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Insubstantial Questions and Federal Jurisdiction

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INSUBSTANTIAL QUESTIONS AND FEDERAL JURISDICTION: A FOOTNOTE TO THE TERM-LIMITS DEBATE

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In *U.S. Term Limits, Inc. v. Thornton*,[1] the Supreme Court held that the Qualifications Clauses[2] prevent the states from restricting the length of service of members of Congress.[3] Some states have sought unsuccessfully to evade this result by seeking to compel candidates for the House of Representatives and the Senate to support a constitutional amendment permitting congressional term limits.[4]

Recently, the U.S. Court of Appeals for the Ninth Circuit relied on *Term Limits* to invalidate a California law requiring congressional candidates to be registered voters in the state when they file nomination papers, a requirement that prevented a Nevada resident who asserted an intention to relocate to the Golden State from running in a special election to fill a vacancy in the House of Representatives.[5] The California law required congressional candidates to

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[1] 514 U.S. 779 (1995).

[2] U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[3] The Court reached this conclusion despite the state's characterization of the restriction at issue as a limitation on ballot access rather than on eligibility for continued membership in the federal legislature. This was, according to the majority, a distinction without a difference. *See Term Limits*, 514 U.S. at 829–31.

[4] Under these proposals, the ballot would contain a statement noting which candidates had refused to support such an amendment. The prospect of a pejorative ballot description labeling them as disdainful of the voters' hostility toward career politicians presumably would supply an incentive for candidates to promote term limits. The Supreme Court recently invalidated one of these measures. *See* Cook v. Gralike, 531 U.S. 510 (2001). Every other court that considered the issue before the Supreme Court's ruling also found this approach to be unconstitutional under the Qualifications Clauses or other provisions. *See* Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999), *aff'd*, 531 U.S. 510 (2001); Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999); Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998); League of Women Voters of Me. v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 1119 (Ark. 1996); Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999); Morrissey v. State, 951 P.2d 911 (Colo. 1998); Advisory Opinion to the Att'y Gen. re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998); Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129 (Idaho 2000); Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997); *In re* Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996).

[5] *See* Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000), *cert denied sub nom.* Jones v. Schaefer, 532 U.S. 904 (2001).

establish residency before the election, whereas the applicable Qualifications Clause mandates only that Representatives be state inhabitants at the time of the election.[6]

The term-limits debate has not been confined to federal offices. Many jurisdictions have adopted restrictions on the tenure of state and local legislators, executives, and judges. While the case law involving state curbs on tenure in federal offices is consistently hostile, the picture with respect to voter-imposed term limits for state and local offices is decidedly mixed. Term limits for state and local officials have survived challenges based on federal law,[7] although some of those efforts have foundered on the shoals of state law.[8]

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[6] *See id.* at 1034. On the possible constitutional significance of the difference between "inhabitant" and "resident," see Sanford Levinson, *2 Texans, Not 1*, N.Y. TIMES, Aug. 4, 2000, at A27 (noting Republican vice-presidential nominee Richard Cheney's attempt to establish himself as an inhabitant of Wyoming after many years' residence in Texas, the home of Republican presidential candidate George W. Bush, to avoid conflict with the Twelfth Amendment). *Cf.* Jones v. Bush, 122 F. Supp. 2d 713 (N.D. Tex.) (dismissing, for lack of standing, an action by three Texas voters who invoked the Twelfth Amendment in an effort to enjoin Texas electors from casting their votes for both Bush and Cheney on the ground that both men were inhabitants of Texas, and concluding on the merits that Cheney was not an inhabitant of Texas), *aff'd mem.*, 244 F.3d 134 (5th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001).

[7] *See, e.g.*, Citizens for Legislative Choice v. Miller, 144 F.3d 916 (6th Cir. 1998) (state legislators); League of Women Voters v. Diamond, 965 F. Supp. 96 (D. Me. 1997) (state legislators and executive officers); Dutmer v. City of San Antonio, 937 F. Supp. 587 (W.D. Tex. 1996) (members of city council); Miyazawa v. City of Cincinnati, 825 F. Supp. 816 (S.D. Ohio 1993) (members of city council), *aff'd*, 45 F.3d 126 (6th Cir. 1995).

Perhaps the only exception to this statement is *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), in which a divided panel found term limits for California legislators invalid under the United States Constitution. The panel ruling was reversed when the case was reheard en banc. *See* Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1021 (1998).

[8] *See, e.g.*, Alaskans for Legislative Reform v. State, 887 P.2d 960 (Alaska 1994) (per curiam) (holding that term limits could be enacted only through constitutional amendment, not by statute or initiative); Allred v. McLoud, 31 S.W.3d 836 (Ark. 2000) (invalidating locally adopted term limits for county officials); Polis v. City of La Palma, 12 Cal. Rptr. 2d 322 (Ct. App. 1992) (concluding that state law preempted municipal term-limit ordinance); Chicago Bar Ass'n v. Ill. State Bd. of Elections, 641 N.E.2d 525 (Ill. 1994) (per curiam) (finding improper a proposed constitutional amendment limiting terms of state legislators); Minneapolis Term Limits Coalition v. Keefe, 535 N.W.2d 306 (Minn. 1995) (concluding that term limits for city officials would violate state constitution); Cottrell v. Santillanes, 901 P.2d 785 (N.M. Ct. App.) (finding term limits for members of city council inconsistent with state law), *cert. denied*, 900 P.2d 962 (N.M. 1995); Lehman v. Bradbury, 37 P.3d 989 (Or. 2002) (striking down term limits for state legislators and state executive officers for failure to comply with the separate-vote requirement for the adoption of amendments to the state constitution); Gerberding v. Munro, 949 P.2d 1366 (Wash. 1998) (rejecting proposed initiative that would have imposed term limits on state constitutional officers).

At the same time, many term limits for state and local officials have survived challenges based on state constitutions and statutes. *See, e.g.*, Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999) (upholding term limits for state legislators and cabinet officers while severing invalid term limits for members of Congress); City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. Dist. Ct. App. 2000) (per curiam) (upholding term limit for clerk of municipal court), *review granted*, 786 So. 2d 1184 (Fla. 2001); Pinellas County v. Eight Is Enough in Pinellas, 775 So. 2d 317 (Fla. Dist. Ct. App. 2000) (upholding term limits for county officers), *review granted*, 786 So. 2d 1188 (Fla. 2001); Abramowitz v. Glasser, 656 So. 2d 1332 (Fla. Dist.

In two of the cases involving term limits for state legislators, there have been suggestions that the federal courts lack subject-matter jurisdiction. A Ninth Circuit concurring opinion in *Bates v. Jones*[9] was based on this premise. Similarly, the Sixth Circuit panel in *Citizens for Legislative Choice v. Miller*[10] took note of this argument but ultimately put it aside because the state failed to raise a jurisdictional defense at any stage of the litigation.[11] Both suggestions were based on the Supreme Court's summary dismissal, "for want of a substantial federal question," of the appeal in *Moore v. McCartney*,[12] a case involving a state constitutional provision limiting the governor of West Virginia to two consecutive terms.

The suggestions concerning the absence of jurisdiction were not dispositive in either case, but they are nevertheless significant because both cases were decided by federal courts of appeals. They are also noteworthy because they misperceive the concept of a "substantial federal question." These judicial statements reflect confusion between the precedential weight of the Supreme Court's summary disposition of an appeal and the power of lower federal courts to hear cases involving the same or similar issues. Although the Court's docket now consists almost exclusively of certiorari cases rather than appeals, there are enough summary dispositions of appeals to cause mischief if district and circuit judges share the confusion shown in these two term-limits cases. At a time of increased judicial sensitivity to federalism,[13] that confusion might lead to mistaken refusals to hear cases on jurisdictional grounds.

