WHAT DOES IT MEAN IF YOUR APPEAL AS OF RIGHT LACKS A "SUBSTANTIAL" CONSTITUTIONAL QUESTION IN THE NEW YORK COURT OF APPEALS?

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I. INTRODUCTION

Experienced appellate practitioners in New York who read the advance sheets or the decision lists of the New York Court of Appeals on its website are familiar with the regular short entries of the court regarding the dismissal of appeals taken as of right under New York Civil Practice Law and Rules ("CPLR") section 5601. One such frequent entry is "[a]ppeal dismissed, without costs, by the Court of Appeals, sua sponte, upon the ground that no substantial

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constitutional question is directly involved."[1] There is no further explanation of what this means. The frequency of this entry and similar entries dismissing appeals or motions for leave to appeal on curtly stated grounds demonstrates how jealously the court guards its jurisdiction, but provides little guidance to would-be appellants on how to convince the court to retain jurisdiction of an appeal on constitutional grounds.[2] Although not unheard of, there is rarely a dissent when the court dismisses an appeal taken as of right on such jurisdictional grounds.

This changed recently when Judge Robert Smith not only dissented from such a dismissal, but criticized the court's internal jurisdictional precedents in *Kachalsky v. Cacace*.[3] This was the first dissent from a dismissal of an appeal taken as of right for lack of a substantial constitutional question in eight years.[4] Judge Smith's dissent has generated comments from court watchers, and prompted this author to investigate this grounds for an appeal as of right under CPLR 5601(b)(1) and several important questions regarding the court's dismissal of such an appeal for lack of "substantiality."[5]

Notably, the word "substantial" is not found in the governing statute, CPLR 5601(b), or the New York Constitution provision that provides for appeals as of right on constitutional grounds.[6] What has the Court of Appeals told us that "substantial" means? We will see that dissents or disagreements on the dismissal or retention of

[1] Kachalsky v. Cacace (*In re* Kachalsky), 14 N.Y.3d 743, 743, 925 N.E.2d 80, 80, 899 N.Y.S.2d 748, 748 (2010).

[2] *See* DONALD M. SHERAW, 1985 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE NEW YORK STATE COURT OF APPEALS 14 (1985) ("Counsel would do well to appreciate the strict jurisdictional requirements imposed by the Constitution and the CPLR that the constitutional question be directly involved in the decision below . . . and that the constitutional question be substantial. One need only compare filings of appeals on constitutional grounds . . . with those cases with a constitutional ground as a predicate which are ultimately calendared for disposition . . . to ascertain the difficulty in meeting these jurisdictional requirements.").

[3] *Kachalsky*, 14 N.Y.3d at 743–44, 925 N.E.2d at 80–82, 899 N.Y.S.2d at 748 (Smith, J., dissenting).

[4] The last prior case with a dissent was in 2002. *See* Paynter v. State of New York, 98 N.Y.2d 664, 771 N.E.2d 832, 744 N.Y.S.2d 759 (2002).

[5] *See* Meredith R. Miller, *An Illusory Right to Appeal: Substantial Constitutional Questions at the New York Court of Appeals*, 31 PACE L. REV. 583 (2011); Joel Stashenko, *Smith Takes Judges to Task for Failure to Find Substantial Constitutional Issue in Gun Case*, N.Y. L.J., Mar. 4, 2010, at 1; Matthew S. Lerner, *Rare Dissent in New York Court of Appeals' Dismissal of Appeal as of Right*, N.Y. CIVIL LAW (Feb. 17, 2010), http://nylaw.typepad.com/new_york_civil_law/2010/02/rare-dissent-in-new-york-court-of-appeals-dismissal-of-appeal-as-of-right.html.

[6] *See* N.Y. CONST. art. VI, § 3(b)(1)–(2); N.Y. C.P.L.R. 5601(b) (McKinney 2011).

appeals on this basis are rare but do exist.[7] Moreover, this jurisdictional requirement of a "substantial" constitutional question exists and has been previously applied in other jurisdictions and contexts.[8] How do other jurisdictions define a "substantial" constitutional question and what is the effect of a dismissal on jurisdictional grounds?[9] Until 1976, when appeals as of right from state courts were repealed, the United States Supreme Court repeatedly dismissed appeals for lack of a "substantial" federal constitutional question, and it is well established that such a dismissal by the Supreme Court is a decision on the merits that constitutes binding precedent.[10] In contrast, it does not appear that the New York Court of Appeals has ever stated whether the dismissal of an appeal taken as of right for lack of a substantial constitutional question constitutes a decision on the merits or has precedential effect.

In short, Judge Smith's dissent has sparked an important debate and discussion of this crucial grounds for an appeal as of right to the Court of Appeals. Moreover, it "offers a rare peek behind the curtain that is the New York Court of Appeals' internal jurisdiction."[11]

II. THE ORIGINS AND BASIS FOR AN APPEAL AS OF RIGHT ON CONSTITUTIONAL GROUNDS

The governing provisions of the state constitution[12] and CPLR

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[7] *See* discussion *infra* Part IV.

[8] *See* discussion *infra* Part V.

[9] *See* discussion *infra* Parts V–VI.

[10] *See* discussion *infra* Part VI.

[11] Lerner, *supra* note 5.

[12] The New York Constitution provides:

> Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section . . . . In civil cases and proceedings as follows:
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> (1) *As of right*, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding *wherein is directly involved the construction of the constitution of the state or of the United States*, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.
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> (2) *As of right*, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding *where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States*; and on any such appeal only the constitutional question shall be considered and determined by the court.

N.Y. CONST. art. VI, § 3(b)(1)–(2) (emphasis added).

5601(b)[13] authorize an appeal as of right to the Court of Appeals in two types of "constitutional" cases: (1) from a final determination of the Appellate Division where a constitutional question is directly involved; and (2) from a final determination of a court of record of first instance where the only question directly involved is the constitutionality of a state or federal statutory provision. There are significant differences between the two, which are dealt with in detail in several treatises and guides.[14] What is crucial to this article, however, is that both avenues for appeal have been interpreted by the Court of Appeals to include a requirement that the constitutional question be "substantial."[15]

As noted above, however, neither the state constitution nor the CPLR contain this requirement. It appears that the Court of Appeals has dismissed appeals for lack of a substantial constitutional question that is directly involved since at least 1935.[16] In his dissent in *Kachalsky*, Judge Smith wrote that:

> Neither the Constitution nor the statute says that the constitutional question involved must be "substantial," but we have interpreted them to mean that. And the interpretation makes sense, if "substantial" is taken literally. The authors of the Constitution and the statute surely did not intend to burden our Court with appeals as of right based on questions that are without substance, i.e., frivolous.[17]

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[13] CPLR 5601 provides in pertinent part:

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

N.Y. C.P.L.R. 5601(b) (McKinney 2011).

[14] *See* ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS §§ 7:9–7:12 (3d ed. 2005); JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶¶ 5601.08–5601.11 (2d ed. 2011).

[15] KARGER, *supra* note 14, § 7:5; WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09.

[16] *See* Wynkoop Hallenbeck Crawford Co. v. W. Union Tel. Co., 268 N.Y. 108, 113, 196 N.E. 760, 762 (1935) ("The appeal taken as of right should be dismissed, without costs, as no substantial constitutional question is involved."); Karsten Dairies, Inc. v. Baldwin, 269 N.Y. 566, 566, 199 N.E. 674, 674 (1935) ("Appeal dismissed, with costs. No substantial constitutional question is raised."); *see also* Miller, *supra* note 5, at 587.

[17] Kachalsky v. Cacace (*In re* Kachalsky), 14 N.Y.3d 743, 744, 925 N.E.2d 80, 80, 899 N.Y.S.2d 748, 748 (2010) (Smith, J., dissenting).

He also quoted from a noted treatise on Court of Appeals practice and jurisdiction, which states that the substantiality requirement "'is an obviously necessary safeguard against abuse of the right to appeal on constitutional questions, for otherwise the right to appeal would turn on the ingenuity of counsel in advancing arguments on constitutional issues, howsoever fanciful they might be.'"[18]

III. JUDGE SMITH'S DISSENT IN *KACHALSKY*

In *Kachalsky*, the court dismissed the appeal with the standard notation "[a]ppeal dismissed, without costs, by the Court of Appeals, sua sponte, upon the ground that no substantial constitutional question is directly involved."[19] Apparently the majority determined that the appeal was not "substantial" since it appeared that the constitutional issue was "directly involved."[20] Judge Smith dissented because, in his words, "I think the dismissal of this appeal exemplifies an amorphous definition of 'substantial constitutional question' that is at odds with CPLR 5601 (b) (1) and the New York Constitution."[21]

After noting his agreement with the court's long-standing imposition of the requirement that the constitutional question be "substantial," he wrote:

> But we have at times followed the practice—one in which, I confess, I have joined—of giving "substantial" a much more flexible meaning, so flexible that it confers on us, in effect, discretion comparable to that we have in deciding whether to grant permission to appeal under CPLR 5602. I am convinced that this practice is inconsistent with both the constitutional provision and the statute implementing it.[22]

In Judge Smith's opinion "[t]his case illustrates the point."[23] He explained his reasoning as follows:

> Petitioner's argument, rejected by the courts below, is that

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[18] *Id.* at 744, 925 N.E.2d at 80, 899 N.Y.S.2d at 748 (quoting KARGER, *supra* note 14, § 7:5); s*ee also* WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09.

[19] *Kachalsky*, 14 N.Y.3d at 743, 925 N.E.2d at 80, 899 N.Y.S.2d at 748.

[20] There is an entire body of law on what it means for the constitutional issue to be "directly involved" as well. It is not addressed here, but is in the leading treatises. *See, e.g.*, KARGER, *supra* note 14, §§ 7:8–7:10; WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.10.

[21] *Kachalsky*, 14 N.Y.3d at 743–44, 925 N.E.2d at 80, 899 N.Y.S.2d at 748 (Smith, J., dissenting).

