger* doctrine.[43] The Fourth Circuit acknowledged that the Supreme Court in *Younger* had dealt only with abstention from federal interference pending a state criminal proceeding.[44] The court recognized, however, that the *Younger* court indicated that the principles that governed abstention from state criminal proceedings also might apply to abstention from certain state civil proceedings.[45] The *Simopoulos* court found that in a Supreme Court decision subsequent to the *Younger* decision, the Court extended the *Younger* doctrine to state civil proceedings involving the state as a party and

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[39] *Id.* at 323, 329. In *Simopoulos*, the appellant claimed that his appeal before the Fourth Circuit involved questions of federal law that were separate and distinct from the issues he would raise in the state circuit court. 644 F.2d at 323. The Fourth Circuit held that an attempt to limit state appeals to state issues and federal appeals to federal issues was contrary to previous federal court rulings. *Id.* at 323 n.4; *see* Moore v. Sims, 442 U.S. 415, 426-27 n.10 (1979) (*Younger* should not apply to some claims while others are left to federal forum); Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (state court decides both state and federal issues in action unless state tribunal is not competent to resolve federal issues); Scruggs v. Campbell, 630 F.2d 237, 239 (4th Cir. 1980) (state court appropriate forum for litigation of all issues arising out of controvery).

[40] 644 F.2d at 323, 329.

[41] *Id.* at 331.

[42] *Id.*; *see* text accompanying notes 26-27, 31-33 *supra* (*Simopoulos* state court actions).

[43] 644 F.2d at 323-24.

[44] *Id.* at 324. In *Simopoulos*, the Fourth Circuit maintained that under the *Younger* doctrine a federal court must apply equitable estoppel and dismiss an action seeking relief also available in a pending state proceeding. *Id.* The Fourth Circuit used the term equitable estoppel to mean that the principles of equity, comity and federalism estop federal courts from hearing an action that is pending in a state court. *Id.*; *see* Younger v. Harris, 401 U.S. at 54. Historically, the doctrine of equitable estoppel means that a party who misrepresents an existing fact upon which the other party justifiably relies to his detriment is estopped from denying his claim to the detriment of the other party. Carruthers v. Whitney, 56 Wash. 327, ____, 105 P. 831, 833 (1909); *see* Rothschild v. Title Guar. & Trust Co., 204 N.Y. 458, ____, 97 N.E. 879, 881 (1912) (equitable estoppel prevents persons from asserting rights that would work an injustice).

[45] 644 F.2d at 324-25; *see* Younger v. Harris, 401 U.S. at 45. In *Younger*, Justice Black, without distinguishing between criminal and civil state proceedings, observed that federal courts repeatedly refuse to enjoin pending state proceedings. *Id.*; *see* Cousins v. Wigoda, 409 U.S. 1201, 1206 (1972) (Court implied that courts should not enjoin pending criminal or civil state proceedings); Lynch v. Snepp, 472 F.2d 769, 773 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) (*Younger* doctrine should not turn on whether pending state proceeding was criminal or civil).

operating to further compliance with a state's criminal laws.[46] The *Simopoulos* court noted that the Court in subsequent decisions broadened the application of the *Younger* doctrine from quasi-criminal proceedings to civil proceedings in which the state was a party.[47] The Fourth Circuit, therefore, concluded that the *Younger* doctrine applied to the *Simopoulos* license suspension proceeding because the state was a party and the suspension furthered compliance with Virginia's abortion laws.[48]

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[46] 644 F.2d at 325; *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975). In *Huffman*, the lessee of a theater brought an action for injunctive declaratory relief challenging the constitutionality of an Ohio nuisance statute. *Id.* at 598. The County Court of Common Pleas ordered Pursue, Ltd. to close its theater for displaying obscene movies in violation of the nuisance statute. *Id.* Pursue brought suit in federal district court rather than appealing the county court judgment within the Ohio court system. *Id.*