Ct. App.) (upholding term limits for elected city officials), *review denied*, 664 So. 2d 248 (Fla. 1995); Maddox v. Fortson, 172 S.E.2d 595 (Ga. 1970) (upholding term limit for governor); Rudeen v. Cenarrusa, 38 P.3d 598 (Idaho 2001) (upholding term limits for statewide officers, state legislators, and county elected officials); Nev. Judges Ass'n v. Lau, 910 P.2d 898 (Nev. 1996) (upholding term limits for judges but noting that ballot summary must be clarified so that voters would understand the full ramifications of approving judicial term limits). *Cf.* Woo v. Superior Ct., 100 Cal. Rptr. 2d 156 (Ct. App. 2000) (narrowly construing term limits in a newly adopted city charter to comport with the outcome of an earlier referendum on municipal term limits); Kuryak v. Adamczyk, 705 N.Y.S.2d 739 (App. Div. 1999) (holding municipal term limits to be prospective only).

[9] 131 F.3d 843, 847-48 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring in the result), *cert. denied*, 523 U.S. 1021 (1998).

[10] 144 F.3d 916 (6th Cir. 1998).

[11] *See id.* at 919-20.

[12] 425 U.S. 946 (1976).

[13] *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (concluding that Congress had not validly abrogated the states' Eleventh Amendment immunity in Title I of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the civil rights remedy provision of the Violence Against Women Act for exceeding federal power under the Commerce Clause and the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding that Congress had not validly abrogated the states' Eleventh Amendment immunity in extending the protections of the Age Discrimination in Employment Act to employees of state and local governments); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not commandeer state executive officials to implement a federal regulatory program); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate the states' Eleventh Amendment immunity in furtherance of its Article I powers); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act for exceeding federal power under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeer state legislatures into enacting federally dictated laws).

This article seeks to clear up the confusion over "substantial federal questions." Part I provides an overview of the Supreme Court's jurisdiction, distinguishing between appeal and certiorari. Part II examines the precedential weight of the Court's summary dispositions, contrasting summary disposition of appeals with denials of certiorari. Part III explains why the suggestions that the lower courts lack jurisdiction over cases presenting issues in which the Supreme Court has dismissed appeals "for want of a substantial federal question" are mistaken.

I. APPEAL, CERTIORARI, AND THE SUPREME COURT

Today, virtually all of the Supreme Court's appellate docket is discretionary.[14] That is, the Court decides for itself whether to hear a case that was decided by a lower federal court or the highest state court in which review was available. A party seeking Supreme Court review generally has no right to appeal but must instead obtain a writ of certiorari.[15]

Despite the dominance of certiorari, this procedure is of comparatively recent vintage. The Court's certiorari jurisdiction was not created until 1891, in the statute that also established the federal courts of appeals.[16] The availability of certiorari was expanded incrementally in several stages that culminated in the passage of the Judges' Bill in 1925.[17]

The other, now rare, means of securing Supreme Court review is by direct appeal, which is a matter of right in certain types of cases. The appeal mechanism existed virtually from the Court's beginning. The Judiciary Act of 1789 provided for review by writ of error in several classes of cases.[18] Specifically, section 13 gave the Court appellate jurisdiction over decisions of the old circuit courts and state courts.[19] Section 22 authorized the Court to review decisions of the circuit courts in civil cases and equitable suits involving amounts in excess of $2,000. Section 25 empowered the Court to review rulings by state courts involving certain federal questions, particularly those in which a federal statute or treaty was ruled invalid or in which a state law or policy was upheld against a challenge based on the Constitution or other federal law.[20] A 1914 statute expanded the Court's power to review state rulings that upheld a federal law or

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[14] I use "appellate" here in contrast with "original" jurisdiction. *See* U.S. CONST. art. III, § 2 (dividing the Supreme Court's jurisdiction into these two categories).

[15] *See* 28 U.S.C. §§ 1254, 1257-59 (1994).

[16] *See* Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828. *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1233-36 (1979).

[17] *See* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936; *see also* Webb Act, ch. 448, 39 Stat. 726 (1916); Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. These provisions were codified in Title 28 by the Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869. *See generally* Linzer, *supra* note 16, at 1237-44.

[18] *See* Act of Sept. 24, 1789, ch. 20, §§ 1, 13, 22, 25, 1 Stat. 73.

[19] One sentence of § 13 was later found to have impermissibly expanded the Court's original jurisdiction. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[20] The validity of § 25 was upheld in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (holding that § 25 gave the Court jurisdiction to review state criminal cases). The Supreme Court did not get jurisdiction over federal criminal cases until 1889, and then only in proceedings involving capital crimes. *See* Act of Feb. 6, 1889, ch. 113, 25 Stat. 655. The new courts of appeals were given

invalidated a state law that was challenged on constitutional or other federal grounds.[21] In 1928 Congress eliminated the writ of error, denominating the nondiscretionary cases coming before the Court as appeals.[22] Almost all appeals were eliminated in 1988; since then cases that previously arose as appeals have become part of the Court's discretionary docket and are handled through writs of certiorari.[23]

Why does the distinction between appeal and certiorari matter? If the Court accords plenary consideration to a case and issues a formal opinion, it makes no real difference whether the case reached the docket as a matter of right or through the exercise of judicial discretion. A ruling on the merits binds the parties to the case and serves as a precedent for future disputes.

The question arises because the Court cannot and does not accord plenary consideration to every case. Indeed, the whole point of certiorari was to allow the justices to refuse to hear cases that do not warrant further review. Even before the adoption of the certiorari process on a wide scale, the Court also developed mechanisms to give less than full treatment to appeals. This summary treatment of appeals arose from the same concerns that led to the creation of the circuit courts of appeals and the use of certiorari: the Court's docket was being overwhelmed by an excessive number of cases.[24] As a result, the justices necessarily exercised a measure of discretion in deciding which appeals warranted plenary consideration, and they did so in ways that blurred the distinction between appeal and certiorari.[25]

A denial of certiorari, the Court has often explained, has no precedential weight. This "orthodox view" of certiorari denials[26] is reflected most famously

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jurisdiction over criminal cases in 1891. *See* Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828.

[21] *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. Such cases were placed within the Court's certiorari, or discretionary, jurisdiction rather than within its appeal, or mandatory, authority. This particular change was made in response to a state-court decision invalidating New York's pioneering worker's compensation law. *See* Ives v. S. Buffalo Ry., 94 N.E. 431 (N.Y. 1911). Supreme Court review was impossible because § 25 limited the Court's jurisdiction over state decisions to cases in which the federal claim was rejected, whereas in this case the federal claim was upheld and resulted in the abrogation of the state law. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 82–84 (1994); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4012, at 217-18 (2d ed. 1996). Earlier, Congress had amended § 25 in less substantial ways. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[22] *See* Act of Jan. 31, 1928, ch. 14, 45 Stat. 54. *See generally* WRIGHT ET AL., *supra* note 21, §§ 4002, 4006.

[23] *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

[24] For example, the Court's docket nearly quadrupled between 1860 and 1880, and the 1890 term began with a backlog of more than 1,800 cases. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 60, 86 (1928); Francis J. Ulman & Frank H. Spears, *"Dismissed for Want of a Substantial Federal Question": A Study in the Practice of the Supreme Court in Deciding Appeals from State Courts*, 20 B.U. L. REV. 501, 508 (1940).

[25] *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12, 14 (1930).

[26] *See* Linzer, *supra* note 16, at 1251, 1255, 1260, 1302.

in Justice Frankfurter's opinion "respecting the denial of the petition for writ of certiorari" in *Maryland v. Baltimore Radio Show*:[27]

> Inasmuch . . . as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.[28]

If denials of certiorari are not precedents and the Court has treated appeals analogously to certiorari cases, we might then wonder whether dispositions of appeals with less than plenary consideration also have no precedential significance. That is the subject of the next section.

II. THE PRECEDENTIAL VALUE OF SUMMARY DISPOSITIONS OF APPEALS

The Supreme Court could summarily dispose of appeals in several ways. The two most common methods were summary affirmance and dismissal "for want of a substantial federal question." Traditionally, the Court reserved summary affirmances for appeals coming from federal courts when the ruling in question was correct and the case presented no legally troublesome issue; if a case came from a state court in similar circumstances, the appeal was "dismissed for want of a substantial federal question."[29]

Whether appeals came from federal or state courts, the overwhelming majority received summary treatment.[30] The precedential weight (if any) to be accorded to summary dispositions generated widespread uncertainty. Justice Clark, sitting by designation on the Fourth Circuit after his retirement, thought that such rulings should have minimal weight. He opined that, during his tenure on the Supreme Court, summary dispositions of appeals were "treat[ed] simi-

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[27] 338 U.S. 912 (1950).