[22] *Id.* at 744, 925 N.E.2d at 80–81, 899 N.Y.S.2d at 748.

[23] *Id.* at 744, 925 N.E.2d at 81, 899 N.Y.S.2d at 749.

> Penal Law § 400.00(2)(f), which requires "proper cause" for the issuance of a license to carry a concealed pistol or revolver, violates the Second Amendment to the United States Constitution. Two constitutional questions are directly involved: (1) whether the Second Amendment limits the powers of the states, as well as of the federal government; and (2) whether a prohibition on carrying concealed weapons without a showing of proper cause is consistent with the Second Amendment. I make no comment on the merits of either issue, except to say that neither is insubstantial. The first is of such great substance, and current importance, that the Supreme Court has granted certiorari to consider it [in *McDonald v. City of Chicago*]. The second issue, in light of [*District of Columbia v. Heller*], unquestionably presents fair ground for litigation. On neither issue could petitioner's case, by any remote stretch, be called frivolous or fanciful.[24]

Judge Smith recognized that "[t]here is . . . a perfectly reasonable argument that, if we had discretion about whether to take up these issues now, we should choose not to do so; it might make sense to wait to see how the Supreme Court decides *McDonald*."[25] He concluded that "I would not quarrel with that exercise of discretion, if I thought the discretion existed. I think, however, that petitioner has a constitutional right to have us hear this appeal, and that's all there is to it."[26]

Although Judge Smith does not specifically define "substantial," his words indicate that he would treat constitutional issues that are not "frivolous" or "fanciful" as "substantial."[27] There appear to be no decisions of the Court of Appeals that describe or define what is a "substantial" constitutional question within the meaning of CPLR 5601(b). Moreover, the *Civil Jurisdiction and Practice Outline* published on the court's website, which is extremely helpful to practitioners on a variety of jurisdictional issues, says very little on this issue given the large number and percentage of appeals taken on these grounds that are dismissed each year by the court.[28] The

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[24] *Id.* at 744–45, 925 N.E.2d at 81, 899 N.Y.S.2d at 749 (citations omitted).

[25] *Id.* at 745, 925 N.E.2d at 81, 899 N.Y.S.2d at 749.

[26] *Id.*

[27] *Id.* at 744–45, 925 N.E.2d at 81, 899 N.Y.S.2d at 749.

[28] *See* CLERK'S OFFICE, N.Y. COURT OF APPEALS, THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE 2–3 (2011),

Civil Jurisdiction and Practice Outline states:

> Whether a substantial constitutional question is presented is a determination that must be made on a case by case basis. The Court has examined the nature of the constitutional interest at stake, the novelty of the constitutional claim, whether the argument raised may have merit, and whether a basis has been established for distinguishing a state constitutional claim (if asserted) from a federal constitutional claim. The Court has stated that questions that have been "clearly resolved against an appellant's position . . . lack the degree of substantiality necessary to sustain an appeal as of right under CPLR 5601(b)(1). On the other hand, a constitutional argument need not prevail on the merits to support an appeal on constitutional grounds.[29]

IV. SIMILAR DISAGREEMENTS OVER WHAT IS A "SUBSTANTIAL" CONSTITUTIONAL QUESTION AND GUIDANCE FROM THE COURT ON WHAT IS "SUBSTANTIAL"

How frequently do members of the Court of Appeals disagree on whether a particular constitutional question on an appeal taken as of right is "substantial?" Research indicates not very often. In the last eighty-three years, it apparently has occurred only ten times. The last time it happened before Judge Smith's dissent in *Kachalsky* was in 2002 in *Paynter v. State*,[30] where Judges George Bundy Smith and Carmen Beauchamp Ciparick dissented and voted

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http://www.courts.state.ny.us/ctapps/forms/civiloutline.pdf (last visited Mar. 14, 2012). "From January 1990 to May 2010, [the New York Court of Appeals] dismissed sua sponte 197 civil appeals 'upon the ground that no substantial constitutional question is directly involved.'" Miller, *supra* note 5, at 592–93 (footnote omitted). This number appears to be smaller than this author would have anticipated. The ANNUAL REPORTS OF THE COURT show how many appeals are resolved by the court each calendar year by jurisdictional basis. The 2010 ANNUAL REPORT reflects that in the five year period 2006–2010 the court decided a total of forty appeals where the jurisdiction of the court was a constitutional question under CPLR 5601(b). *See* ANDREW W. KLEIN, 2010 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK app. 5 (2010), *available at* http://www.courts.state.ny.us/ctapps/news/annrpt/AnnRpt2010.pdf (last visited Mar. 14, 2012). Based on this author's Westlaw research, it appears that during this same 2006–2010 time period the court dismissed 218 appeals on the ground that no substantial constitutional question was directly involved under CPLR 5601(b)(1) and transferred an additional twenty appeals to the Appellate Division taken under CPLR 5601(b)(2). Thus, of the 278 "constitutional" appeals taken as of right from 2006–2010, the court decided only 14.39% of them, dismissed 78.42%, and transferred the remaining 7.19%.

[29] CLERK'S OFFICE, *supra* note 28 (citations omitted).

[30] Paynter v. State, 98 N.Y.2d 644, 644, 771 N.E.2d 832, 832, 744 N.Y.S.2d 759, 760 (2002).

to retain jurisdiction of the appeal without opinion.[31] In addition, the few disagreements among members of the court over a dismissal for lack of "substantiality" offer little by way of definitions or explanations.

In *Schulz v. State*, Judge Bundy Smith dissented from the majority's dismissal of an appeal in a related but separate case "for lack of a preserved substantial constitutional question."[32] The majority opinion does not state whether the question would have been deemed "substantial" if preserved. In his dissent, Judge Bundy Smith simply wrote that "I conclude that substantial constitutional issues have been preserved in Schulz Appeal No. 2 and that, in both [appeals] laches should not be a bar to a determination on the merits of these alleged constitutional violations . . . ."[33] Thus, from *Schulz* we can safely say that a constitutional issue cannot be "substantial" if the question is not preserved for the court's review,[34] which follows from the hornbook rule that the Court of Appeals has no power to review unpreserved issues of law, except in extremely narrow circumstances.[35]

In *In re Roger S.*, Judge Hugh Jones' dissent—joined in by Judge Fuchsberg—from the majority's dismissal of an appeal taken as of right under CPLR 5601(b)(1), offers some guidance on what he considered a "substantial" constitutional question.[36] Notably, he

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[31] *Id.* at 644, 771 N.E.2d at 832, 744 N.Y.S.2d at 760. Similarly, in *Weinbaum v. Cuomo*, Judge Bundy Smith dissented from the dismissal of an appeal "upon the ground that no substantial constitutional question is directly involved" and "vote[d] to retain jurisdiction on the ground that the allegations of racial discrimination in the funding of City University of New York and State University of New York present substantial constitutional questions and support an appeal as of right pursuant to CPLR 5601 (b) (1)." Weinbaum v. Cuomo, 87 N.Y.2d 917, 917, 664 N.E.2d 506, 506, 641 N.Y.S.2d 595, 595 (1996) (Smith, J., dissenting).

[32] Schulz v. State, 81 N.Y.2d 336, 343, 615 N.E.2d 953, 954, 599 N.Y.S.2d 469, 470 (1993) (Smith, J., dissenting). The majority affirmed the Appellate Division in Appeal No. 1 on the sole ground of laches. *Id.* at 342, 615 N.E.2d at 954, 599 N.Y.S.2d at 470. In a footnote, the majority wrote that

> [d]espite the Court's dismissal of Schulz Appeal No. 2, the dissent nevertheless addresses a threshold preservation concern that is of no moment, because if that appeal did lie, the result in the case would be the same as the one the Court reaches in Schulz Appeal No. 1, i.e., affirmance on laches only.

Id. at 343 n.*, 615 N.E.2d at 954 n.*, 599 N.Y.S.2d at 470 n.*. The court also denied the oral motion for leave to appeal made at oral argument. *Id.* at 344, 615 N.E.2d at 955, 599 N.Y.S.2d at 471.

[33] *Id.* at 351, 615 N.E.2d at 959, 599 N.Y.S.2d at 475 (Smith, J., dissenting).

[34] The Court of Appeals apparently considers *Schulz* to be a dismissal for lack of the constitutional question being "directly involved" more than for a lack of substantiality. *See* CLERK'S OFFICE, *supra* note 28, at 2.

[35] *See id.* at 14, 22–23.

[36] *In re* Roger S., 47 N.Y.2d 750, 751–52, 390 N.E.2d 1179, 1179, 417 N.Y.S.2d 255, 256

dissented from the dismissal although he would have affirmed the Appellate Division order.[37] He wrote that "[i]n my opinion appellant does raise a substantial constitutional objection, thus entitling him to an appeal as of right under CPLR 5601[(b)(1)] . . . ."[38] According to Judge Jones, "[t]he question defendant raised in the courts below and now presents on this appeal is whether, within the requirements of the Fourth Amendment to the Federal Constitution and section 12 of article I of our State Constitution, there was probable cause for his arrest."[39] Most importantly, he described the test of "substantial[ity]" by referring to the "reverse" test set forth in the then current edition of the Karger treatise: "whether the contention raised is so clearly nondebatable and utterly lacking in merit as to require dismissal for want of substance. In the present instance the question raised is a close one; accordingly I have no hesitancy in concluding that an appeal lies as of right."[40]

In re Robinson (Ross) is worth noting for what the majority did and what the dissent would have done although there is no discussion by the majority or the dissent of what "substantial" means.[41] The majority affirmed in an unsigned per curiam decision that treats the constitutional due process issue as almost frivolous: "This case presents no question of constitutional violation. Unless mandatory due process is to be equated with abstract notions of 'ideal' fairness, the claimant's arguments must be rejected."[42] Judge Cooke's dissent would have reversed the order appealed on the basis of the due process issue.[43] He further found that even if the court concluded that "the appeal as of right should be dismissed for a purported lack of direct involvement of a substantial constitutional question, leave to appeal should be granted and the order appealed from reversed on the [alternative] ground that denial of claimant's application" violated the Labor Law.[44]

In *Town of Ramapo v. Village of Spring Valley*, the majority dismissed an appeal taken as of right directly from the trial court

(1979) (Jones, J., dissenting).