The *Huffman* Court noted that the State was a party to the Court of Common Pleas proceeding, and the proceeding was both in aid of and closely related to criminal statutes that prohibit dissemination of obscene materials. *Id.* at 604. The Court observed that federal interference with a state judicial proceeding resulted in a duplication of judicial proceedings and could easily be a negative reflection on the state court's ability to decide constitutional issues. *Id.* The Supreme Court concluded that the federalism basis of *Younger* was equally applicable to *Huffman*-type civil proceedings as well as to criminal proceedings. *Id.* at 604-05; *see* note 5 *supra* (discussing *Younger* principles). The *Huffman* court also determined that, concomitant to *Younger*, a party must exhaust its state appellate remedies before seeking relief in federal court, unless the party can bring its action within a *Younger* exception. *Id.* at 608; *see* text accompanying notes 13-15 *supra* (discussing *Younger* exceptions). The *Huffman* Court refused to make general pronouncements upon the applicability of *Younger* to all civil litigation. *Id.* at 607.

[47] 644 F.2d at 325-26. *See* Moore v. Sims, 442 U.S. 415, 423 (1979) (*Younger* abstention applied to civil case in which State was a party); Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (Court applied *Younger* doctrine to civil proceeding in which State is party and State is interested in protecting public programs); Juidice v. Vail, 430 U.S. 327, 335-37 (1977) (Court held that *Younger* principles applied to civil case that dealt with State's contempt process).

Despite the clear trend in judicial precedent to expand the *Younger* doctrine, three Supreme Court cases clarify the parameters of the doctrine. Doran v. Salem Inn, Inc., 422 U.S. 922, 928-29 (1975); Steffel v. Thompson, 415 U.S. 452, 461-62 (1974); Lake Carriers' Ass'n v. McMullan, 406 U.S. 498, 509-10 (1972). In *Lake Carriers*, the Court found that a § 1983 plaintiff did not have to initiate state proceedings that might provide a remedy if no state suit is pending when plaintiff commences a federal action. 406 U.S. at 509-10; *see* Monroe v. Pape, 365 U.S. 167, 183 (1961) (plaintiff may seek federal remedy under § 1983 even though state remedy available); *but see* Monell v. Department of Social Services, 436 U.S. 658, 663 (1978) (overruled *Monroe v. Pape* on other grounds). Moreover, in *Steffel*, the Court held that a federal court may not abstain when no state action is pending, even though the state may have threatened a state action. 415 U.S. at 461-62; *cf.* Hicks v. Miranda, 422 U.S. 332, 349 (1975) (abstention required if state suit initiated prior to federal court action on merits). In *Doran*, the Supreme Court held that the *Younger* abstention does not apply to plaintiffs merely because their interests are similar to those of parties to pending state proceedings. 422 U.S. at 928-30; *cf.* Stivers v. Minnesota, 575 F.2d 200, 203 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979) (requiring federal abstention when plaintiff's interests are similar to those of parties to pending state proceeding if party brought federal action to interfere with state proceeding).

[48] 644 F.2d at 326. The *Simopoulos* court recognized that a federal district court, in Rucker v. Wilson, 475 F. Supp. 1164, 1166 (E.D. Mich. 1979), applied the *Younger* doctrine to

After the Fourth Circuit decided that the *Younger* abstention doctrine applied to the pending license suspension proceedings, the court found that a prior Supreme Court decision foreclosed Simopoulos' attempt to secure either declaratory or injunctive relief against the Virginia abortion statute.[49] The *Simopoulos* court noted that the doctor could have challenged federal abstention only by claiming bad faith or harassment in the Virginia abortion statute's enforcement or the lack of an opportunity to raise his constitutional claim in the state forum.[50] The court found that Simopoulos made no claim of bad faith and harassment in the enforcement of the Virginia abortion statute and, therefore, the doctor could pursue his constitutional claims only in state court.[51]

Furthermore, the *Simopoulos* court relied on a Supreme Court decision, *Huffman v. Pursue, Ltd.*,[52] to hold that the Fourth Circuit should abstain from granting injunctive relief to Simopoulos regarding the revocation of his license.[53] In *Huffman*, the Supreme Court held that the *Younger* doctrine applied to civil proceedings in aid of or closely related to criminal statutes.[54] The *Simopoulos* court observed that the legislature enacted the Virginia license suspension statute in aid of and for the purpose of maintaining the standards set forth in the Virginia abortion statute and, therefore, met the *Huffman* quasi-criminal standard.[55] Although the *Simopoulos* license suspension was an administrative proceeding rather than a state court proceeding, the *Simopoulos*