[28] *Id.* at 919. For other statements of the orthodox view, see, e.g., Singleton v. Comm'r, 439 U.S. 940, 942-45 (1978) (Stevens, J., respecting the denial of the petition for writ of certiorari); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 364 n.1 (1973); Parker v. Ellis, 362 U.S. 574, 576 (1960) (per curiam), *overruled on other grounds by* Carafas v. LaVallee, 391 U.S. 234 (1968); United States v. Shubert, 348 U.S. 222, 228 n.10 (1955); Sunal v. Large, 332 U.S. 174, 180 (1947); House v. Mayo, 324 U.S. 42, 48 (1945) (per curiam), *overruled on other grounds by* Hohn v. United States, 524 U.S. 236 (1998). *But see* United States v. Kras, 409 U.S. 434, 443 (1973) (finding "not without some significance" dissents from a denial of certiorari); Linzer, *supra* note 16, at 1277-91 (discussing *Kras* and other cases in which certiorari denials have been accorded precedential value).

[29] *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 266 (7th ed. 1993). We will also briefly consider a third approach, dismissal "for want of jurisdiction." *See id.* at 267-68. *See also infra* Part III. A fourth technique for summarily disposing of appeals was the "adequate state ground," under which appeals from state courts were dismissed without plenary consideration where the decision rested on nonfederal grounds that were sufficient to resolve the case. *See* STERN ET AL., *supra* at 267-68. *See generally* WRIGHT ET AL., *supra* note 21, §§ 4019-33. The adequate-state-ground doctrine is beyond the scope of this article.

[30] *See* STERN ET AL., *supra* note 29, at 210, 211; Ulman & Spears, *supra* note 24, at 523-24, n.112; Pamela R. Winnick, Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508, 517-18 n.52 (1976); Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 COLUM. L. REV. 688, 694 n.54 (1963). *See also* Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 708, n.9 (1956).

lar[ly]" to certiorari denials.[31] Leading scholars disagreed about the question. Some argued that summary dispositions were entitled to precedential weight because the Court had a constitutional obligation to reach the merits of every case within its appellate jurisdiction.[32] Others maintained that summary dispositions reflected prudential concerns as much as substantive ones and therefore should not count as precedents.[33]

The Supreme Court resolved the debate in favor of treating summary dispositions as precedents in *Hicks v. Miranda*,[34] a 1975 decision involving the validity of the California obscenity statute. The owner of an adult theater who was prosecuted for showing the movie "Deep Throat" filed a First Amendment challenge to the statute.[35] A three-judge federal district court invalidated the statute under the standard established in *Miller v. California*.[36] Before that ruling became final, however, the Supreme Court dismissed, for want of a substantial federal question, an appeal from a state-court ruling upholding the same statute under the *Miller* test.[37] On direct appeal from the district court in *Hicks*, the Supreme Court held that the summary dismissal constituted a binding precedent. Justice White's majority opinion explained that "[t]he three-judge court was not free to disregard this pronouncement."[38] Because that appeal presented a federal question, the Court "had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction"; the justices "were required to deal with its merits," and lower courts were obliged to follow this summary disposition.[39]

Concluding that summary dispositions in appeals have precedential value does not resolve the question of how much weight these rulings have. The Court provided its answer the year before *Hicks*, concluding in *Edelman v. Jordan*[40] that appeals decided summarily have less "precedential value" than do cases resolved after plenary consideration and a full opinion.[41] *Edelman* involved a class action alleging that Illinois welfare officials had improperly administered public assistance programs and wrongfully withheld benefits from eligible recipients.[42] The officials asserted an Eleventh Amendment defense,

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[31] Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975) (Clark, J., concurring), *cert. denied*, 428 U.S. 913 (1976).

[32] *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10-13 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959).

[33] *See* Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). For additional sources on both sides of the scholarly debate, see United States *ex rel.* Epton v. Nenna, 318 F. Supp. 899, 906 n.8 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir. 1971), *cert. denied*, 404 U.S. 948 (1971).

[34] 422 U.S. 332 (1975).

[35] During the pendency of these proceedings he was also charged with violating the same obscenity statute for showing "The Devil in Miss Jones." *See id.* at 341 n.10.

[36] 413 U.S. 15 (1973).

[37] *See* Miller v. California, 418 U.S. 915 (1974).

[38] *Hicks*, 422 U.S. at 344.

[39] *Id.*

[40] 415 U.S. 651 (1974).

[41] *See id.* at 671. This conclusion was anticipated and more fully elaborated in David W. Brown, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. REV. 373, 407-10 (1972).

[42] *See Edelman*, 415 U.S. at 653-55.

arguing that any payment of back benefits would come from the state treasury even though the state was not named as a defendant.[43] The Court accepted this argument despite the existence of three district-court rulings awarding similar relief that had been summarily affirmed on appeal over Eleventh Amendment objections.[44] Because those cases did not explicitly address the Eleventh Amendment, they could not of their own force control the disposition of *Edelman*.[45]

The Court took a similar approach in *Caban v. Mohammed*,[46] which invalidated a New York law that allowed the mother of a child born to unmarried parents to give unilateral consent to the child's adoption. The state relied in part on *Orsini v. Blasi*,[47] which had dismissed an appeal, for want of a substantial federal question, from a state-court ruling upholding the same statute. The Court explained that *Orsini* "was a ruling on the merits, and therefore [was] entitled to precedential weight,"[48] but was "not entitled to the same deference given a ruling after briefing, argument, and a written opinion."[49] Full consideration of the issue on the merits led to the conclusion that *Orsini* should be overruled.[50]

There are other cases in which appeals decided summarily have not been followed,[51] but they are the exception rather than the rule. This is quite predictable. Summary dispositions typically reflect the Court's views on the merits, and "the Justices are not likely to change their minds after they have once come to such a conclusion."[52] But establishing that summary decisions have at least limited precedential value does not resolve the matter. Whatever weight sum-

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[43] *See id.* at 668.

[44] *See id.* at 670, n.13 (citing Sterrett v. Mothers' & Childrens' Rights Org., 409 U.S. 809 (1972); State Dep't of Health & Rehabilitative Servs. v. Zarate, 407 U.S. 918 (1972); Wyman v. Bowens, 397 U.S. 49 (1970)). The Court also noted that the Eleventh Amendment was raised, but not discussed in the opinion, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), which upheld an order for retroactive welfare payments to recipients who had been denied assistance under an unconstitutional residency requirement. *See Edelman*, 415 U.S. at 670-71.

[45] *See Edelman*, 415 U.S. at 671.

[46] 441 U.S. 380 (1979).

[47] 423 U.S. 1042 (1976).

[48] *Caban*, 441 U.S. at 389 n.9 (citing Hicks v. Miranda, 422 U.S. 332, 344 (1975)).

[49] *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 671 (1974)).

[50] *See id.* ("Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.").

[51] For other instances, see, e.g., Boggs v. Boggs, 520 U.S. 833, 849 (1997) (refusing to treat dismissal for want of a substantial federal question of a state ruling on ERISA preemption as dispositive of the preemption question in a later case); Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 920 (1990) (per curiam) (refusing to regard a dismissal for want of a substantial federal question as "the 'overruling [of] clear past precedent on which litigants may have relied'") (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (brackets in original)); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981) (treating summary affirmances and dismissals for want of a substantial federal question of appeals from rulings upholding billboard regulations as having less precedential weight than full opinions on the merits).

[52] STERN ET AL., *supra* note 29, at 217. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366-67 n.16 (1975) (emphasizing the precedential value of a summary affirmance in a case raising almost identical Establishment Clause issues), *overruled on other grounds by* Mitchell v. Helms, 530 U.S. 793 (2000); Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (relying in part

mary dispositions of appeals should receive, there remains the problem of determining exactly what such rulings decided. Because they contain little or no reasoning, this can be a most daunting task. The Court has struggled with this problem on several occasions.