[37] *Id.* at 751, 390 N.E.2d at 1179, 417 N.Y.S.2d at 256.

[38] *Id.*

[39] *Id.* at 751–52, 390 N.E.2d at 1179, 417 N.Y.S.2d at 256.

[40] *Id.* at 752, 390 N.E.2d at 1179, 417 N.Y.S.2d at 256 (citing HENRY COHEN & ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 55 (rev. ed. 1992)).

[41] *In re* Robinson (Ross), 45 N.Y.2d 11, 379 N.E.2d 180, 407 N.Y.S.2d 653 (1978).

[42] *Id.* at 15, 379 N.E.2d at 182, 407 N.Y.S.2d at 655.

[43] *Id.* at 17, 379 N.E.2d at 183, 407 N.Y.S.2d at 656 (Cooke, J., dissenting).

[44] *Id.* at 17, 379 N.E.2d at 183, 407 N.Y.S.2d at 656.

under CPLR 5601(b)(2).[45] Judge Van Voorhis, joined by Judge Foster, dissented in a strongly worded opinion raising an interesting question of the court's power to apply its judicially created "substantiality" requirement in another way under this statute.[46]

> This direct appeal . . . is being dismissed upon the ground that other than constitutional questions are involved. The court declines to consider whether the alleged nonconstitutional questions are substantial or merely frivolous. Where the jurisdiction of the Court of Appeals depends upon the presence of a constitutional question, the court will not entertain jurisdiction unless the constitutional question be substantial. *By the same token, it seems to me that before declining jurisdiction upon the ground that nonconstitutional questions are presented, the court should likewise inquire into whether such alleged other questions are substantial.* In my view, the nonconstitutional questions alleged to be here are not substantial but frivolous, and should not result in a dismissal of the appeal. At most, they will automatically be disposed of by a decision of the constitutional question. The court should, at least, inquire into whether they are frivolous. If direct appeals under this constitutional and statutory procedural provision are to be dismissed in event of nonconstitutional questions which lack any substantial basis, the effect is to nullify the provision authorizing direct appeals to this court. In my view the appeal should not be dismissed, but be decided upon the merits of the constitutional question.[47]

Chupka v. Lorenz-Schneider Co.[48] would likely be handled differently today than in 1962. There, the majority addressed the merits of the appellant's arguments, dismissing them all as

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[45] Town of Ramapo v. Vill. of Spring Valley, 13 N.Y.2d 918, 193 N.E.2d 892, 244 N.Y.S.2d 67 (1963). That provision includes three requirements not found in CPLR 5601(b)(1), namely that (1) the "substantial" and "directly related" constitutional question be the only issue presented; (2) the appeal involve the validity of a state or federal statute; and (3) that it originated from certain specified trial courts of record. *See* KARGER, *supra* note 14, §§ 7:2, 7:10; WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.08; CLERK'S OFFICE, *supra* note 28, at 2–3.

[46] *See Town of Ramapo*, 13 N.Y.2d at 918, 193 N.E.2d at 892, 244 N.Y.S.2d at 68 (Van Voorhis, J., dissenting) (citations omitted).

[47] *Id.* at 919–20, 193 N.E.2d at 892–93, 244 N.Y.S.2d at 68 (emphasis added) (citations omitted).

[48] Chupka v. Lorenz-Schneider Co., 12 N.Y.2d 1, 186 N.E.2d 191, 233 N.Y.S.2d 929 (1962).

essentially meritless, and then, after a full opinion by Chief Judge Desmond, dismissed the appeals taken as of right under CPLR 5601(b)(1) "on the ground that they present no substantial constitutional question."[49] Although Judge Van Voorhis dissented, he did so on the merits of the arguments discussed in detail in the majority opinion.[50] Today, there likely would be no majority opinion.

The fact that an appellant survives a pre-argument motion to dismiss an appeal taken under CPLR 5601(b)(1) does not mean that party is safe. In *Youmans v. State of New York*,[51] the court denied a motion to dismiss, which was renewed at oral argument or thereafter, but in a one sentence decision—apparently after oral argument of the appeal—the majority dismissed the appeals "upon the ground that no substantial constitutional question is presented."[52] Again, Judge Van Voorhis dissented as to certain claims on the grounds that "[i]nasmuch as it appears as matter of law that these claimants owned these parcels, which were appropriated by the State in 1949 without payment of compensation, a substantial constitutional question is presented."[53] Since he would have found for these claimants on the merits, he found the constitutional question to be "substantial."[54]

The majority opinion in *O'Brien v. Commissioner of Education*[55] offers at least some indication of a category of cases that generally do not raise a "substantial" constitutional question. Judge Fuld wrote:

> Whether or not [the Appellate Division's decision] be correct, we are neither called upon nor empowered to decide, for the appeal is not properly before us. Section 588 (subd. 1, par. [a]) of the Civil Practice Act sanctions an appeal to this court as of right only if there is "directly involved the construction of the [state or federal] constitution". Quite obviously, and we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly

[49] *Id.* at 7, 186 N.E.2d at 193, 233 N.Y.S.2d at 932.
[50] *Id.* at 11, 186 N.E.2d at 196, 233 N.Y.S.2d at 936 (Van Voorhis, J., dissenting).
[51] Youmans v. State, 309 N.Y. 653, 128 N.E.2d 313 (1955).
[52] *Id.* at 654, 128 N.E.2d at 314.
[53] *Id.* at 655, 128 N.E.2d at 314 (Van Voorhis, J., dissenting).
[54] *Id.*
[55] O'Brien v. Comm'r of Educ., 4 N.Y.2d 140, 149 N.E.2d 705, 173 N.Y.S.2d 265 (1958).

> involves the construction of the constitution nor poses a constitutional question of any kind.[56]

Judge Van Voorhis' separate opinion concurred in the dismissal of the appeal, but discussed the merits—or lack thereof—of the appeal in great detail.[57]

In *Valz v. Sheepshead Bay Bungalow Corp.*, the majority's opinion not only resolves the appeal taken as of right on constitutional grounds from the Appellate Division, but first addresses at some length the issue of whether it is "directly related" and, to a lesser extent, whether it is "substantial."[58] The issue in the case was whether a nonresident's action to redeem real property sold at a mortgage foreclosure on the ground that publication of the summons in a newspaper other than designated by court order was a violation of due process under the New York and Federal Constitutions.[59] The court wrote that if the Legislature had "provided in express terms that where, through inadvertence, publication is made in a newspaper other than one of those selected by the court, the court might thereafter disregard the error as a mere irregularity"[60] and "then, perhaps, no substantial claim could have been made that the judgment was not binding upon the non-resident defendants named in the summons, *and no substantial constitutional question would be involved*. Here the Legislature has not so provided in express terms, but the courts have so construed the statute."[61]

In its opinion, the court rejected defendants' motion "to dismiss the appeal taken without permission" holding "that the construction of the statute and not the construction of the Constitution of the state or of the United States is directly involved" under Civil Practice Act section 588.[62] The court noted that "terms 'directly' or 'indirectly' involved are relative rather than absolute, and hence are not capable of unvarying definition," and that unlike other cases:

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[56] *Id.* at 145, 149 N.E.2d at 706, 173 N.Y.S.2d at 267 (second alteration in the original) (citing Kuhn v. Comm'r of Educ., 2 N.Y.2d 749, 138 N.E.2d 742, 157 N.Y.S.2d 383 (1956)).

[57] *Id.* at 145–59, 149 N.E.2d at 707–15, 173 N.Y.S.2d at 268–79 (Van Voorhis, J., concurring).

[58] Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 132, 163 N.E. 124, 127 (1928).

[59] *Id.* at 129–30, 163 N.E. at 126. The Court noted that this "exact question has, so far as we know, never been adjudicated by any appellate court in this or any other state." *Id.* at 134, 163 N.E. at 127.

[60] *Id.* at 131, 163 N.E. at 126.

[61] *Id.* (emphasis added).

[62] *Id.*

> The sole question presented to the courts in the instant case is whether the judgment of foreclosure is based upon due process of law. That question involves directly and necessarily the construction of the Constitution. . . . Where the question of whether a judgment is the result of due process is the decisive question upon an appeal, the appeal lies to this court as a matter of right.[63]

Thus, it appears from a thorough review of the decisions of the Court of Appeals that it has not defined or really attempted to define what is or is not a "substantial" constitutional question. As stated by Karger, "[t]he standard of substantiality cannot, of course, be defined with mechanical precision. Whether a particular constitutional issue is sufficiently substantial to warrant an appeal as of right is, generally speaking, rather a matter of judgment, to be determined on the facts of the individual case."[64] One commentator has stated that he "once overhea[r]d a legendary Court of Appeals' Deputy Clerk tell a pro se petitioner that a 'substantial' constitutional question is like a tough stain on a shirt, not like the ordinary daily stains that we all get and rub out with some elbow grease."[65]

Some general guidelines may be found in the decisions of the court. First, the would-be appellant is not required to establish the merits of the constitutional argument in order to obtain jurisdiction.[66] Thus, the prospect that the court might ultimately resolve a constitutional question against the appellant "does not make it the less a ground for appeal" as of right, because "[n]o appellant should be required to insure that his answer to the constitutional question will be adopted by the court."[67] A stricter standard of substantiality would, in effect, oblige the appellant to

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[63] *Id.* at 131–32, 163 N.E. at 126–27. In addition, the court rejected the argument that jurisdiction of the appeal as of right was not defeated by alternative grounds for the holding, observing that "the courts below did not and could not find estoppel or laches." *Id.* at 132, 163 N.E. at 127. The majority affirmed the order of the Appellate Division. *Id.* at 139, 163 N.E. at 129. Three judges dissented and would have reversed without opinion "on the ground that the defect in service of summons was jurisdictional." *Id.*

[64] KARGER, *supra* note 14, § 7:5. As noted elsewhere, "[b]ecause substantiality is not a concept that permits mechanical application to facts, decisional law can offer no bright-line formula for determining whether the Court will find a particular constitutional question substantial in a given case." WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09.