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an administrative proceeding similar to the *Simopoulos* Board's proceeding. *Id.* at 327. The *Simopoulos* court noted that *Rucker* held that the *Younger* doctrine applied to administrative proceedings in which a right to appeal to state courts exists and the state is a party. *Id.* The Fourth Circuit noted, however, that the *Simopoulos* Board of Medicine's decision to revoke the doctor's license was pending in a state court. *Id.* The court, therefore, did not have to go so far as to apply *Younger* abstention to an administrative proceeding. *Id.* at 327; *see* Gibson v. Berryhill, 411 U.S. 564, 577 (1973). *Gibson* involved a § 1983 suit brought by licensed optometrists seeking injunctions to stop the Alabama Board of Optometry hearings on charges of unprofessional conduct according to the Alabama optometry statute. *Id.* at 569-70. The *Gibson* court did not apply the *Younger* abstention doctrine because the Optometry Board was biased. *Id.* at 577. The *Younger* predicate that requires the opportunity to raise the federal issues and have them decided in a timely manner by a competent state tribunal, therefore, was lacking. *Id.* The Supreme Court indicated that *Younger* would have applied to the *Gibson* administrative proceeding if the *Younger* predicate was not absent. *Id.*; *see* Younger v. Harris, 401 U.S. at 49; *cf.* Ohio Bureau of Empl. Serv. v. Hodory, 431 U.S. 471, 479-80 (1977) (since agency waived claim for abstention, Court did not have to apply *Younger* abstention).

[49] 644 F.2d at 329; *see* Roe v. Wade, 410 U.S. 113, 126 (1973) (absent harassment or bad faith, defendant in state criminal proceeding could not challenge a statute under which state was prosecuting him in federal court).

[50] 644 F.2d at 329; *see* text accompanying notes 13-15 *supra* (discussion of bad faith or harassment and *Younger* exception).

[51] 644 F.2d at 329, 331.

[52] 420 U.S. 592 (1975).

[53] 644 F.2d at 329.

[54] Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); *see* text accompanying notes 10 & 46 *supra* (discussion of *Huffman*).

[55] 644 F.2d at 329; *see* note 46 *supra* (*Huffman* quasi-criminal standard).

court recognized that federal courts have applied the *Younger* doctrine to administrative proceedings that are subject to judicial review.[56] The Fourth Circuit thus found that the *Huffman* quasi-criminal standard applied to the *Simopoulos* Board's administrative proceeding.[57] The *Simopoulos* court concluded that federal abstention became appropriate when the doctor appealed to the state circuit court even though no state suit was pending when Simopoulos filed his federal action.[58]

Dissenting in *Simopoulos*, Judge Butzner concurred with the majority's affirmance of the dismissal of Simopoulos' claim that the Virginia abortion statute was unconstitutional.[59] The dissent argued, however, that the *Younger* doctrine did not require abstention from considering the doctor's claim that the Board of Medicine revoked his license in violation of the fourteenth amendment's due process clause.[60] Judge Butzner noted that the Supreme Court has interpreted *Younger* to require, as a prerequisite for a federal court's abstention, that the opportunity be present to raise the federal issues and to have them decided in a timely manner by a state tribunal.[61] The Supreme Court long has recognized that due process includes the opportunity to be heard in a meaningful and timely manner.[62]

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[56] 644 F.2d at 329; *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); Gibson v. Berryhill, 411 U.S 564, 577 (1973) (pendency of administrative proceeding subject to broad judicial review supports *Younger* treatment); Rucker v. Wilson, 475 F. Supp. 1164, 1166 (E.D. Mich. 1979) (*Younger* doctrine applied to administrative proceeding when State is party and proceeding involves enforcement of state criminal laws); VA. CODE § 54-320 (1978) (right to appeal to state courts); note 48 *supra* (discussion of *Gibson* and *Rucker*).