The leading case on the subject is *Mandel v. Bradley*,[53] a challenge to Maryland's ballot-access rules for independent candidates. The three-judge district court gave dispositive weight to the summary affirmance of a decision invalidating Pennsylvania's access rules for independents.[54] The Supreme Court held that the lower court erred in doing so. The Pennsylvania law required independents to obtain their signatures within a twenty-one day window and submit them 244 days before the general election.[55] The Maryland law required independents to file their signatures almost as far in advance but did not restrict when the signatures had to be collected.[56] The summary affirmance in the Pennsylvania case did not necessarily control the Maryland dispute because the Free State's access rules differed somewhat from the Keystone State's.

The summary disposition, in other words, "affirm[ed] the judgment but not necessarily the reasoning by which it was reached."[57] The Court added that "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the *specific challenges* presented in the [jurisdictional] statement [and] prevent lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided* by those actions."[58] Such rulings do not "break[ ] new ground" but simply "apply[ ] principles established by prior decisions to the particular facts involved" in those cases.[59] The Court has repeatedly endorsed this restrictive view of the precedential effect of summary dispositions of appeals.[60]

Determining the "specific challenges" presented and the "precise issues" that were "necessarily decided" in a summary disposition can be quite difficult.[61] The task can be especially daunting with respect to dismissals for want of a substantial federal question, because such dispositions might be viewed as either substantive or jurisdictional in nature. Indeed, the term-limits cases dis-

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on two summary affirmances in rejecting a constitutional challenge to laws disenfranchising convicted felons).

[53] 432 U.S. 173 (1977) (per curiam).

[54] *See id.* at 175 (citing Tucker v. Salera, 424 U.S. 959 (1976)).

[55] *See id.*

[56] *See id.* at 177. Maryland's filing deadline could be as much as 240 days before a presidential election. *See id.* at 174.

[57] *Id.* at 176 (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)).

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

[59] *Id.*

[60] *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-83 (1979); Wash. v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979).

[61] This analysis presumably requires access to "most if not all of the appeal papers in the earlier proceedings." STERN ET AL., *supra* note 29, at 220. *See also* Winnick, *supra* note 30, at 528-29 (discussing factors relevant to determining the "reach and content" of a summary disposition).

cussed at the outset suggest that the jurisdictional interpretation retains vitality. For that reason, we now turn to this subject.

III. Untangling the Meaning of "Substantial Federal Question"

Corrigan v. Buckley,[62] an early case involving racially restrictive covenants,[63] demonstrates how the Supreme Court has elided the distinction between jurisdiction and the merits when the substantiality of a federal question is at issue. Irene Corrigan, a white woman, agreed to sell her home in Washington, D.C., to an African American woman named Helen Curtis. The property was subject to a covenant prohibiting its sale, occupancy, lease, or gift to "any person of the negro [*sic*] race or blood."[64] A white neighbor, John Buckley, sought to enjoin the transaction, and Corrigan moved to dismiss his complaint. The trial court denied the motion and was affirmed by the United States Court of Appeals sitting as the highest local court for the District of Columbia.[65] Corrigan then appealed to the Supreme Court.

Corrigan argued that the covenant violated the Fifth, Thirteenth, and Fourteenth Amendments as well as various Reconstruction-era civil rights statutes. A unanimous Court, in an opinion by Justice Sanford, concluded that the constitutional claim was "entirely lacking in substance or color of merit"[66] because the case involved only private rather than governmental action. The statutory argument was "equally unsubstantial" for the same reason.[67] Because neither contention raised a substantial federal question, the appeal was "dismissed for want of jurisdiction."[68] Despite this formal statement of the grounds for disposition, it is difficult to avoid the conclusion that the Court had rejected the claim on the merits. The jurisdictional defect was intimately connected to the flaws of the substantive claim.

The *Corrigan* Court's invocation of jurisdiction as a basis for dismissing an appeal that was regarded as weak on the merits reflected common practice at the time. That approach differs from cases like *Moore v. McCartney*, where the appeals were summarily dismissed for want of a substantial federal question, because *Corrigan* was dismissed after a detailed analysis of the merits. Understanding how this practice arose can nonetheless help us more clearly understand the correct meaning of summary dismissals for want of a substantial federal question. That understanding emerges from both early case law (all of which comes from cases with reasonably detailed opinions) and the evolution of the Supreme Court's rules. This article considers each of these topics, then examines the Court's more recent summary dispositions of appeals.

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[62] 271 U.S. 323 (1926).

[63] As the following text explains, *Corrigan* rejected the challenge to the racial covenants at issue. This ruling was effectively circumvented in *Hurd v. Hodge*, 334 U.S. 24 (1948), which held that judicial enforcement of such covenants violated the Fifth Amendment. *See also* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that enforcement of similar covenants by state courts violated the Fourteenth Amendment).

[64] *Corrigan*, 271 U.S. at 327.

[65] *See id.* at 328-29; 299 F. 899 (D.C. Cir. 1924).

[66] *Corrigan*, 271 U.S. at 330.

[67] *Id.* at 330-31.

[68] *Id.* at 332.

A. *Early Cases*

The Supreme Court first announced that a substantial question was necessary to invoke its jurisdiction on appeal in *Millingar v. Hartupee*,[69] an 1867 case that had its roots in the Union blockade of the Confederacy during the Civil War. Hartupee sued Millingar in a Pennsylvania state court for the value of cotton that Millingar had sold. The cotton was seized by the federal government during the Union blockade and released to Millingar by the United States District Court for the Northern District of New York. Hartupee had earlier obtained a judgment against a man named Gearing and claimed that Gearing was the true owner of the cotton. Millingar denied Gearing's interest, but the state courts ruled for Hartupee.[70] Millingar then appealed to the Supreme Court, contending that the state courts had denied effect to the federal district court's release of the cotton to him and that this brought the case within the Court's jurisdiction.[71]

Hartupee successfully moved to dismiss the appeal. Chief Justice Chase found nothing in the federal district court's order that addressed the ownership of the cotton; the order simply released the government's claim.[72] Accordingly, there was no federal action involved in the dispute between Millingar and Hartupee. "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court," Chase explained.[73] Because there was not even a colorable claim of federal action, the Court lacked jurisdiction over the appeal and granted the motion to dismiss.[74]

The next development, in 1872, was actually a slight detour from *Millingar*. In *Pennywit v. Eaton*,[75] the Court denied a motion to dismiss for want of jurisdiction despite a strong suspicion that the appeal lacked merit. Seeking to enforce a Louisiana judgment, Eaton had sued Pennywit in an Arkansas state court. Pennywit contested the validity of the judgment on the ground that the Louisiana judge had been appointed by the military governor at the height of the Civil War. This arrangement, Pennywit claimed, violated Article III (in that the Louisiana court had not been created by Congress) and the Appointments Clause (in that the President had not nominated the judge and the Senate had not confirmed him).[76] The Arkansas state courts rejected Pennywit's arguments. The Supreme Court, in a brief opinion by Chief Justice Chase, concluded that Pennywit had raised a federal question, "though somewhat obscurely," and therefore declined to dismiss the appeal on jurisdictional grounds despite its obvious weakness.[77]

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[69] 73 U.S. (6 Wall.) 258 (1867).

[70] *See id.* at 259.

[71] *See id.* at 260.

[72] *See id.* at 262.

[73] *Id.* at 261.

[74] *See id.* at 262.

[75] 82 U.S. (15 Wall.) 380 (1872).

[76] *See id.* at 380-81.

[77] *Id.* at 381. After hearing arguments on the merits, the Court dispatched Pennywit's claim in a single paragraph and assessed him damages because the appeal seemed to have been prosecuted only for delay. *See* Pennywit v. Eaton, 82 U.S. (15 Wall.) 382, 384 (1872).