[65] Lerner, *supra* note 5.

[66] *See* Davega City Radio, Inc. v. State Labor Relations Bd., 281 N.Y. 13, 19, 22 N.E.2d 145, 146 (1939).

[67] *Id.* at 19, 22 N.E.2d at 146.

prevail on the appeal before briefing or argument. Second, to qualify as substantial, a constitutional question must appear to have colorable merit and not to be advanced solely or primarily as the predicate for appeal as of right.[68] The court has been vigilant against efforts to invoke mandatory jurisdiction by casting procedural error as a due process violation,[69] or by casting the determination below as a deprivation of property[70] or of other constitutional rights.[71]

Third, the question is not substantial once the court has authoritatively resolved it in a recent decision.[72] "Because precedent is subject to reevaluation in light of evolving law and changing social and economic conditions, an older precedent does not necessarily preclude a finding of substantiality. The line of demarcation between 'recent' and 'older' itself defies mechanical determination and requires exercise of judgment consistent with

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[68] *See infra* notes 72–74.

[69] *See, e.g.*, Cities Serv. Oil Co. v. Murdock, 295 N.Y. 806, 66 N.E.2d 583 (1946). On review of the respondent board's determination, the Court dismissed an appeal from an unanimous Appellate Division order based on asserted denial of due process, where the board refused to adjourn hearing into application for a variance and later to hold rehearing. *Id.* Karsten Dairies, Inc. v. Baldwin, 269 N.Y. 566, 199 N.E. 674 (1935). On review of the respondent commissioner's order, the Court dismissed an appeal from an unanimous Appellate Division order based on asserted denial of due process where the commissioner held a hearing on a license application without providing the applicant with subpoena power. *Id.*

[70] *See, e.g.*, Stewart v. Ahrens, 273 N.Y. 591, 7 N.E.2d 707 (1937). The Court dismissed the appeal as of right from an unanimous Appellate Division order based on a claim that by denying the appellant "the right to an orderly trial of his substantial cause of action against respondent," the order deprived him of property. *Id.*; Fryberger v. N. W. Harris Co., 273 N.Y. 115, 118, 6 N.E.2d 398, 399 (1937) (dismissing appeal from unanimous Appellate Division order on similar grounds).

[71] *See, e.g.*, Edde v. Columbia Univ., 5 N.Y.2d 881, 156 N.E.2d 458, 182 N.Y.S.2d 829 (1959). The Court dismissed an appeal as of right from a unanimous Appellate Division order based on a claim that by rejecting appellant's proposed doctoral dissertation, the respondent deprived the appellant of freedom of speech. *Id.* Liverpool & London & Globe Ins. Co. v. Fed. Commerce & Navigation Co., 298 N.Y. 924, 85 N.E.2d 66 (1949) (dismissing direct appeal form judgment that assertedly denied appellant equal protection).

[72] *See, e.g.*, N.Y. Pub. Interest Research Grp., Inc. v. N.Y. State Thruway Auth., 77 N.Y.2d 86, 89, 565 N.E.2d 1259, 1260, 564 N.Y.S.2d 708, 709, (1990). Discussing dismissal of the appeal for lack of substantial constitutional question, the Court of Appeals stated that the question had been resolved thirteen years earlier under "an essentially identical statute." *Id.* City of New Rochelle v. Stevens, 300 N.Y. 754, 755, 92 N.E.2d 460, 460 (1950). Because the Court had upheld the statute's constitutionality five years earlier, the motion to dismiss the appeal was granted because no substantial constitutional question was presented. *Id. In re* Orange Pulp & Paper Mills, Inc., 288 N.Y. 505, 41 N.E.2d 924 (1942) (determining no substantial constitutional question presented because the court had upheld the statute's constitutionality twenty-one years earlier). *But see* MacDonald v. Browne, 294 N.Y. 263, 62 N.E.2d 63 (1945). Because the Court had previously upheld the statute's validity under the state constitution, it determined that the appeal as of right on constitutional grounds lay in the suit challenging its validity under the Federal Constitution. *Id.*

stare decisis."[73] Fourth, as noted earlier, a constitutional question is not substantial where the issue was not properly preserved for review.[74]

In short, the word "substantial" can be amorphous. In *Kachalsky*, Judge Robert Smith took issue with the court's application of the "substantiality" requirement in the past and in the present appeal, noting that the court's treatment of this requirement conferred discretion similar to whether the court should grant a motion for leave to appeal.[75] Clearly, the entire Court of Appeals would agree that it was never the court's intention in adopting this requirement to convert the appeal as of right provided for in the New York Constitution and the CPLR into another discretionary motion for leave to appeal.[76]

V. WHAT A "SUBSTANTIAL" CONSTITUTIONAL QUESTION MEANS IN OTHER CONTEXTS

There are at least four areas of law outside of the jurisdiction of the New York Court of Appeals where one can look to compare how other courts have defined a "substantial" constitutional question: (1) appeals as of right to the United States Supreme Court from states' highest courts; (2) the now repealed requirement for convening a three-judge district court panel in federal court; (3) the highest courts of other states that also have an appeal as of right based on the existence of a "substantial" constitutional question; and (4) the standard for a "certificate of appealability" for a federal habeas proceeding.

First, before its amendment in 1988, 28 U.S.C. section 1257(a) provided that a party had an appeal as of right to the United States Supreme Court from a decision of the highest court of a state when either (1) "the validity of a treaty or statute of the United States" was questioned and "the decision [was] against its validity"; or (2) where "the validity of a statute of any state" was questioned "on the ground of its being repugnant to the Constitution, treaties or laws of

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[73] WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09.

[74] *See* Schulz v. State of New York, 81 N.Y.2d 336, 344, 615 N.E.2d 953, 954–55, 599 N.Y.S.2d 469, 470–71 (1993).

[75] Kachalsky v. Cacace (*In re* Kachalsky), 14 N.Y.3d 743, 744, 925 N.E.2d 80, 80–81, 899 N.Y.S.2d 748, 748 (2010) (Smith, J., dissenting).

[76] *See* Lerner, *supra* note 5 ("Clearly, the New York Constitution and the CPLR does [sic] not want the Court to treat appeals as of right as it if were determining whether to grant or deny motions for leave to appeal.").

the United States, and decision [was] in favor of its validity."[77] Just like the New York Court of Appeals, the Supreme Court crafted a judicially-adopted requirement that the appeal present a "substantial" federal constitutional question for the appeal as of right to lie.[78] In this context, the test for determining "substantiality," in the words of the Supreme Court, was whether the contention raised "is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance."[79] This test sounds much like the information we have from the Court of Appeals under CPLR 5601(b).

Second, until 1976 when they were repealed, 28 U.S.C. sections 2281 and 2282 required the convening of a three-judge panel in the district court to grant (1) "an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality" and (2) "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality" respectively.[80] Each of the statutes required, as a prerequisite to convening a three-judge panel, that the single judge in the district court find that the claim involved a "substantial" federal question.[81] As noted in *Kinsella v. Board of Education*,[82] in 1973 the Supreme

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[77] *See* 28 U.S.C. § 1257 (1970) (amended 1988). The amendment removed the appeal as of right and converted it into a discretionary certiorari petition. *See id.* § 1257(a) (2011). As amended, the statute now provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. § 1257(a) (2011).

[78] *See, e.g.*, Humphrey v. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n, 475 U.S. 1114 (1986) (dismissing the appeal for want of a substantial federal question); Burton v. Sills, 394 U.S. 812 (1969) ("The motion to dismiss is granted and the appeal [from the New Jersey Supreme Court] is dismissed for want of a substantial federal question.").

[79] Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 258 (1934) (citations omitted); *see also* Roe v. Kansas *ex rel.* Smith, 278 U.S. 191, 192 (1929) ("The alleged grounds . . . are so lacking in substance that they may be properly designated as frivolous."); Wabash R.R. Co. v. Flannigan, 192 U.S. 29, 38 (1904) ("[T]he Federal question asserted . . . is manifestly lacking all color of merit.") (citing Swafford v. Templeton, 185 U.S. 487, 493 (1902)).

[80] 28 U.S.C. §§ 2281, 2282 (repealed 1976).

[81] *See Ex parte* Poresky, 290 U.S. 30, 31–32 (1933); Kinsella v. Bd. of Educ., 402 F. Supp. 1155, 1158 (W.D.N.Y. 1975).

[82] *Kinsella*, 402 F. Supp. at 1158.

Court had this to say about "constitutional insubstantiality" in this context:

> "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit." The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281.[83]

There is good reason not to apply the repealed three-judge "substantiality" standard to the jurisdiction of the New York Court of Appeals—they serve different purposes. In the Court of Appeals it is to limit the number of appeals heard as of right and to protect the court's jurisdiction.[84] In contrast, "the strictness of the 'substantiality' standard articulated in *Goosby* favors the convening of a three-judge court in all but the most 'open and shut' cases . . . particularly where the State, for whose benefit the three-judge court statute was enacted, contends that a three-judge court is necessary."[85]

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[83] Goosby v. Osser, 409 U.S. 512, 518 (1973) (citations omitted). *Goosby* redefined the standard by which a district judge must determine substantiality "in the most limiting terms the Court has ever used." Roe v. Ingraham, 480 F.2d 102, 106 (2d Cir. 1973). Prior to *Goosby*:

> The lack of substantiality of a federal constitutional question which will preclude the convening of a three-judge court may appear either because the claim presented "is obviously without merit" or because "its unsoundness so clearly results from the previous decisions of the court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Thus a district judge must dismiss the complaint when the constitutional issue is insubstantial or enjoin the challenged statute when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional."