[57] 644 F.2d at 329; *see* note 56 *supra* (*Younger* doctrine applied to administrative proceedings).

[58] 644 F.2d at 329-30. *See* Hicks v. Miranda, 422 U.S. 332, 349-50 (1975) (*Younger* abstention applies when a state begins criminal proceeding against plaintiff after plaintiff filed complaint in federal court but before federal court proceeded on merits); Scruggs v. Campbell, 630 F.2d 237, 239 (4th Cir. 1980) (although no state suit pending when plaintiff filed federal action, federal abstention correct because federal court had conducted no proceedings on merits of claim when school board sought review of administrative decision in state court); text accompanying notes 28-38 *supra* (discussion of leave suspension proceedings and susequent appeal to state court). The *Simopoulos* court also concluded that the Supreme Court did not allow appeal to a federal court when state remedies are available because the losing party in the state court believes his chances on appeal in his state are not favorable. 644 F.2d at 330; *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 610 (1975) (truncation of state proceedings not allowed). The court rejected as superfluous the doctor's claim that he was not attacking his conviction but that he only wanted relief during the time in which the state proceeding was pending. 644 F.2d at 330-31. The Fourth Circuit concluded that declaratory relief has the same effect as an injunction and, therefore, falls within the *Younger* doctrine. *Id.* at 331; *see* note 8 *supra* (*Samuels* Court's decision regarding declaratory and injunctive relief under *Younger* doctrine).

[59] 644 F.2d at 331 (Butzner, J., dissenting).

[60] *Id.*

[61] *Id.; see* Gibson v. Berryhill, 411 U.S. 564, 577 (1973); note 48 *supra* (discussion of *Gibson*).

[62] 644 F.2d at 332 (Butzner, J., dissenting); *see, e.g.*, Parratt v. Taylor, 451 U.S. 527, 540 (1981); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

In addition to Dr. Simopoulos' right to a timely hearing, Judge Butzner maintained that the due process clause protects a physician's property interest in his professional license.[63] The dissent reasoned that the lapse of 56 days, from the time the Board of Medicine revoked Simopoulos' license to the time of his reinstatement hearing, did not satisfy the requirement of the due process clause for a prompt post-revocation hearing when a physician's license is at stake.[64] Although agreeing with the majority that the initial revocation of the doctor's license without a hearing did not offend due process,[65] the dissent pointed out that the Supreme Court conditioned its sanction of prehearing revocation upon the state furnishing prompt judicial or administrative review to definitively determine the issues.[66] Judge Butzner concluded that the lack of assurance of a prompt post-revocation hearing, as well as the actual

[63] 644 F.2d at 334 (Butzner, J., dissenting); *see* Barry v. Barchi, 443 U.S. 55, 64 (1979) (due process clause protects property interest in professional license). The requirements of procedural due process apply to the deprivation of interests that the fourteenth amendment's protection of liberty and property encompasses. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). A person must have more than an abstract need to have a property interest in a benefit such as a professional license. *Id.* at 577. Moreover, to have a property interest one must have a legitimate claim to the benefit. *Id.*; *see* Bell v. Burson, 402 U.S. 535, 539 (1971) (once licenses are issued, they may become essential in pursuit of livelihood, thus requiring fourteenth amendment procedural due process to suspend); Perry v. City of Chicago, 480 F. Supp. 498, 502 (1979) (peddler's license restricted long before its issuance to him, therefore, peddler had no property interest in form of right to peddle in restricted area). Property interests are created by existing rules, such as state law, and not by the Constitution. 408 U.S. at 577; *see* Petite Auberge Village, Inc. v. California Employment Dev. Dept., 650 F.2d 192, 194 (9th Cir. 1981) (right to recover delinquent taxes during bankruptcy proceedings as condition in transfer of liquor license stems from state's power to define state created property rights).