The Court overcame its reluctance to dispatch frivolous appeals in *City of Chanute v. Trader*.[78] This 1889 case still reflected uneasiness over treating substantively weak cases as jurisdictionally flawed, however. Trader won a lawsuit in a federal court against the city for overdue payment of municipal bonds, then prevailed in a second action to compel satisfaction of that judgment.[79] The city appealed to the Supreme Court, and Trader moved to dismiss or affirm. In a unanimous opinion written by Justice Blatchford, the Court concluded that the case was technically within its jurisdiction but that the appeal was patently frivolous. Exercising "its inherent power and duty to administer justice," the Court affirmed the lower court's ruling without briefs or arguments on the merits.[80]

Two years later, the Court returned to *Millingar's* jurisdictional approach. *City of New Orleans v. New Orleans Water Works Co.*[81] dealt with an alleged violation of the Contracts Clause. Although the 1877 statute chartering the company purported to give the city free water service, an 1884 law required the city to pay for water.[82] When the state courts rejected the claim that the 1884 action breached a contract embodied in the 1877 legislation, the city appealed to the Supreme Court. Relying on *Millingar*, the Court dismissed the appeal on the company's motion. Justice Brown explained that the 1877 statute did not create a legal contract.[83] Accordingly, the "bare averment" of a contract was entirely insufficient to invoke the Contracts Clause and thereby bring the appeal within the Court's jurisdiction.[84] In the absence of a properly presented federal question, the motion to dismiss was granted.[85]

The cases discussed so far all dealt with extremely weak, if not frivolous, claims. Even in those situations, the Court was sometimes reluctant to treat clearly fanciful contentions as jurisdictionally defective. Early in the twentieth century, however, the *Millingar* approach came to be applied to plausible but ultimately unpersuasive arguments, especially ones that had been addressed in earlier cases. The first example of this phenomenon was *New Orleans Waterworks Co. v. Louisiana*,[86] a challenge to the forfeiture of the charter of the same company that was involved in the *City of New Orleans* dispute a decade earlier. The state contended that the company had failed to provide pure water to its customers and had charged excessive rates for its services.[87] After the state courts upheld the forfeiture, the company appealed to the Supreme Court on the grounds that the state had impaired its contractual rights and taken its

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[78] 132 U.S. 210 (1889).

[79] *See id.* at 211.

[80] *Id.* at 214.

[81] 142 U.S. 79 (1891).

[82] *See id.* at 80-81, 84.

[83] *See id.* at 88-89, 92 (explaining that the state courts had held the alleged contract *ultra vires*, the city had repudiated whatever contract might have existed, and the Contracts Clause does not protect municipalities because their charters are subject to revision or revocation by the state legislature at any time).

[84] *Id.* at 87.

[85] *See id.* at 93.

[86] 185 U.S. 336 (1902).

[87] *See id.* at 338.

property without due process.[88] After invoking *Millingar* for the view that the Court's jurisdiction cannot arise from the "mere claim" of a federal question,[89] Justice Peckham devoted six pages to discussing several cases that foreclosed the company's claims[90] and almost four more to applying those precedents to the facts of the case.[91] This extensive analysis led to the conclusion that the company's federal claims were "so clearly without color of foundation that this court is without jurisdiction in this case," so the appeal was dismissed.[92]

A few months later, the Court combined its analysis of dismissal and affirmance in substantively weak appeals. The move came in *Equitable Life Assurance Society of the United States v. Brown*,[93] a dispute over a life insurance policy. After the policy owner died, competing claims were filed: one on behalf of his daughter in a Hawaii territorial court, and another by a relative of the decedent in New York. The company refused to pay the daughter, the legal heir, because of the pendency of the New York action. The territorial courts ruled in favor of the daughter, and the company appealed to the Supreme Court.[94] Her representative moved to dismiss or affirm.

The Court concluded that the company's position had been squarely rejected in a previous case.[95] Like *New Orleans Waterworks Co. v. Louisiana*, therefore, this appeal involved "a question adequate, abstractly considered, to confer jurisdiction," but that question was "so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy."[96] The federal question, then, was "devoid of any substantial foundation or merit," and this case was controlled by the *New Orleans Waterworks Co.* rule.[97]

In other words, the dispositive motion should be granted, but which disposition was appropriate? Then-Justice Edward White explained that "it [was] obvious that on this record either the motion to dismiss should be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other will . . . finally dispose of this controversy."[98] Jurisdiction and the merits were inextricably intertwined: "the unsubstantiality of the [f]ederal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing."[99] The Court chose to grant the motion to dismiss, because "the better practice is to cause our decree to respond to the question which arises first in order for decision."[100]

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[88] *See id.* at 343-44.

[89] *Id.* at 344.

[90] *See id.* at 346-51 (quoting extensively from Chicago Life Ins. Co. v. Needles, 113 U.S. 574 (1885)).

[91] *See id.* at 351-54.

[92] *Id.* at 354.

[93] 187 U.S. 308 (1902).

[94] *See id.* at 309-10.

[95] *See id.* at 312 (discussing New Eng. Mut. Life Ins. Co. v. Woodworth, 111 U.S. 138 (1884)).

[96] *Id.* at 311.

[97] *Id.* at 314.

[98] *Id.* at 315.

[99] *Id.*

[100] *Id.*

The Supreme Court followed a similar approach in *Zucht v. King*,[101] a 1922 case that would be included for many years afterward in the Court's rules. This was a challenge to a San Antonio ordinance requiring children to provide proof of vaccination as a prerequisite for attending school. Although Rosalyn Zucht properly raised constitutional objections to the ordinance, her contentions were plainly foreclosed by *Jacobson v. Massachusetts*,[102] which had upheld an almost identical requirement.[103] Under the circumstances, Justice Brandeis wrote, the federal questions were not substantial, so the Court had no jurisdiction over the appeal.[104] Like *Equitable Life Assurance Society*, then, the jurisdictional issue was closely connected to the merits. A dismissal for want of a substantial federal question in these cases meant that the claim lacked merit because it was either very weak or foreclosed by precedent. As a practical matter, such a dismissal amounted to an affirmance on the merits.

We can observe the close relationship between dismissal for want of a substantial federal question and affirmance on motion by examining the evolution of the Supreme Court's rules. Those rules came to embody a pattern that emerged from the cases: appeals dismissed for want of a substantial federal question came from state courts,[105] whereas those affirmed on motion came from federal courts.

B. Supreme Court Rules

The Supreme Court's general rules relating to disposition of appeals on motion date from the 1870s. In 1878 the Court amended paragraph 5 of what was then Rule 6 to provide:

> There may be united, with a motion to dismiss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.[106]

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[101] 260 U.S. 174 (1922).

[102] 197 U.S. 11 (1905).

[103] *See Zucht*, 260 U.S. at 176.

[104] *See id.* at 177. The Court conceded that Zucht had raised a substantial equal protection question, but that question entailed a claim that the ordinance was unconstitutional as applied. Unfortunately, such a claim was then reviewable only on certiorari, *see id.*, and her certiorari petition had been dismissed for failure to comply with the rules for such petitions, *see id.* at 176.

[105] *Equitable Life Assurance Society* came from a territorial court, but the rules governing appeals from that court were the same as those applicable to appeals from state courts. *See* Equitable Life Assurance Soc'y of the U.S. v. Brown, 187 U.S. 308, 309 (1902).

[106] 97 U.S. vii (1878). The 1878 amendment built on similar language that had been adopted two years earlier. That language governed writs of error to state courts. *See* 91 U.S. vii (1876). The 1878 amendment extended the provision to cover appeals from federal courts.

The Court concluded that the appeal in *City of Chanute* was "frivolous, and that it was taken for delay only," City of Chanute v. Trader, 132 U.S. 210, 214 (1889), but found that the circumstances of the case did not warrant invocation of Rule 6. *See id.*; Ulman & Spears, *supra* note 24, at 512. The ruling therefore rested on the Court's inherent power. *See City of Chanute*, 132 U.S. at 214. As we have seen, even before the adoption of Rule 6 the Court invoked its inherent power to assess damages against a party who had prosecuted an appeal only for delay. *See* Pennywit v. Eaton, 82 U.S. (15 Wall.) 382, 384 (1872).