Amin v. Bronstein, No. 73 Civ. 4011, 1973 WL 251, at *3 (S.D.N.Y. Nov. 14, 1973) (citations omitted). The three-judge panel requirement still exists "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (2011).

[84] *See supra* Part II.

[85] *Amin*, 1973 WL 251, at *9 (citations omitted). As stated in *Amin*,

> [i]ndeed, the history of the three-judge court statute shows that it grew out of a Congressional desire to alleviate state resentment at a declaration of unconstitutionality of a State statute by a single judge. Since the primary purpose of the statute is to prevent a single judge from improvidently enjoining the enforcement of a state statute . .

Third, it appears that several other states also provide for appeals to their highest court when there is a "substantial" constitutional question involved in the case, whether the "substantial" requirement is statutorily or judicially imposed.[86] For example, North Carolina provides for an appeal as of right to its Supreme Court when a decision from the North Carolina Court of Appeals "directly involves a substantial question arising under the Constitution of the United States or of this State."[87] Not surprisingly, former North Carolina Supreme Court Justice Robert Orr has written that "[t]here is perhaps no aspect of appellate practice in North Carolina that has left practitioners as perplexed as the question of what exactly constitutes a substantial constitutional question, particularly as it applies to the North Carolina Constitution."[88]

Since this jurisdictional basis was created in 1967 in North Carolina, very few cases have addressed the meaning of a "substantial" constitutional question. "The case law that has developed over the years, articulating the definition of a substantial constitutional question, is limited in its usefulness and articulates a standard of interpretation that raises more questions than it answers."[89] In *State v. Colson*, the North Carolina Supreme Court stated, "[t]he question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial

. it may well be that a close question of substantiality should be resolved in favor of the State, when the State, not the plaintiff, requests the convening of a three-judge court.

Id. (citations omitted).

[86] These states include North Carolina, Ohio, and Virginia. *See* N.C. GEN. STAT. § 7A-30(1) (2010); Darrell L. Heckman, *The Memorandum in Support of Jurisdiction in the Supreme Court of Ohio*, HECKMANLAW.COM, http://www.heckmanlaw.com/Articles/SupremeCourtMemorandum.pdf (last visited Nov. 13, 2011) (citing OHIO CONST., art. IV, § (2)(B)(1)(iii)); VIRGINIA'S JUDICIAL SYSTEM, *The Court of Appeals of Virginia*, http://www.courts.state.va.us/courts/cav/cavinfo.pdf (last visited Nov. 13, 2011) ("If the Supreme Court determines on a petition for review that the decision of the [Virginia] Court of Appeals involves a substantial constitutional question as a determinative issue or a matter of significant precedential value, review may be had in the Supreme Court.").

[87] N.C. GEN. STAT. § 7A-30(1).

[88] Robert Orr, *What Exactly Is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211, 211 (2011). This article is an excellent discussion of this same issue under North Carolina law. The author is a former justice of the North Carolina Supreme Court, who sat on that court for ten years after sitting on the North Carolina Court of Appeals, the intermediate appellate court, for eight years. *Id.* at 211 n.*.

[89] *Id.* at 220.

determination."[90] "The court further explained that the: '[m]ere mouthing of constitutional phrases like 'due process of law' and 'equal protection of the law' will not avoid dismissal.'"[91] Since *Colson*, "the court occasionally addressed this issue, but simply [repeated] the *Colson* standard," and "[o]ver the past thirty years the [North Carolina Supreme Court] has not announced any new decisions on this issue."[92]

"One of the primary causes of uncertainty [on this issue in North Carolina] is the fact that [just like the New York Court of Appeals, the North Carolina Supreme Court] does not articulate its reasoning for dismissing an appeal of right [for lack of] a substantial constitutional question," which it often does on its own motion.[93] Like New York, very few appeals on this ground are decided by the North Carolina Supreme Court.[94] According to Justice Orr, from January 1, 2000 to December 31, 2010—an eleven-year period—the North Carolina Supreme Court only accepted 186 out of 887 appeals taken on this ground, which is twenty-one percent (21%).[95]

Fourth, in order for a petitioner in a habeas proceeding, in which the detention complained of arises out of process issued by a state court, to appeal from the district court to the court of appeals, a circuit judge must issue a certificate of appealability, which requires a finding that "the applicant has made a substantial showing of the denial of a constitutional right."[96] The United States Supreme Court has observed that an applicant has made a "substantial showing" of a constitutional violation where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[97] Again, there is a substantial body of case law on what is a "substantial" constitutional issue under this statutory provision.[98]

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[90] State v. Colson, 163 S.E.2d 376, 383 (N.C. 1968).

[91] Orr, *supra* note 88, at 220 (quoting *Colson*, 163 S.E.2d at 383).

[92] *Id.* at 221.

[93] *Id.*; *see, e.g.*, *In re* Jones, 184 S.E.2d 267, 268 (N.C. 1971) (dismissing the appeal, sua sponte, because there was no substantial constitutional question).

[94] *See* Orr, *supra* note 88, at 219.

[95] *Id.* at 222 n.63.

[96] 28 U.S.C. § 2253(c)(2) (2011).

[97] Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

[98] *See, e.g.*, Downs v. Lape, No. 09 4723 pr., 2011 WL 4057173, at *2 (2d Cir. Sept. 14, 2011); Resendez v. Knight, No. 11 1121, 2011 WL 3250571, at *1–2 (7th Cir. July 29, 2011)

VI. THE EFFECT OF A DISMISSAL FOR LACK OF A "SUBSTANTIAL" CONSTITUTIONAL QUESTION

Both the Supreme Court and the New York Court of Appeals have repeatedly stated that a denial of certiorari or motion for leave to appeal, respectively, is discretionary, is not an adjudication on the merits, and has no res judicata effect.[99] The United States Supreme Court has also made it clear, however, that a dismissal of an appeal, taken as of right because the constitutional challenge to a state statute is not a "substantial" one, is a decision on the merits of those issues raised in the appellant's jurisdictional statement for purposes of res judicata and collateral estoppel, and constitutes precedent on the issue raised.[100] The New York Court of Appeals has recognized this Supreme Court rule.[101]

It does not appear, however, that the New York Court of Appeals has ever stated the effect of its dismissal of an appeal taken as of right on the grounds that no substantial constitutional question was directly involved. Specifically, it has not stated whether such a decision is binding under the doctrines of res judicata or collateral estoppel, or whether such a decision constitutes a precedent of the Court in rejecting the constitutional question on the merits. Other

("Because Mr. Resendez's petition presents a question concerning a's [sic] constitutional right to counsel that we have not yet settled, I grant Mr. Resendez's application. . . . Because this court has not previously determined [the issue presented here] and because, given the factors this court considers, reasonable jurists could differ on whether this proceeding should be considered direct or collateral, Mr. Resendez's application sets forth a substantial showing of the denial of a constitutional right. I express no view on the correct resolution of the question presented. Mr. Resendez's application for a COA therefore is granted."); Longworth v. Ozmint, 302 F. Supp. 2d 569, 574 (D.S.C. 2004) (noting that "the issue is very much unresolved" in support of its conclusion that a COA should issue).

[99] *See, e.g.*, Brown v. Allen, 344 U.S. 443, 457–58 (1953); United States v. Carver, 260 U.S. 482, 490 (1923); Marchant v. Meade-Morrison Mfg. Co., 252 N.Y. 284, 297–98, 169 N.E. 386, 390–91 (1929); CLERK'S OFFICE, *supra* note 28, at 14. *See generally* Javits v. Stevens, 382 F. Supp. 131, 141–42 (S.D.N.Y. 1974) (observing that dismissal of appeal by Court of Appeals under CPLR 5601(b)(1) was not a decision on the merits that constitutional claim was "insubstantial" when issue first raised after Appellate Division decision from which appeal was taken; dismissal was because constitutional question was not "directly involved").

[100] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 802 (2007) (Stevens, J., dissenting); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); Hicks v. Miranda, 422 U.S. 332, 343–45 n.14 (1975); Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959) ("Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . .").

[101] *See* Brady v. State, 80 N.Y.2d 596, 602 n.3, 607 N.E.2d 1060, 1063 n.3, 592 N.Y.S.2d 955, 958 n.3 (1992); People v. Smith, 44 N.Y.2d 613, 623 n.3, 378 N.E.2d 1032, 1037 n.3, 407 N.Y.S.2d 462, 468 n.3 (1978).

courts in New York, however, have commented on this issue.

In *Winters v. Lavine*, the Second Circuit concluded that the New York Court of Appeals dismissal of plaintiff's appeal taken as of right on the grounds that no substantial constitutional question was directly involved was preclusive even though the Appellate Division determination rested upon alternate grounds, one of which did not involve the constitutionality of the challenged statute.[102] The circuit court held that the dismissal of plaintiff's appeal on this ground did not establish that the Appellate Division's decision did not rest on any constitutional grounds for purposes of determining whether the Appellate Division's decision collaterally estopped plaintiff from raising the issue of the constitutionality of New York's Medicaid statute in this subsequent federal civil rights action.[103] In so holding, the Second Circuit wrote:

> There is one situation in which a dismissal [of an appeal for lack of a substantial constitutional question] by the Court of Appeals might possibly constitute an adjudication on the merits. This would occur when there is no possibility that the Appellate Division's decision was based on other than constitutional grounds and the constitutional issues, and no others, are clearly presented on appeal to the Court of Appeals. In such circumstances, it may well be that a dismissal "for want of a substantial constitutional question," may mean, at least in the context of *res judicata* analysis, "that the constitutional issues specifically raised were insubstantial on the merits." It is somewhat doubtful, however, whether the New York courts would share this view.[104]

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[102] Winters v. Lavine, 574 F.2d 46, 60–64 (2d Cir. 1978); *see also* Winters v. Comm'r of N.Y.S. Dep't of Soc. Servs., 49 A.D.2d 843, 844, 373 N.Y.S.2d 604, 605 (App. Div. 1st Dep't 1975), *appeal dismissed*, 39 N.Y.2d 832, 351 N.E.2d 441, 385 N.Y.S.2d 1029 (1976).