In *Mathews v. Eldridge*, the Supreme Court established certain factors to determine the extent to which due process protects the erroneous deprivation of a property interest. 422 U.S. 319, 335 (1976). Private interests affected by the official action, risk of wrongful deprivation, and the government's interest are factors that require consideration. *Id.*; *see* Mackey v. Montrym, 443 U.S. 1, 11-19 (1979) (weight of private interest and risk of error not substantial enough to outweigh state's compelling interest in highway safety regarding prehearing suspension of driver's license); Dixon v. Love, 431 U.S. 105, 113 (1977) (nature of property interest in license to operate motor vehicle is not serious enough to require hearing prior to revocation). When a state's action implicates the fourteenth amendment's protected interests of liberty and property, the right to a prior hearing is paramount. Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

[64] 644 F.2d at 334 (Butzner, J., dissenting).

[65] *Id.*; *see* 644 F.2d at 323, 330 n.37 (*Simopoulos* majority holding license suspension statute constitutional); Barry v. Barchi, 443 U.S. 55, 64-65 (1979) (evidentiary hearing not required prior to suspension of horse trainer's license); Mackey v. Montrym, 443 U.S. 1, 11-12 (1979) (neither nature nor weight of private interest involved compel conclusion that summary suspension procedures are unconstitutional); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174, 180 (4th Cir. 1974) (due process does not always require hearing before doctor's privileges are suspended).

[66] 644 F.2d at 334 (Butzner, J., dissenting); *see* Barry v. Barchi, 443 U.S. 55, 64 (1979) (state is entitled to impose interim suspension pending prompt judicial or administrative hearing that would definitely determine issues); Mackey v. Montrym, 443 U.S. 1, 11-12 (1979) (summary suspension hearings constitutional, particularly in view of immediately available post-suspension hearing).

lapse of 56 days, deprived the doctor of his property interest in his license without procedural due process of law.[67]

The dissent noted that the due process clause, in addition to protecting property interests, requires an administrative agency to state the findings and the reasoning underlying its decision.[68] Judge Butzner found that the *Simopoulos* Board made no findings and issued no opinion when it announced it would not reinstate the doctor's license, thus denying the doctor procedural due process.[69] The dissenting judge concluded that when an administrative agency denies a licensee procedural due process, the *Younger* doctrine does not require federal abstention merely because the licensee can seek judicial review of the administrative decision.[70]

The Fourth Circuit's decision to abstain from granting declaratory and injunctive relief regarding the constitutionality of the Virginia abortion statute is rational. The Supreme Court consistently has applied the *Younger* doctrine of abstention in situations when a criminal prosecution is pending in a state court.[71] Simopoulos did not meet the requirements

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[67] 644 F.2d at 334 (Butzner, J., dissenting).

[68] *Id.* at 335; *see* VA. CODE § 54-321.2 (Supp. 1981) (Board shall record license suspension proceedings formally); Vitek v. Jones, 445 U.S. 480, 494-95 (1980) (medical nature of inquiry and protection of defendant's liberty interest requires written statement of evidence relied on by Board); Wolff v. McDonnell, 418 U.S. 539, 564 (1974) (fact finder must provide written statement of evidence relied on and reasons for disciplinary action against inmate); Panama Ref. Co. v. Ryan, 293 U.S. 388, 432 (1935) (validity of administrative agency's order rests upon findings of fact when statute requires findings of fact as condition precedent to an order).

Courts have held that express findings of fact are not necessary when administrative action is not subject to judicial review. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 432 (1935); Lisbon Regional School Dist. v. Landaff School Dist., 114 N.H. 674, ____, 327 A.2d 727, 730 (1974); *cf.* Saporiti v. Zoning Bd. of App., 137 Conn. 478, ____, 78 A.2d 741, 743 (1951) (no findings of fact are necessary in informal administrative proceeding when not required by statute).

[69] 644 F.2d at 335 (Butzner, J., dissenting).