This provision was slightly reworded in ways that had no substantive effect in the Court's 1911 rules.[107] Of particular significance, this provision suggests that the Court lacks jurisdiction over frivolous or dilatory appeals. Paragraph 5 incorporates the *Millingar* approach, under which an appeal that has no basis whatever can be dismissed without plenary consideration. The language does not explicitly reach appeals that are foreclosed by prior decisions, such as *New Orleans Waterworks*, *Equitable Life Assurance Society*, or *Zucht*, and none of those cases mentioned Rule 6. The next revision of the rules, in 1925, changed the word "frivolous" to "unsubstantial."[108]

Significant change came in 1928, when the Court promulgated a new set of rules. The new Rule 12 required appellants to file a statement "particularly disclosing the basis on which it is contended this court has jurisdiction to review on appeal the judgment or decree below."[109] Specifically, the statement had to "distinctly refer to the statutory provision believed to sustain the jurisdiction"[110] and "the cases believed to sustain the jurisdiction."[111] Appellees could file a responsive statement "disclosing any matter making against the jurisdiction asserted by the appellant."[112] Nothing in Rule 12 specified that jurisdiction depended on the existence of a substantial federal question, although new Rule 7 retained the essence of the 1925 amendment of old Rule 6, authorizing motions to dismiss any appeal where the determinative question was "so unsubstantial as not to need further argument."[113]

The requirement of a substantial federal question was added to Rule 12 in 1936, with a specific reference to *Zucht v. King*. The revised paragraph 1 of Rule 12, describing the contents of the jurisdictional statement, continued to require a distinct reference to "the statutory provision believed to sustain the jurisdiction."[114] There followed this inserted language:

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[107] The revised provision read, in relevant part, as follows:

> The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ [of error] or appeal was taken for delay only, or that the questions on which the decision of the cause depend [*sic*] are so frivolous as not to need further argument.

SUP. CT. R. 6(5), 222 U.S. (App.) 10 (1911).

[108] The relevant portion of the revised rule then read:

> The court will receive a motion to affirm on the ground that it is manifest that the writ [of error] or appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

SUP. CT. R. 6(5), 266 U.S. 657 (1925).

[109] SUP. CT. R. 12(1), 275 U.S. 603 (1928).

[110] SUP. CT. R. 12(1)(a), 275 U.S. 603 (1928).

[111] SUP. CT. R. 12(1)(d), 275 U.S. 603 (1928).

[112] SUP. CT. R. 12(2), 275 U.S. 604 (1928). This rule was revised four years later. Most of the changes were unrelated to the matters discussed here. The only relevant change for our purposes was the addition of the following language immediately after the passage quoted in text: "There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm." SUP. CT. R. 12(3), 286 U.S. 603 (1932).

[113] SUP. CT. R. 7(4), 275 U.S. 599 (1928). This paragraph provided, in relevant part:

> The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . . . A motion to affirm may be united in the alternative with a motion to dismiss.

[114] SUP. CT. R. 12(1), 297 U.S. 733 (1936).

> The [jurisdictional] statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on, including a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U.S. 174, 176, 177), and shall cite the cases believed to sustain the jurisdiction.[115]

The amended rule did not provide any further insight into the definition of a substantial question, but the reference to *Zucht* (as well as the retention of the paragraph in Rule 7 about cases involving questions that were "so unsubstantial as not to require further argument")[116] made clear that the Court welcomed motions to dispose of appeals where the issues were foreclosed by prior decisions.[117]

Any doubt that the decision to dispose of an appeal on motion implicated the merits should have evaporated with the promulgation of the Court's 1954 rules. The new Rule 15 distinguished between appeals from state courts (which were governed by paragraph (1)(e)) and appeals from federal courts (which were governed by paragraph (1)(f)). A careful reading shows that all appeals received similar treatment whether they came from state or federal courts.

Rule 15(1)(e) provided:

> If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht v. King*, 260 U.S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on [as required by Rule 15(b)(iii)] and the cases cited to sustain the jurisdiction [as required by Rule 15(b)(iv)], and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.[118]

Rule 15(1)(f) provided:

> If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.[119]

The most striking feature of these provisions is the more expansive concept of substantiality. Indeed, they use the word "substantial" in two different senses. First, all appellants, whether seeking to overturn state or federal judicial rulings, must demonstrate that the question presented is sufficiently important to justify plenary consideration. Second, appellants from state courts must also satisfy the traditional requirement, embodied in the reference to *Zucht v. King* in Rule 15(e), that the issue not be frivolous or foreclosed by precedent.[120] To

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[115] *Id.*

[116] SUP. CT. R. 7(4), 286 U.S. 598 (1932).

[117] *See* SUP. CT. R. 12(1), 297 U.S. 733 (1936). Rule 12 was revised again in the Court's 1939 rules. The requirement of demonstrating the existence of a substantial question remained, as did the reference to *Zucht v. King*, but the new version of the rule applied only to cases involving appeals from state courts. *See* SUP. CT. R. 12(1), 306 U.S. 694 (1939). That limitation was removed in 1942, and a reference to appeals from federal courts was added to the one to *Zucht*. *See* SUP. CT. R. 12(1), 316 U.S. 715 (1942).

[118] SUP. CT. R. 15(1)(e), 346 U.S. 962 (1954).

[119] SUP. CT. R. 15(1)(f), 346 U.S. 962 (1954).

[120] *See* Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 786-87 (1968). The reference to original sin is from Walter Wheeler Cook, *"Substance" and "Procedure" in the*

understand the implications of these two meanings of "substantial" in Rule 15, we need to examine the procedures for disposing of appeals without plenary consideration.

Rule 16 authorized motions to dismiss or affirm appeals. The rule denominated such motions differently depending on whether the appeal was from a state or a federal court, but the differences in nomenclature could not conceal the fundamental similarity of the legal consequences of granting the motion.[121] In an appeal from a state court, Rule 16(1)(b) allowed the appellee to move to "dismiss" because the case "does not present a substantial federal question."[122] In an appeal from a federal court, Rule 16(1)(c) allowed the appellee to move to "affirm" because "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."[123]

These provisions remained on the books unchanged for more than a quarter-century.[124] In 1980, Rule 15(1) was rewritten to make clear that appeals from state and federal courts received the same treatment. The 1980 version removed the reference to *Zucht* and the requirement that appellants from state courts demonstrate the substantiality of the federal questions presented. Instead, all jurisdictional statements, regardless of the court from which the appeal came, had to include "[a] statement of the reasons why the questions presented are so substantial as to require plenary considerations, with briefs on the merits and oral argument, for their resolution."[125] The relevant portions of Rule 16, governing motions to dismiss or affirm appeals, were retained with only cosmetic changes.[126] All of these provisions were superseded by the rules adopted following the effective elimination of the Court's appeals docket in 1988 and the transfer of almost everything that had previously been dealt with on that mandatory docket to the discretionary certiorari docket.[127]

Conflict of Laws, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

[121] Rule 16(1) contained a provision authorizing motions to dismiss, whether the appeal came from a state or a federal judgment, if the Supreme Court lacked jurisdiction because the appeal was not taken consistently with a relevant statute or other provisions of the Court's rules. *See* SUP. CT. R. 16(1)(a), 346 U.S. 963 (1954).

[122] SUP. CT. R. 16(1)(b), 346 U.S. 964 (1954). The appellee could also move to dismiss because "the federal question sought to be reviewed was not timely or properly raised, or expressly passed on [in state court]; or [because] the judgment rest[ed] on an adequate non-federal basis." *Id.*

[123] SUP. CT. R. 16(1)(c), 346 U.S. 964 (1954).

[124] *See* SUP. CT. R. 15(1)(e)-(f), 16(1)(b)-(c), 388 U.S. 944-45 (1967); 398 U.S. 1026-28 (1970).

[125] SUP. CT. R. 15.1(h), 445 U.S. 999 (1980).

[126] *See* SUP. CT. R. 16.1, 445 U.S. 1000-01 (1980).