[103] *Winters*, 574 F.2d at 65–67.

[104] *Id.* at 62 n.15 (citing Turco v. Monroe Cnty. Bar Ass'n, 554 F.2d 515, 519 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977); O'Brien v. Comm'r of Educ., 4 N.Y.2d 140, 145, 149 N.E.2d 705, 706–07, 173 N.Y.S.2d 265, 267 (1958), *appeal dismissed, cert. denied*, 361 U.S. 117 (1959)). It is unclear why the Second Circuit cited *O'Brien*, discussed *supra* note 55, for the proposition that "[i]t is somewhat doubtful, however, whether the New York courts would share [the] view" that a dismissal for lack of a substantial constitutional question "may mean, at least in the context of *res judicata* analysis, 'that the constitutional issues specifically raised were insubstantial on the merits.'" *Id.* In *O'Brien*, the Court of Appeals dismissed an appeal taken as of right under the predecessor to CPLR 5601(b)(1) after oral argument in a full opinion on the grounds that as "we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a

The Second Circuit was more definitive on the res judicata and collateral estoppel effect of a dismissal for lack of a substantial constitutional question in *Ellentuck v. Klein*.[105] In addressing the same issue in the same procedural context—a prior unsuccessful state court article 78 proceeding followed by a section 1983 action in federal court—the court applied both doctrines to affirm the dismissal of the case and wrote:

> The papers before the court make it abundantly clear that the due process arguments and the challenge to Justice Latham's participation were vigorously presented to the New York Court of Appeals. It is equally clear that, as a legal matter, a dismissal by the New York Court of Appeals for want of a substantial constitutional question is "tantamount to a dismissal of the constitutional issues on the merits," and is thus determinative of the issues actually raised and litigated, either by way of res judicata or collateral estoppel.[106]

At least one New York court has gone even further than applying res judicata and collateral estoppel to the same parties from the dismissal by the Court of Appeals of an appeal taken as of right for lack of a substantial constitutional question.[107] It held that such a decision is precedent that binds the court in another proceeding raising the same legal issue among different parties.[108] In *In re Estate of Hamilton*, the Surrogate's Court of Queens County

constitutional question of any kind." *O'Brien*, 4 N.Y.2d at 145, 149 N.E.2d at 706, 173 N.Y.S.2d at 267.

[105] Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978).

[106] *Id.* at 422–23 (citing *Turco*, 554 F.2d at 521; McCune v. Frank, 521 F.2d 1152, 1155 (2d Cir. 1975)); *see also* Sassower v. Mangano, 927 F. Supp. 113, 120 (S.D.N.Y. 1996). The dismissal of an attorney's appeal as of right by New York Court of Appeals on the ground that no substantial constitutional question was involved was "final adjudication on the merits" for res judicata purposes. *Id.* The plaintiff whose constitutional challenges to the state court's decision to suspend her license to practice law had previously been raised in state court disciplinary proceedings and litigated to the United States Supreme Court and was barred by res judicata effect of the state court proceedings from pursuing her constitutional claims in a section 1983 action. *Id.*; Carino v. Town of Deerfield, 750 F. Supp. 1156, 1167 (N.D.N.Y. 1990). The court held that for purpose of collateral estoppel under New York law, New York Court of Appeals' dismissal of claims "for want of a substantial constitutional question [was] tantamount to a dismissal of the constitutional issues on the merits." *Id.*; Olitt v. Murphy, 453 F. Supp. 354, 359 (S.D.N.Y. 1978), *aff'd*, 591 F.2d 1331 (2d Cir. 1978) (holding that dismissal on grounds for lack of a substantial consitutional question was final and on the merits).

[107] *See In re* Estate of Hamilton, 181 Misc. 2d 697, 695 N.Y.S.2d 497 (Queens County Sur. Ct. 1999).

[108] *Id.* at 700, 695 N.Y.S.2d at 499.

dismissed a petition seeking an order vacating an order holding the petitioner in contempt of court and releasing him from custody on the grounds that he cannot be compelled to file an accounting since to do so would tend to incriminate him in violation of his Fifth Amendment privilege.[109] In support of his claim petitioner cited to the grant of a habeas petition to a petitioner making the same constitutional claim by the Southern District of New York in *Bertucci v. Cunningham*.[110]

Prior to the habeas proceeding in federal court, however, Bertucci had made the same constitutional claim in the state courts.[111] After the Appellate Division rejected his claim he appealed as of right to the Court of Appeals, which dismissed his appeal sua sponte upon the grounds that no substantial constitutional question was directly involved.[112] Moreover, there was no question that the constitutional claim had been fully raised in the state courts and had been passed upon by the Appellate Division.[113]

The Surrogate's Court rejected Hamilton's argument that it was bound by the Southern District's decision in *Bertucci* because it is established law in New York that although all state courts are "bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution . . . the interpretation of a Federal constitutional question by the lower Federal courts [serves only] as useful and persuasive authority" and is not binding.[114] The court then held that "[i]n this case, the Surrogate's Court is bound by the decision of the New York State Court of Appeals, which found that no substantial constitutional question was directly involved in the *Bertucci* case."[115]

This is clearly an issue that the New York Court of Appeals should address and resolve in the very near future for the benefit of all New York courts (federal and state) and litigants. Notably, the United States Supreme Court has held that "[i]n the absence of positive assurance to the contrary from [a state's highest court], we consider that court's dismissal of [an] appeal [as of right for lack of a

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[109] *Id.* at 698–99, 695 N.Y.S.2d at 498–99.

[110] *Id.*; Bertucci v. Cunningham, No. 84 Civ. 4460 (WK), 1984 WL 1213, at *2 (S.D.N.Y. Nov. 16, 1984).

[111] *Bertucci*, 1984 WL 1213, at *2.

[112] *Id.*

[113] *See id.*

[114] *Hamilton*, 181 Misc. 2d at 699–700, 695 N.Y.S.2d at 499 (quoting People v. Kin Kan, 78 N.Y.2d 54, 59–60, 574 N.E.2d 1042, 1045, 571 N.Y.S.2d 436, 439 (1991)).

[115] *Hamilton*, 181 Misc. 2d at 700, 695 N.Y.S.2d at 499.

substantial constitutional question] to be a decision on the merits."[116]

VII. THE POSSIBILITY THAT THE COURT WILL GRANT LEAVE TO APPEAL WHEN IT DISMISSES A CONSTITUTIONAL APPEAL FROM THE APPELLATE DIVISION

As reflected in the Court of Appeals cases above, from time to time the court will dismiss an appeal taken as of right under CPLR 5601(b)(1), but grant leave to appeal—even oral motions made during oral argument—to address an important nonconstitutional issue in the case.[117] So what strategy should a would-be "constitutional" appellant apply to enhance the probability that its case is heard in the Court of Appeals? Does it matter when the motion for leave to appeal in a constitutional appeal is made and what the likelihood is it will be granted?

An appellant who believes that they have an appeal as of right under CPLR 5601(b)(1) files a notice of appeal and a preliminary appeal statement.[118] Because this appellant may be unable to

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[116] R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C., 479 U.S. 130, 138 (1986). The Court "note[d] that treating the North Carolina Supreme Court's summary dismissal as a decision on the merits accords with this Court's view of its own summary dispositions." *Id.* at 139 n.7 (citing Hicks v. Miranda, 422 U.S. 332, 344 (1975)).

[117] Because the court transfers appeals taken under CPLR 5601(b)(2) to the appropriate Appellate Division when it determines that a direct appeal to it from a trial court of record does not lie, moving for leave to appeal is not an issue with CPLR 5601(b)(2) appeals. *See* CLERK'S OFFICE, *supra* note 28, at 3 ("The only question involved must be the constitutionality of a statutory provision; where issues are involved that must be resolved in addition to the constitutional question, the appeal is transferred to the Appellate Division." (citations omitted, emphasis in original)); KARGER, *supra* note 14, § 7:2; WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09.

[118] Section 500.9 of the Court of Appeals Rules provides as follows:

> Preliminary appeal statement.
>
> (a) Within 10 days after an appeal is taken by (1) filing a notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a criminal case, appellant shall file with the clerk of the court an original and one copy of a preliminary appeal statement on the form prescribed by the court, with the required attachments and proof of service of one copy on each other party. No fee is required at the time of filing the preliminary appeal statement.
>
> (b) Where a party asserts that a statute is unconstitutional, appellant shall give written notice to the Attorney General before filing the preliminary appeal statement, and a copy of the notification shall be attached to the preliminary appeal statement. The notification and a copy of the preliminary appeal statement shall be sent to the Solicitor General, Department of Law, The Capitol, Albany, NY 12224.
>
> (c) After review of the preliminary appeal statement, the clerk will notify the parties either that review pursuant to section 500.10 or 500.11 of this Part shall commence or that the appeal shall proceed in the normal course.

determine beforehand whether the Court of Appeals will agree that "the strict jurisdictional requirements imposed by the Constitution and the CPLR" are satisfied, and the court dismisses so many such appeals, the appellant has two options.[119]

First, because every CPLR 5601(b)(1) appeal is subject to a jurisdictional inquiry in the court in which the appellant will be allowed to explain and support the basis of jurisdiction,[120] the appellant may, simultaneous with filing the notice of appeal, file a motion for leave to appeal and explain why the court should entertain the appeal and address both the constitutional and nonconstitutional issues.[121]

N.Y. COMP. CODES R. & REGS. tit. 22, § 500.9 (2011).

[119] SHERAW, *supra* note 2, at 14.