[70] *Id.* In the *Simopoulos* dissent, Judge Butzner, distinguished *Huffman*, *Scruggs*, and *Rucker* with respect to the doctor's due process claims. *Id.* at 336 (Butzner, J., dissenting); *see* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980); Rucker v. Wilson, 475 F. Supp. 1164 (E.D. Mich. 1979); notes 10, 46, 48, 58 *supra* (discussion of *Huffman*, *Scruggs*, and *Rucker*). In *Huffman*, the complainant challenged the constitutionality of a state statute in a state court. 420 U.S. at 594; *see* note 46 *supra* (discussion of *Huffman*). The *Simopoulos* dissent argued that contrary to the *Simopoulos* action, *Huffman* did not involve proof that state remedies were procedurally defective. 644 F.2d at 336 (Butzner, J., dissenting). Unlike *Huffman*, *Simopoulos* presented the issue that the state proceedings deprived the claimant of his property without affording due process of law. *Id.*

In *Scruggs*, the federal statute allowed review of administrative proceedings in state or federal court. 630 F.2d at 238. The Fourth Circuit in *Scruggs* held that even when the aggrieved party had petitioned a state court the opposing party could forestall state review by bringing a federal suit before administrative proceedings were complete. *Id.* at 238-39. Judge Butzner noted that the terms of the statute in *Scruggs*, in contrast to *Simopoulos*, provided that one judicial forum was sufficient. 644 F.2d at 336 (Butzner, J., dissenting); *see* 630 F.2d at 239. The dissent thus concluded that *Scruggs* does not involve the procedural due process claims present in *Simopoulos*. 644 F.2d at 336 (Butzner, J., dissenting); *see* 630 F.2d at 239.

necessary to preclude *Younger* abstention which requires a showing of immediate irreparable harm under extraordinary circumstances.[72] In addition, the *Simopoulos* state court did not conduct the criminal proceeding in bad faith or for purposes of harassment.[73] Moreover, the State's application of the Virginia abortion statute did not flagrantly and patently violate express constitutional prohibitions.[74] The Supreme Court has held that in order to meet the *Younger* test of an extraordinary circumstance, a statute must violate express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever and against whomever a court may apply the statute.[75] In addition, in order to demonstrate irreparable harm, the *Younger* doctrine requires that a plaintiff be able to eliminate a threat to his federal rights by his defense to a single prosecution.[76] The Fourth Circuit properly found that Simopoulos did not demonstrate that the Virginia abortion statute caused immediate irreparable harm under extraordinary circumstances and thus the court properly denied injunctive relief.[77] Finally, the Fourth Circuit properly dismissed the doctor's request for declaratory relief because the *Younger* doctrine applies equally to declaratory as well as injunctive relief.[78]

Nevertheless, the Fourth Circuit did not follow prior judicial precedents in its decision to abstain from Dr. Simopoulos' claim that the Board of Medicine denied him procedural due process of law in its revocation of his medical license. The Supreme Court has held that a person has a property right in a professional license to which he has legitimate entitlement.[79] Simopoulos had a property interest in his license to practice medicine because he depended on the license for his livelihood.[80] Due process requirements protect the erroneous deprivation of a property in-

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The dissent also distinguished *Rucker*. 644 F.2d at 336 (Butzner, J., dissenting). The doctor in *Rucker* did not lose his license pending the Board of Medicine's hearing as did Simopoulos. 475 F. Supp. at 1165. Judge Butzner concluded that the federal court would have provided the doctor in *Rucker* federal relief if the Board had deprived him of his property interest without due process of law. 644 F.2d at 336. The dissent also weighed the interests of the state in protecting public interests against the harm a physician suffers by revocation of his professional license. *Id.* at 337. Consequently, Judge Butzner found that no likelihood of danger to the public existed if the Board allowed Simopoulos to practice medicine pending his appeal. *Id.*

[71] *See* note 5 *supra* (discussing *Younger* and citing its five companion cases).

[72] *See* text accompanying notes 13-15 *supra* (discussion of immediate irreparable harm).

[73] *See* Simopoulos v. Commonwealth, 221 Va. 1059, 1077, 277 S.E.2d 194, 205 (1981); note 14 *supra* (discussion of extraordinary circumstances).

[74] *See* text accompanying note 14 *supra* (discussion of irreparable injury).

[75] *See* text accompanying note 14 *supra* (example of flagrant constitutional violation).