[127] *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; *supra* note 23 and accompanying text. Under this statute, the few cases that remain within the Court's mandatory appeals jurisdiction (as opposed to the discretionary certiorari jurisdiction) arise from United States district courts. The Court's post-1988 rules governing appeals appear in Rule 18. This new rule eliminated most of the details specifying that the jurisdictional statement demonstrate the necessity for plenary consideration, saying only that the statement must "follow, insofar as applicable, the form for a petition for a writ of certiorari." SUP. CT. R. 18.3, 493 U.S. 1118 (1990). The provision about motions to dismiss or affirm contains no

C. Implications

This background shows why we should reject the suggestions in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller* that the dismissal, for want of a substantial federal question, of the appeal in *Moore v. McCartney* means that the federal courts lack subject-matter jurisdiction over challenges to state term limits.[128] The case law and the Supreme Court's rules governing appeals evolved in parallel fashion. That evolution shows that dismissals of Supreme Court appeals for want of a substantial federal question do not have broader jurisdictional implications.

Early cases, notably *Millingar v. Hartupee*, spoke in terms of jurisdiction as the basis for rejecting substantively weak appeals from state courts.[129] Weak appeals from federal courts, on the other hand, were affirmed on motion. This practice is exemplified by *City of Chanute v. Trader*.[130] It is unclear why the Court used jurisdictional language to dispose of marginal appeals from state courts but not from federal courts. After all, one of the early cases discussed above, *Pennywit v. Eaton*, affirmed a state-court ruling rather than dismissing a substantively weak appeal on the merits.[131] The leading treatise on Supreme Court procedure observes that "[o]nly history would seem to have justified this distinction."[132] The problem was accentuated when the Court began to dismiss plausible but legally foreclosed arguments, granting motions to dismiss appeals from state courts in cases like *New Orleans Waterworks Co. v. Louisiana*, *Equitable Life Assurance Society of the United States v. Brown*, and *Zucht v. King* when the questions presented were controlled by prior rulings.[133]

Meanwhile, the Court's rules also contained language that appeared to combine jurisdiction and the merits in certain appeals. Old Rule 6, dating from the 1870s, provided for dismissal on jurisdictional grounds for frivolous appeals; the 1925 revision of that rule explicitly introduced the notion of substantiality into the process for disposing of appeals without plenary consideration.[134] The 1936 amendment to Rule 12 of the 1928 rules and the 1939 rules specifically required appellants to demonstrate the existence of a substantial federal question in the jurisdictional statement.[135]

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details on the grounds for such motions. *See* SUP. CT. R. 18.6, 493 U.S. 1119 (1990). These provisions were retained verbatim in the 1995 and 1999 versions of the rules. *See* 515 U.S. 1216, 1218 (1995); 525 U.S. 1210, 1212 (1999).

[128] Judge O'Scannlain's suggestion that the court of appeals had no jurisdiction "to *review* this case," Bates v. Jones, 131 F.3d 843, 847 (9th Cir. 1997) (O'Scannlain, J., concurring in the result) (emphasis added), *cert. denied*, 523 U.S. 1021 (1998), looks like a slip of the pen. The federal courts of appeals have power to review all final judgments of the district courts. *See* 28 U.S.C. § 1291 (1994). If the Ninth Circuit had no jurisdiction, the district court could not have had jurisdiction, either. Accordingly, the discussion proceeds on the assumption that Judge O'Scannlain meant to suggest that no federal court had jurisdiction over the challenge to term limits for state legislators.

[129] *See supra* notes 69-74 and accompanying text.

[130] *See supra* notes 78-80 and accompanying text.

[131] *See supra* notes 75-77 and accompanying text.

[132] STERN ET AL., *supra* note 29, at 266.

[133] *See supra* notes 86-104 and accompanying text.

[134] *See supra* notes 106-08 and accompanying text.

[135] *See supra* notes 114-17 and accompanying text.

If this were all that we had to go on, it might make sense to view the dismissal of an appeal from a state court for want of a substantial federal question as implying that the federal courts lacked subject-matter jurisdiction over cases presenting similar issues. There is language in many cases suggesting that the federal courts may not hear cases involving frivolous or foreclosed claims.[136] But this approach, which the second Justice Harlan characterized as "more ancient than analytically sound,"[137] confuses jurisdiction with the merits. As then-Justice Rehnquist explained, a complaint that lacks all merit should be dismissed at the threshold for failure to state a claim, not for want of subject-matter jurisdiction.[138]

Treating dismissals for want of a substantial federal question as jurisdictional could also raise doubts about the precedential value of summary dispositions of appeals, which in turn could imply that the Court got it wrong in *Hicks v. Miranda* and other cases that treat such dispositions as having some, albeit limited, precedential effect.[139] If the absence of a substantial federal question means that federal courts have no jurisdiction, then presumably a Supreme Court dismissal for want of substantiality would not be a ruling on the merits and could not bind other courts.[140] It would also prompt questions about the need for this category of disposition when the Court dismisses other appeals "for want of jurisdiction."[141] Those other jurisdiction-based dismissals do not decide the merits and therefore have no precedential weight.[142] Conflating jurisdiction and the merits therefore would add unnecessary complexity to an already difficult field of law.

One last consideration counsels against treating dismissals for want of a substantial federal question as having jurisdictional implications. If we take seriously the notion that such a dismissal means that the federal courts have no authority to hear cases presenting the same questions, we will effectively – and unnecessarily – freeze the development of legal doctrine in the federal courts. All such cases would have to be dismissed for lack of subject-matter jurisdic-

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[136] *See* Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 524 U.S. 436, 440 (2002); Hagins v. Lavine, 415 U.S. 528, 536-38 (1974) (collecting cases). *See also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3564 (1984 & Supp. 2001).

[137] Rosado v. Wyman, 397 U.S. 397, 404 (1970).

[138] *See* Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1160-61 (1982) (Rehnquist, J., dissenting from denial of certiorari). *See also* Bell v. Hood, 327 U.S. 678, 682 (1946). *Compare* FED. R. CIV. P. 12(b)(1) (dismissal for lack of jurisdiction over the subject matter) *with* FED. R. CIV. P. 12(b)(6) (dismissal for failure to state a claim upon which relief can be granted).

[139] *See supra* notes 34-49 and accompanying text.

[140] *See* J. Timothy Eaton et al., *Petitions for Writ of Certiorari from the United States Supreme Court to the Illinois Courts (28 U.S.C. § 1257), in* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ILLINOIS CIVIL APPELLATE PRACTICE § 31.12 (1997).

[141] *See, e.g.*, Moore v. Dupree, 510 U.S. 1068 (1994); Watkins v. Fordice, 507 U.S. 981 (1993). The categories "for want of a substantial federal question" and "for want of jurisdiction" are not coterminous. Some appeals dismissed for want of jurisdiction were filed out of time or have some similar procedural defect that does not go to the existence of a substantial federal question. *See* STERN ET AL., *supra* note 29, at 267. On the other hand, appeals from state-court rulings that rested on an adequate nonfederal ground have also been dismissed for want of jurisdiction, even though the nonfederal ground might suggest the absence of a substantial federal question in the particular case. *See id.* at 267-68.

[142] *See, e.g.*, Hopfman v. Connolly, 471 U.S. 459, 460-61 (1985) (per curiam).

tion. To be sure, these claims could be asserted in state courts, with Supreme Court review ultimately available. It is far from clear that the Supreme Court has the practical ability to monitor interpretations of federal law in the state courts, and some commentators have raised efficiency objections to such an arrangement.[143]

More important, actual practice is inconsistent with the no-jurisdiction scenario described in the previous paragraph. On several occasions, the lower federal courts have entertained claims involving issues that were seemingly resolved by summary dismissals of Supreme Court appeals for want of a substantial federal question. Perhaps the most notable example is *Minersville School District v. Gobitis*,[144] the first compulsory flag-salute case. Despite several cases in which the Supreme Court had dismissed, for want of a substantial federal question, appeals from state courts upholding requirements that schoolchildren salute the flag,[145] the Supreme Court addressed the merits of the case without the slightest hint that the lower courts had erred in exercising jurisdiction.[146] The difficulty of the flag-salute issue is also shown by the brief life of *Gobitis*, which was overruled only three years later in *West Virginia State Board of Education v. Barnette*.[147]

Even if there were more basis for the view that a dismissal for want of a substantial federal question has jurisdictional implications, the Supreme Court's summary dispositions are open to a very different interpretation. We can see this from Rule 15(1)(e) adopted in 1954, which reflected the Court's previous practice and remained on the books without meaningful revision until after the elimination of appeals from state courts in 1988.[148] That rule governed the contents of jurisdictional statements.