[120] The CIVIL PRACTICE OUTLINE states:

> As stated in Rule 500.10, the Court may determine, sua sponte, whether it has subject matter jurisdiction over an appeal taken as of right or by permission of the Appellate Division. . . . [J]urisdictional review is invoked when a question is raised in four main areas: finality, constitutional questions, direct appeals and double dissents. If the Court determines, after an inquiry made to the parties involved, that a jurisdictional predicate is lacking, it will dismiss the appeal sua sponte. . . . Under the authority of Rule 500.10, *the Clerk of the Court screens all appeals taken as of right pursuant to CPLR 5601* . . . to determine the validity of the jurisdictional predicate and timeliness of the appeal. If a jurisdictional question arises, a jurisdictional inquiry letter is sent to counsel inviting written comment. After comments are received or the period for counsels' comment expires, the Court determines whether to retain or dismiss the appeal.

CLERK'S OFFICE, supra note 28, at 6–7. Section 500.10 of the Court of Appeals Rules provides as follows:

> Examination of subject matter jurisdiction.
>
> On its own motion, the court may examine its subject matter jurisdiction over an appeal based on the papers submitted in accordance with section 500.9 of this Part. The clerk of the court shall notify all parties by letter when an appeal has been selected for examination pursuant to this section, stating the jurisdictional concerns identified in reviewing the preliminary appeal statement and setting a due date for filing and service of comments in letter form from all parties. Such examination shall result in dismissal of the appeal by the court or in notification to the parties that the appeal shall proceed either under the review process described in section 500.11 of this Part or in the normal course, with or without oral argument. This examination of jurisdiction shall not preclude the court from addressing any jurisdictional concerns at any time.

N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10 (2011).

[121] *See* WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.02 ("Attorneys sometimes appeal to the Court of Appeals and simultaneously seek leave to appeal, with the understanding that even if there is no appeal as of right, the Court may still grant leave to appeal."). S*ee, e.g.*, Hendrickson v. City of Kingston, 98 N.Y.2d 662, 662, 773 N.E.2d 1015, 1015, 746 N.Y.S.2d 277, 277 (2002) ("On the Court's own motion, appeal dismissed, without costs, upon the ground that no appeal lies as of right from the unanimous order of the Appellate Division absent the direct involvement of a substantial constitutional question (CPLR 5601). Motion for leave to appeal denied."); Akivis v. Drucker, 80 N.Y.2d 786, 787, 599 N.E.2d 687, 687, 587 N.Y.S.2d 283, 283 (1992) ("On the Court's own motion, appeal by Ethel Akivis from the Appellate Division order . . . which affirmed the grant of the motions for

Second, the appellant can address the court's jurisdictional inquiry and wait to see if it survives or the appeal is dismissed sua sponte, and then subsequently move for leave to appeal arguing the importance of the nonconstitutional issues in the case if any.[122] The court has granted leave under these circumstances in the past. For example, in *423 South Salina Street, Inc. v. City of Syracuse*, the Court of Appeals dismissed plaintiff's appeal on the ground that no substantial constitutional question was directly involved, but its motion for leave to appeal, thereafter made, was granted.[123] This has occurred in other cases as well.[124]

Frankly, in most cases it would seem to be the preferred course to simultaneously file the notice of appeal and move for permission to appeal. Presumably, the court would prefer to examine whether it wishes to take an appeal because it has a substantial constitutional question or has important nonconstitutional issues only once, rather than in separate applications.[125] The one time when it would clearly be strategically beneficial to the appellant to wait is when

summary judgment dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. . . . [M]otion by Ethel Akivis for leave to appeal otherwise denied."); Schwartz v. Comm'r of Fin. of N.Y.C., 78 N.Y.2d 1005, 1005, 580 N.E.2d 765, 765, 575 N.Y.S.2d 279, 279 (1991).

[122] *See* WEINSTEIN, KORN & MILLER, supra note 14, ¶ 5601.08. If an appeal taken as of right to the Court of Appeals is dismissed for lack of a substantial constitutional question, the appellant still has thirty days after service of that order with notice of entry to move for leave to appeal under CPLR section 5514(a), which provides:

> If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

N.Y. C.P.L.R. 5514(a) (McKinney 2011).

[123] 423 S. Salina St., Inc. v. City of Syracuse, 112 A.D.2d 745, 746, 492 N.Y.S.2d 241, 242 (App. Div. 4th Dep't), *appeal dismissed*, 66 N.Y.2d 914, 489 N.E.2d 772, 498 N.Y.S.2d 1026 (1985), *leave granted*, 67 N.Y.2d 605, 492 N.E.2d 795, 501 N.Y.S.2d 1024, *aff'd*, 68 N.Y.2d 474, 494, 503 N.E.2d 63, 74, 510 N.Y.S.2d 507, 518 (1986).

[124] *See, e.g.*, Paynter v. State, 290 A.D.2d 95, 735 N.Y.S.2d 337 (App. Div. 4th Dep't 2001), *appeal dismissed*, 98 N.Y.2d 644, 644, 771 N.E.2d 832, 832, 744 N.Y.S.2d 759, 759 (2002), *leave granted*, 98 N.Y.2d 613, 779 N.E.2d 186, 749 N.Y.S.2d 475 (2002), *aff'd*, 100 N.Y.2d 434, 470, 797 N.E.2d 1225, 1249–50, 765 N.Y.S.2d 819, 843–44 (2003). As noted earlier, Judges George Bundy Smith and Carmen Beauchamp Ciparick dissented from the dismissal of the appeal taken as of right and voted to retain jurisdiction of the appeal. *See supra* note 31 and accompanying discussion. Since it only takes two judges to grant leave to appeal, it was relatively easy for the appellant to decide to seek, and successfully obtain, leave to appeal after the dismissal. *See* N.Y. C.P.L.R. 5602(a) (McKinney 2011).

[125] As noted in WEINSTEIN, KORN & MILLER, although CPLR 5514(a) allows a later motion for leave to appeal, it "does not expressly provide protection against the time and expense that parties would devote to briefing and arguing an ultimately dismissed appeal." WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.08.

one or more of the issues in the case is also pending and about to be decided in another Appellate Division so that a separate, later motion for leave to appeal—after the jurisdictional inquiry has played out for several weeks or more—might allow the appellant to now argue that there is a split in the departments that did not exist at the time of the notice of appeal, thus strengthening the motion for leave to appeal.[126]

The fact that an appellant survives a jurisdictional inquiry under CPLR section 5601(b)(1) does not mean that the issue of whether the constitutional question is "substantial" and thus supports an appeal as of right is done and over, never to resurface again in the appeal.[127] As the Court Rules state, "[t]his examination of jurisdiction [based on the preliminary appeal statement] shall not preclude the court from addressing any jurisdictional concerns at any time."[128] As the court's decisions demonstrate, whether the court later grants leave to appeal or just dismisses the appeal may depend on the court's view of the merits of the appeal.[129]

Thus, *New York State Ass'n of Counties v. Axelrod* tells us something about what happens when the court determines after argument that the constitutional issue is not substantial or that they do not need to reach it.[130] The petitioner brought an article 78 proceeding alleging that a new Medicare reimbursement regulation: "(1) [was] arbitrary and capricious, an abuse of discretion and without a rational basis; (2) violate[d] Public Health Law §§ 2807 and 2808; and (3) deprive[d] the nursing homes of due process of law."[131] The majority reversed on the first issue, and stated that "we need not and do not reach the constitutional question. We have also examined the other issues raised by the parties and determine that they do not affect the analysis or result in this case."[132] Accordingly, the court dismissed petitioner's appeal taken as of

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[126] CLERK'S OFFICE, *supra* note 28, at 14–15; N.Y. COMP. CODES R. & REGS. tit. 22, § 500.22(b)(4) (2011) ("[A] [m]ovant's papers [on a motion for permission to appeal in a civil case] "shall contain . . . [a] concise statement of the questions presented for review and why the questions presented merit review by this court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this court, or involve a conflict among the departments of the Appellate Division.").

[127] N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10.

[128] *Id.*

[129] *See, e.g.*, N.Y. State Ass'n of Cntys. v. Axelrod, 78 N.Y.2d 158, 169, 577 N.E.2d 16, 22, 573 N.Y.S.2d 25, 31 (1991).

[130] *Id.*

[131] *Id.* at 164–65, 577 N.E.2d at 19, 573 N.Y.S.2d at 28.

[132] *Id.* at 169, 577 N.E.2d at 22, 573 N.Y.S.2d at 31.

right "on the ground that no substantial constitutional question is directly involved," granted its motion for leave to appeal, reversed the Appellate Division order, and reinstated the judgment of the Supreme Court declaring the recalibration regulation null and void.[133] As noted above, other appellants have not fared so well.[134]

The bottom line is that, as an appellant under CPLR 5601(b)(1), whether a jurisdictional inquiry is made or you survive any such jurisdictional inquiry or a motion to dismiss, you must be prepared to address the jurisdiction of the Court of Appeals to hear and decide your appeal through oral argument and beyond. A constitutional appellant must also be prepared to make a written or oral motion for permission to appeal—or treat your notice of appeal as a pending and unresolved motion for leave to appeal—to the

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[133] *Id.* at 169, 577 N.E.2d at 22, 573 N.Y.S.2d at 31; *see also* Bd. of Educ. v. Wieder, 72 N.Y.2d 174, 182–83, 187, 189, 527 N.E.2d 767, 771, 774–75, 531 N.Y.S.2d 889, 893, 896–97 (1988). "The core of the Appellate Division decision was its construction of the pertinent statutes," and "[t]he constitutional discussion thus appears to have been incidental to the . . . holding," so the court dismissed the appeal as of right taken on constitutional grounds under CPLR 5601(b)(1), but granted appellant's motion for leave to appeal made during oral argument and decided the appeal on the merits. *Id.* *In re* Shannon B., 70 N.Y.2d 458, 462, 517 N.E.2d 203, 205, 522 N.Y.S.2d 488, 490 (1987) ("The Appellate Division did not explicitly address the constitutional argument upon which appellant hinges her appeal as of right to this court . . . . The record reveals that this argument was first raised on the appeal to the Appellate Division. The issue is therefore not preserved for our review and the appeal as of right must be dismissed on the ground that no substantial constitutional question is directly involved. Anticipating this development, however, appellant moved at oral argument for leave to appeal, relief which we grant to consider the important issue of the scope of police authority in these circumstances."); Fossella v. Dinkins (*In re* Fossella), 66 N.Y.2d 162, 167–68, 485 N.E.2d 1017, 1017–19, 495 N.Y.S.2d 352, 352–54 (1985) ("On the merits, although we agree with the courts below that the referendum should be stricken from the ballot, we do so solely on State statutory grounds. In our view the statutes and policies of this State are alone sufficient to sustain the decisions reached below. There is no need to reach the Federal constitutional questions or the other issues raised in this proceeding. . . . Appeals taken as of right dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Oral motion by intervenors-respondents Campaign for a Nuclear Navyport Referendum *et al.* for leave to appeal granted." (citation omitted)).