[76] *See* text accompanying note 15 *supra* (defense of single prosecution).

[77] 644 F.2d at 329, 331.

[78] *Id.* at 331; *see* Samuels v. Mackell, 401 U.S. 66, 72-73 (1971) (*Younger* doctrine applies equally to declaratory as well as injunctive relief); note 8 *supra* (discussion of *Samuels*).

[79] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

[80] *Id.*; *see* 644 F.2d 321, 333-34 (1981) (Butzner, J., dissenting); note 63 *supra* (property interest in license).

terest to the extent that private interests affected by the deprivation and the risk of wrongful deprivation outweigh the government's interest in the deprivation.[81] Although the *Simopoulos* court did not resolve this balancing test, the doctor's private interest in his license could arguably outweigh the government's interest in revoking the doctor's license.[82]

Once an administrative agency revokes a license, due process requires a prompt judicial or administrative hearing to definitely determine the issues.[83] Courts have held that considerations of delay are relevant in making abstention determinations.[84] Consequently, the *Simopoulos* dissent correctly argued that the lack of assurance of a prompt post-revocation hearing, as well as the actual lapse of 56 days, denied the doctor of his property right in violation of due process of law.[85] The denial of a property right without procedural due process of law clearly does not provide an adequate forum for a plaintiff to raise his constitutional claims.[86] The Virginia State Board of Medicine thus did not provide an adequate opportunity to raise constitutional claims as required for the *Younger* abstention doctrine to apply.[87]

In *Simopoulos*, the Fourth Circuit recognized that the *Younger* doctrine applied to civil cases in which the state was a party and in which the statute was quasi-criminal.[88] The court failed to notice, however, that *Younger* abstention may not apply before the opportunity to have a prompt and competent state tribunal test is met.[89] The *Simopoulos*

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[81] *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Fuentes v. Shevin, 407 U.S. 67, 86 (1972); note 63 *supra* (discussion of *Mathews*). In *Fuentes*, the Supreme Court held that any significant taking of property is within the purview of the due process clause of the fourteenth amendment. 407 U.S. at 86. The Court noted that the fourteenth amendment draws no limitations around three-day, ten-day, or fifty-day deprivations of property. *Id.* The length or severity of a deprivation is a factor to weigh in determining the appropriate form of hearing. *Id.*

[82] *See* 644 F.2d at 337 (Butzner, J., dissenting) (no likelihood of danger to public if Simopoulos practices medicine pending appeal); Doe v. Bolton, 410 U.S. 179, 194-95 (1973) (Supreme Court declared unconstitutional statute similar to Virginia abortion statute).

[83] *E.g.*, Barry v. Barchi, 443 U.S. 55, 64 (1979); *see* Mackey v. Montrym, 443 U.S. 1, 19 (1979). In *Mackey*, the Supreme Court held that the prehearing suspension of a driver's license to be constitutional because it afforded an immediate post-suspension hearing. *Id.* at 19.

[84] Fuentes v. Shevin, 407 U.S. 67, 86 (1972); *see* Anderson v. Babb, 632 F.2d 300, 306 n.3 (4th Cir. 1980) (considerations of delay are relevant in making abstention determinations); *accord*, Griffin v. County School Bd., 377 U.S. 218, 228-29 (1964) (abstention not proper because case delayed too long).

[85] 644 F.2d at 334 (Butzner, J., dissenting); *see* Gibson v. Berryhill, 411 U.S. 564, 576-77 (1973) (*Younger* presupposes opportunity to have competent state tribunal hear issues in timely manner).

[86] 644 F.2d at 334 (Butzner, J., dissenting); *see* Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

[87] 644 F.2d at 334 (Butzner, J., dissenting); *see* note 5 *supra* (discussion of *Younger*).

[88] 644 F.2d at 329-31; *see* text accompanying notes 45-49 *supra* (*Younger* doctrine's application to civil cases in which state is party).

[89] 644 F.2d at 331-32 (Butzner, J., dissenting); *see* text accompanying notes 61-64 *supra* (prompt and competent state tribunal test).