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[143] *See, e.g.*, Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1820 (1998).

[144] 310 U.S. 586 (1940). The challenger's name was misspelled in the official report. The correct spelling is "Gobitas." *See* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 338 (1999).

[145] *See* Hering v. State Bd. of Educ., 303 U.S. 624 (1938), *dismissing appeal for want of a substantial federal question from* 194 A. 177 (N.J. 1937); Leoles v. Landers, 302 U.S. 656 (1937), *dismissing appeal for want of a substantial federal question from* 192 S.E. 218 (Ga. 1937). The Court had also summarily affirmed an appeal from a federal court on the same question. *See* Johnson v. Town of Deerfield, 306 U.S. 621 (1939), *summarily aff'g* 25 F. Supp. 918 (D. Mass. 1939). In all of these cases, the Court cited *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), which upheld a military-training requirement for university students over religious objections.

[146] The opinion, by Justice Frankfurter, did note the conflict between the rulings by the district court and court of appeals in *Gobitis* and the earlier summary dispositions. *See* 310 U.S. at 592 n.2. In light of Frankfurter's long record as a student of the Court's jurisdiction even before his appointment to the bench, *see, e.g.*, FRANKFURTER & LANDIS, *supra* note 24; Frankfurter & Landis, *supra* note 25, the failure even to allude to a possible jurisdictional problem cannot be regarded as a judicial oversight.

[147] 319 U.S. 624 (1943). For other examples of situations in which the Supreme Court considered issues that had previously arisen in appeals that had been dismissed for want of a substantial federal question, see Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 818-19 (1983); Comment, *supra* note 120, at 788.

[148] *See supra* notes 124-27 and accompanying text.

As explained earlier, Rule 15(1)(e) used the word "substantial" in two distinct ways.[149] First, appellants from state courts were expected to show that "the federal questions are substantial"; this instruction was accompanied by a reference to *Zucht v. King*. Second, appellants had to explain "why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Identical language appeared in Rule 15(1)(f), which was directed at appellants from federal courts. Appellants in cases coming from state courts who sought a ruling upholding the judgment below without plenary consideration were instructed by Rule 16(1)(b) to file a motion to dismiss for want of a substantial federal question, while Rule 16(1)(c) told appellants from federal courts to move to affirm.[150]

If the Court granted a Rule 16(1)(b) motion to dismiss for want of a substantial federal question, then, the grounds for the summary disposition of the appeal from a state court would remain ambiguous. Perhaps the case presented a frivolous or foreclosed question, in which event the dismissal might have jurisdictional implications for the lower federal courts. But the terms of Rule 15(1) made it equally plausible to infer that the motion to dismiss had been granted because the questions presented, while not utterly lacking in merit, were not sufficiently important to justify the time, energy, and expense of plenary consideration.[151] Because summary dismissals typically appear in one-sentence orders unaccompanied by even a citation, let alone a skeletal explanation, it is impossible to tell why an appeal from a state court was dismissed. If we cannot tell the grounds for decision, we cannot determine, as the Court explained in *Mandel v. Bradley*, "the precise issues presented and necessarily decided" by the summary dismissal for want of a substantial federal question.[152] This in turn militates against reading too much into such a disposition.

To return to the suggestions of jurisdictional problems in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller*, there were neither citations nor reasoning in the order dismissing the appeal in *Moore v. McCartney*.[153] For this reason, we have no way of knowing which concept of substantiality prompted the Court to dismiss the appeal summarily. The federal question might have been frivolous or foreclosed, but it might also have been regarded as less urgent than other matters on the Court's docket that warranted plenary consideration. We are left to speculate about the grounds for the disposition. With no clues from the Supreme Court's unadorned dismissal order, there is no justification for treating the order as resting on some jurisdictional defect. Accordingly, the notion that the challenges to term limits for state legislators may be heard only in state court (with the possibility of discretionary review by the Supreme Court) should be rejected.

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[149] *See supra* notes 118-20 and accompanying text.

[150] *See supra* notes 122-23 and accompanying text.

[151] Chief Justice Warren made this point explicitly in a speech to the American Law Institute shortly after the 1954 rules were promulgated. *See* Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954). The rules were promulgated on April 12, 1954. *See* 346 U.S. 943 (1954). The Chief Justice's talk took place on May 19. *See* Wiener, *supra*, at 50 n.135.

[152] *See supra* text accompanying note 58.

[153] *See* 425 U.S. 946 (1976).

IV. CONCLUSION

With the effective elimination of the mandatory appeal jurisdiction in 1988, it is easy to lose sight of the meaning of summary dismissals for want of a substantial federal question. These dismissals, in appeals from state courts, were the equivalent of summary affirmances of appeals from federal courts. In other words, the questions presented by such appeals did not require plenary consideration. Summary dismissals for want of a substantial federal question therefore should have no jurisdictional implications for subsequent cases presenting the same issues in federal district courts. If the same issue is subsequently presented in a federal district court and there is no reason to believe that intervening doctrinal developments have undermined the summary dismissal, the correct response is to dismiss the new complaint for failure to state a claim, not for lack of subject-matter jurisdiction.

Before closing, however, we should briefly consider the Supreme Court's most recent dismissal of an appeal for want of a substantial federal question. In *Department of Commerce v. United States House of Representatives*,[154] two sets of plaintiffs challenged the Census Bureau's plan to use statistical adjustment to correct for undercount in determining the population used for apportioning congressional seats among the states. After upholding one set of plaintiffs' statutory challenge to the plan,[155] the Court turned to the claims asserted by the House. Concluding that the legal issues raised by the House had been resolved in the companion case, the Court determined that the House's case "no longer present[ed] a substantial federal question" and dismissed the appeal.[156]

At first blush, the disposition of the appeal in the House's case is remarkable. Unlike the typical appeal that is dismissed for want of a substantial federal question, the House's case came up on appeal from a federal court, not from a state court.[157] This novel procedural gambit can best be explained as a creative judicial response to the extraordinarily sensitive jurisdictional issue lurking in the case. It is not clear that the House of Representatives had standing to bring its lawsuit in the first place. After many years of avoiding the issue,[158] the Court only recently had concluded that individual members of Congress generally lack standing to challenge laws or policies of dubious constitutionality or legality. That ruling came in *Raines v. Byrd*,[159] a challenge to the Line Item Veto Act. That statute was invalidated the following year in *Clinton v. City of*

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[154] 525 U.S. 316 (1999).

[155] *See id.* at 343.

[156] *Id.* at 344.

[157] *See* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76 (D.D.C. 1998) (3-judge court).

[158] *See, e.g.*, Burke v. Barnes, 479 U.S. 361 (1987) (declining to determine the standing of members of Congress because the case had become moot); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (avoiding a ruling on the standing of a congressional plaintiff because another challenger clearly had standing to sue); Goldwater v. Carter, 444 U.S. 996 (1979) (directing the dismissal of a complaint filed by members of Congress but not specifying the basis for that ruling). *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (allowing a member to challenge his exclusion from the House of Representatives).

[159] 521 U.S. 811 (1997).

New York,[160] a case brought by other parties. *Raines v. Byrd* did not resolve whether either or both chambers of Congress could ever have standing, but the decision at least implied the plausibility of that potentially difficult question. Stretching the "substantial federal question" doctrine to the House's appeal from a federal court in the census case enabled the justices to avoid a possible confrontation with a coequal branch if they ruled that the House lacked standing while at the same time resolving the substantive question on the merits in the case brought by the other plaintiffs.

We should not, therefore, read more into this unusual ruling than the unique circumstances of the case justify. At a general level, the confusion over the meaning of summary dismissals of appeals for want of a substantial federal question further attests to the wisdom of the effective elimination of the Supreme Court's mandatory appeal jurisdiction in favor of discretionary certiorari review. Unfortunately, as the misleading jurisdictional suggestions in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller* demonstrate, we continue to live with the mischief caused by the former procedures.

[160] 524 U.S. 417 (1998).