[134] *See, e.g.*, Schulz v. State, 81 N.Y.2d 336, 343–44, 615 N.E.2d 953, 954–55, 599 N.Y.S.2d 469, 470–71 (1993) (dismissing appeal "for lack of a preserved substantial constitutional question," and oral motion for leave to appeal made at oral argument denied, both over Judge George Bundy Smith's dissent); Chupka v. Lorenz-Schneider Co., 12 N.Y.2d 1, 7, 186 N.E.2d 191, 193, 233 N.Y.S.2d 929, 931 (1962). The court addressed the merits of appellant's arguments, dismissed them all as essentially meritless, and then dismissed the appeals taken as of right under CPLR 5601(b)(1) "on the ground that they present no substantial constitutional question." *Id.*; O'Brien v. Comm'r of Educ., 4 N.Y.2d 140, 145, 149 N.E.2d 705, 707, 173 N.Y.S.2d 265, 267–68 (1958) (dismissing appeal as of right on constitutional grounds after oral argument); Youmans v. State, 309 N.Y. 653, 653–54, 128 N.E.2d 313, 313–14 (1958). The court denied motion to dismiss, but in a one sentence decision—apparently after the motion was renewed during oral argument of the appeal—the majority dismissed the appeals "upon the ground that no substantial constitutional question is presented." *Id.*

court at any time in order to get your appeal resolved in the Court of Appeals. Be diligent and be prepared!

VIII. CONCLUSION

Two clear themes emerge from this analysis of appeals taken as of right on constitutional grounds to the Court of Appeals. First, as reflected in Judge Smith's dissent in *Kachalsky*, something needs to be done with the court-imposed "substantiality" requirement so that this important right to appeal can be more definitively determined and to ensure that it does not, in Judge Smith's words, become "so flexible that it confers on us, in effect, discretion comparable to that we have in deciding whether to grant permission to appeal under CPLR 5602."[135] Second, it clearly appears that the Court of Appeals has never stated whether the dismissal of an appeal taken as of right for lack of a substantial constitutional question constitutes a decision on the merits for purposes of res judicata, collateral estoppel, or has precedential effect, despite the established law from the United States Supreme Court that its similar dismissal of an appeal for lack of a substantial federal constitutional question is a decision on the merits that constitutes binding precedent.[136]

On the issue of the judicially created "substantiality" requirement, at least one commentator has, in the wake of Judge Smith's dissent, advocated eliminating it altogether.[137] The rationale advocated for this approach is twofold: (1) that the court has converted appeals as of right on constitutional grounds to another form of discretionary permission to appeal, thus depriving appellants of their right to appeal;[138] and (2) that "it simply does not appear that the Court of Appeals would be overburdened if the 'substantiality' requirement were eliminated," and "[t]here are

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[135] Kachalsky v. Cacace (*In re* Kachalsky), 14 N.Y.3d 743, 744, 925 N.E.2d 80, 80, 899 N.Y.S.2d 748, 748 (2010) (Smith, J., dissenting).

[136] *See* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 258 (1934).

[137] *See* Miller, *supra* note 5, at 598 (arguing that the substantiality requirement conflicts with the New York Constitution and CPLR, and should be eliminated).

[138] *See id.* at 591–93. Miller stated:

> The court is using the requirement of "substantiality" to invoke discretion that it should not, by definition, have on appeals as of right. . . . Through the requirement of substantiality, the Court of Appeals has some measure of discretion whether to retain an appeal on constitutional grounds and, therefore, this type of appeal "as of right" is not really "as of right." . . . This invocation of discretion is problematic because it may serve to deprive an aggrieved litigant of a proper appeal. In addition, it is a way for the court to avoid addressing the merits of difficult, politically charged issues.

Id. at 591.

intellectually honest ways for the court to prevent frivolous appeals on invented constitutional grounds without invoking discretion that it is not technically granted by statute or New York State Constitution."[139]

The fact is that the "substantiality" test is not going to, nor should it, be eliminated. Even Judge Smith, in his dissent in *Kachalsky*, expressly stated that the court's imposition of this requirement "makes sense, if 'substantial' is taken literally. The authors of the Constitution and the statute surely did not intend to burden our Court with appeals as of right based on questions that are without substance, i.e., frivolous."[140] Clearly, all of the members of the court agree, as do the leading commentators on the Court of Appeals, that for an appeal as of right to lie under CPLR 5601(b) the constitutional question must be "substantial."[141]

What is needed is a better definition or description by the court of what it considers "substantial" in one case or decision. While the "definition" in the court's CIVIL PRACTICE OUTLINE is helpful,[142] the reality is that many practitioners do not even know about this document, let alone treat it as authoritative. While it is certainly possible for the New York Legislature to create a statutory definition of "substantial" or modify this requirement in CPLR 5601(b) given that it is judicially created, it seems unlikely that it will.[143] Thus, it falls to the Court of Appeals to provide further

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[139] *Id.* at 595–96.

[140] *Kachalsky*, 14 N.Y.3d at 744, 925 N.E.2d at 80, 899 N.Y.S.2d at 748; *see* KARGER, *supra* note 14, § 7:5 (classifying the substantiality requirement as necessary to avoid appeals based on "fanciful" arguments); WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09 (stating that a constitutional question requires merit to be substantial, helping to ensure that these questions are not just argued as a predicate for appealing on other issues).

[141] *See Kachalsky*, 14 N.Y.3d at 743–44, 925 N.E.2d at 80, 899 N.Y.S.2d at 748. The majority dismissed the case due to the lack of a substantial constitutional question, and the dissent agreed that a substantial constitutional question is required but disagreed with the majority's flexible interpretation of the concept. *Id.*; *see also* KARGER, *supra* note 14, § 7:5 (citing the substantial constitutional question requirement); WEINSTEIN, KORN & MILLER, *supra* note 14, ¶ 5601.09 (citing the substantial constitutional question requirement).

[142] CLERK'S OFFICE, *supra* note 28, at 2–3.

[143] In his article, Justice Orr advocates for a legislative remedy in North Carolina. *See* Orr, *supra* note 88, at 235–37. He suggests that the North Carolina Legislature first add the "substantial" requirement to the statute, and then "provide a definition for what constitutes a substantial constitutional question." *Id.* at 235–36. He also offers a detailed definition that would include the following considerations:

> (1) if, in the case of a provision of the United States Constitution, the interpretation as to the meaning and intent of the framers has not been conclusively reviewed by the United States Supreme Court; (2) if a provision of the United States Constitution is at issue and its meaning and intent have been conclusively determined by the United States Supreme Court but the factual circumstances in the appeal to the North Carolina Supreme Court

guidance to the bar on this issue.

Similarly, it is imperative that the Court of Appeals inform the bench and bar as soon as possible of the res judicata, collateral estoppel, and precedential effect of its dismissal of an appeal for lack of a directly involved substantial constitutional question. While the Second Circuit and other New York courts have discussed this issue, we apparently have no word on this important issue from the Court of Appeals. Notably, the United States Supreme Court not only treated its past dismissals of appeals as of right from state courts for lack of a substantial federal constitutional question as a decision on the merits and as precedent, but it treats all such dismissals by state courts the same.[144] Clearly, this is an issue that the New York Court of Appeals should resolve for the benefit of all New York federal and state courts and litigants alike.

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are sufficiently unique and different from the federal courts' application of the constitutional provision; (3) if, in the case of a provision of the North Carolina Constitution, the interpretation as to meaning and intent of the framers has not been conclusively reviewed by the North Carolina Supreme Court; (4) if a provision of the North Carolina Constitution is at issue and the interpretation as to the meaning and intent of the provision has been conclusively determined by the North Carolina Supreme Court but the factual circumstances are sufficiently unique from those cases determined under that provision by the North Carolina Supreme Court; (5) if a provision of the North Carolina Constitution is at issue and the interpretation as to the meaning and intent of the provision has been conclusively determined by the North Carolina Supreme Court but there is only one decision on that provision and a dissenting opinion was filed and the appealing party contends that the prior decision of the North Carolina Supreme Court should be reversed; (6) if, when dealing with a provision of the North Carolina Constitution that grants a right or rights to the citizens of the state and there is parallel provision in the United States Constitution, the interpretation of the parallel provision in the United States Constitution being the basis for the interpretation of the provision in the North Carolina Constitution, and the appealing Party contends that the North Carolina provision should be interpreted to give greater rights to North Carolina citizens than those afforded under the United States Constitution.

Id. at 236–37.

[144] R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C., 479 U.S. 130, 138 (1986) ("In the absence of positive assurance to the contrary from [a state's highest court of appeal], we consider that court's dismissal of [an] appeal [as of right for lack of a substantial constitutional question] to be a decision on the merits."). The Supreme Court "note[d] that treating the North Carolina Supreme Court's summary dismissal as a decision on the merits accords with this Court's view of its own summary dispositions." *Id.* at 139 n.1 (citing Hicks v. Miranda, 422 U.S. 332, 344 (1975)).